

CITATION: Jackson v. Vaughan (City), 2010 ONCA 118

DATE: 20100212

DOCKET: C50275

COURT OF APPEAL FOR ONTARIO

Feldman, Cronk and Gillese JJ.A.

BETWEEN

Linda D. Jackson

Appellant

and

The Corporation of the City of Vaughan, LECG Canada Ltd., Ken Froese and Timothy Wilkin

Respondents

Morris Manning, Q.C., for the appellant

Robert Rueter and Sara J. Erskine, for the respondents LECG Canada Ltd. and Ken Froese

Ian J. Lord and Raivo Uukkivi, for the respondents, the Corporation of the City of Vaughan and Timothy Wilkin

Heard: September 23, 2009

On appeal from the judgment of Justice Peter Lauwers of the Superior Court of Justice, dated March 11, 2009, with reasons reported at (2009), 59 M.P.L.R. (4th) 55.

Gillese J.A.:

OVERVIEW

[1] Linda D. Jackson (the “appellant”) was elected mayor of Vaughan. As a candidate in a municipal election, she was required to file financial statements relating to her campaign finances. A compliance audit of her election campaign finances revealed apparent contraventions of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32 (the “Act”).

[2] After receiving the compliance audit report, the Council of the City of Vaughan (“Council”) passed a by-law authorizing the commencement of legal proceedings against the appellant. Her application to have the by-law quashed and the relevant legislative provisions struck down was unsuccessful.

[3] She appeals, asking this court for an order preventing those legal proceedings from continuing. For the reasons that follow, I would dismiss the appeal.

[4] As s. 81 of the *Act* is central to the appeal, it is set out in full in Schedule “A” to these reasons.

BACKGROUND

[5] Linda D. Jackson was elected as the Mayor of the City of Vaughan (the “City”) on November 13, 2006. As a candidate in a municipal election, she was required to comply

with the *Act*, including the requirement to file a financial statement and auditor's report reflecting her campaign finances.

[6] On or about May 14, 2007, two residents of the City (the "complainants"), brought an application under ss. 81(1) and (2) of the *Act*, seeking a compliance audit of the appellant's election campaign finances. Relying on her filed financial statements and auditor's report, the complainants asserted that there were reasonable grounds to believe that the appellant had contravened a provision of the *Act* related to campaign finances.

[7] On May 22, 2007, Council deferred consideration of the application on the basis that it wished to wait until the last supplementary filing date had passed for the reporting of election expenses. The complainants appealed to the Ontario Court of Justice under s. 81(3.3) of the *Act*.

[8] On February 19, 2008, Justice L. Favret of the Ontario Court of Justice allowed the appeal and ordered the City to appoint an auditor to conduct a compliance audit for the period which the appellant's financial statement covered, namely April 6, 2006 to December 31, 2006. Following the audit, the auditor was required to report the findings to Council, pursuant to s. 81(7) of the *Act*.

[9] Shortly after Favret J.'s order, Council issued a request for proposal for an auditor to conduct a compliance audit of the appellant's 2006 municipal election campaign finances in accordance with s. 81(6) of the *Act*.

[10] At the end of March 2008, the complainants filed a second application for a compliance audit of the appellant's election campaign finances within the initial reporting period and during a supplementary reporting period.

[11] On March 31, 2008, Council appointed Ken Froese of LECG Canada Ltd. and Glen R. Davison, C.A., to conduct a compliance audit of the appellant's campaign expenses for the 2006 municipal election for the period of April 6, 2006 to December 31, 2006. It also directed that a second compliance audit be conducted for the appellant's campaign finances for the period of April 6, 2006 to December 31, 2007. The two audits were to be combined and the results were to be presented in a single report (the "compliance audit report").

[12] On June 18, 2008, Council received the compliance audit report. The report was comprehensive, neutrally framed and factual. It identified numerous apparent contraventions of the election campaign finance rules under the *Act*, ranging from matters such as excess campaign spending to missing postal codes on the addresses of some contributors, contrary to the requirements for the financial statements set out in the prescribed form. The report contained no conclusions or opinions on whether legal action should be taken against the appellant in respect of the apparent contraventions.

[13] At its regularly scheduled meeting on June 23, 2008, Council moved to schedule a special meeting on June 24, 2008, for the purposes of dealing with the compliance audit

report, and to retain a lawyer, Timothy J. Wilkin, to provide legal advice in respect of that report. It waived the requirement of 48 hours notice for a council meeting.

[14] On June 24, 2008, Council received legal advice from Mr. Wilkin in closed session. After reconvening in public session, Council passed a resolution dated June 24, 2008 (the “Resolution”), in which it instituted the laying of charges against the appellant for breaches of the *Act* and retained Mr. Wilkin to conduct the prosecution of those charges.

[15] By-law No. 205-2008 ratified the Resolution. The Resolution reads as follows:

WHEREAS Council has received, reviewed, and considered the Report of Ken Froese and Glen R. Davison dated June 18, 2008, being the Compliance Audit Report regarding the 2006 municipal election campaign finances of Linda D. Jackson;

AND WHEREAS the Compliance Audit Report has identified numerous apparent contraventions of the Municipal Elections Act, regarding the election campaign finances of Linda D. Jackson;

AND WHEREAS Council has received and considered the legal advice of Timothy J. Wilkin on June 24, 2008;

AND WHEREAS the obligation to commence legal proceedings in respect of such contraventions under the Municipal Elections Act falls to Council;

AND WHEREAS it is important for all concerned to avoid any perception of bias as legal proceedings move forward.

NOW THEREFORE THE COUNCIL OF THE CITY OF VAUGHAN RESOLVES AS FOLLOWS:

1. That the City of Vaughan institute the laying of charges against Linda D. Jackson under the Municipal Elections Act, 1996; and
2. That Mr. Timothy J. Wilkin of Cunningham, Swan, Carty, Little & Bonham LLP, be retained to conduct the prosecutions and to proceed in a timely manner; and
3. That the charges to be laid shall be those for which reasonable and probable grounds exist for believing that an offence has been committed, as may be determined in the legal opinion of Timothy J. Wilkin; and
4. That the retainer includes instructions that Timothy J. Wilkin have the authority, in his sole discretion:
 - i) to withdraw any charge, or charges, against Linda D. Jackson if, in his opinion, the available evidence in respect of a charge or charges does not provide a reasonable likelihood of obtaining a conviction; and
 - ii) to conduct any pre-trial or trial proceedings necessary, and to summon such witnesses as may be required including, if necessary, the retaining of experts to appear as witnesses; and
 - iii) to enter into negotiations with respect to the charges for the purposes of establishing an agreed statement of facts, a plea bargain and/or a joint submission to the Court in respect of penalty; and
 - iv) to enter into a binding plea bargain agreement; and
 - v) to establish what penalty to seek from the Court upon a conviction; and

- vi) to provide regular status reports to the City Solicitor for her information.

[16] On September 8, 2008, Council passed By-law No. 228-2008 reconfirming the steps taken in relation to the compliance audit report and the prosecution arising from it.

[17] On August 29, 2008, the appellant brought an application to have By-law No. 205-2008 quashed. The application was subsequently amended to include a request that By-law No. 228-2008 also be quashed (the “By-laws”). She also asked for an order declaring s. 81 of the *Act* to be contrary to s. 7 of the *Charter* and, thus, of no force or effect. One of her key arguments in support of this ground was that the relevant provisions in the *Act* were unconstitutionally vague.

[18] After the application was heard and while judgment was on reserve, the appellant brought a motion to admit fresh evidence relating to a compliance audit report performed in respect of Councillor Joyce Frustaglio. The application judge, Lauwers J., admitted the fresh evidence on the basis that it assisted in setting the context within which the vagueness argument could be assessed. He found that the two compliance audit reports were substantially the same in terms of format and methodology, and in the auditors’ interpretations of the *Act*. He noted that while there were differences between the two reports, they were not significant and were the result of factual differences between the two campaigns.

[19] The application judge dismissed the application. He held that s. 81 of the *Act*, read in context and in conjunction with other relevant provisions in the *Act*, is not impermissibly vague. He explained that s. 81 delineates a “zone of risk”¹ that sets out the boundaries of permissible and impermissible campaign finances and expenses. Further, he found that the compliance audit and prosecution processes under s. 81 do not engage s. 7 of the *Charter*. He reasoned that there is no real or imminent deprivation of life, liberty or security of the person by engaging in such processes under the *Act*. Moreover, by participating as a candidate in the municipal election, the appellant voluntarily subjected herself to the provisions of the *Act*, which required her to provide information on her campaign finances to a compliance auditor. In such circumstances, she cannot assert the right against self-incrimination to avoid providing information to the compliance auditor. He also rejected the submission that Council’s acts were so markedly inconsistent with the relevant legislation that they amounted to bad faith. He concluded by stating that virtually all of the complaints levied by the appellant about the *Act*, its interpretation and the acceptability of the processes followed by Council, could have been raised by the appellant in her defence to prosecution.

[20] The appellant appeals to this court.

¹ This phrase comes from *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. It is explained at para. 29 below.

[21] The application judge gave thorough, thoughtful reasons for dismissing the application. I see no error in his reasons. For the reasons that follow, I would dismiss the appeal.

THE ISSUES

[22] The issues raised on appeal are essentially the same as those below, namely:

- 1) Is s. 81 of the *Act* impermissibly vague?
- 2) Does s. 81 of the *Act* breach the appellant's rights under s. 7 of the *Charter*?
- 3) Was Mr. Wilkin's appointment an unlawful delegation of Council's power to prosecute?
- 4) Were the acts of Council so markedly inconsistent with the relevant legislative context that they amount to bad faith?

[23] After the oral hearing of the appeal and while the matter was on reserve, the parties were invited to make additional written submissions on whether ss. 23.2 and 23.3 of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "*Municipal Act, 2001*")² have any impact on Mr. Wilkin's appointment to prosecute the appellant. The points raised in the additional submissions are addressed as part of the third issue.

² The relevant provisions of s. 23 of the *Municipal Act, 2001*, are set out in Schedule "B" to these reasons.

IS SECTION 81 OF THE ACT IMPERMISSIBLY VAGUE?

[24] The appellant submits that the application judge erred in failing to find s. 81 of the *Act* to be of no force and effect because it offends the constitutional principle against vagueness. The rule of law, she argues, requires the striking down of legislation which enables the exercise of arbitrary power. Section 81 of the *Act*, it is contended, is that type of legislative provision because it grants discretion but fails to give direction on how it should be exercised, thereby permitting its arbitrary exercise. Examples of the alleged vagueness in s. 81 include: the creation of an ill-defined power given to an auditor to determine whether there has been a contravention of the *Act*; lack of guidance on what constitutes “reasonable grounds”, a “compliance audit” or an “apparent contravention”; and, no articulation of the factors that a council is to take into consideration in determining whether to grant or refuse an application for a compliance audit or commence a legal proceeding pursuant to s. 81. The uncertainty and vagueness of the powers given to the auditors and the meaning of the words used in s. 81, it is submitted, are evident in both the Jackson and Frustaglio compliance audit reports.

[25] I reject this submission. For the reasons given by the application judge, I do not find s. 81 to be impermissibly vague. The following is a summary of the application judge’s reasoning.

[26] The *Act* creates two classes or categories of contraventions – the more serious are “corrupt practices” and the less serious relate to contraventions of the election campaign

finance rules. The appellant has been charged with only the latter, less serious, contraventions. Convictions for corrupt practices attract fines, imprisonment, forfeiture of office and, in certain situations, disqualification from running again for office for six years. When a person is convicted of having contravened the election campaign finance rules, however, imprisonment is not a possible penalty. In those circumstances, s. 80(2) permits the imposition of specific penalties including forfeiture of office, ineligibility for election until the next regular election has taken place, and suspension from office without pay.

[27] The election campaign finance rules operate on a system of self-reporting. Section 78 of the *Act* requires a candidate to file a financial statement accompanied by an auditor's report, each in the prescribed form, and to file a supplementary financial statement where necessary.

[28] The statutory audit compliance/prosecution process consists of the following five stages or "checks".

1. When an application for a compliance audit is made, the municipal council must consider the application within 30 days of its receipt and decide whether to grant or reject it (s. 81(3)). The requirement that the applicant have "reasonable grounds" (s. 81(1)) prevents frivolous and vexatious applications. The council has little discretion in deciding whether to order a compliance audit once reasonable grounds have been

found to exist.³ However, the applicant can be required to pay the auditor's costs if the compliance audit report indicates that there was "no apparent contravention" and the council "finds that there were no reasonable grounds for the application" (s. 81(11)).

2. If the council refuses an application for a compliance audit, the applicant can appeal to the Ontario Court of Justice (s. 81(3.3)).

3. The independent audit must be conducted by an independent auditor licensed under the *Public Accounting Act, 2004*, S.O. 2004, c. 8 (s. 81(5)). The auditor must promptly conduct an audit to determine whether the candidate has complied with the provisions of the *Act* relating to election campaign finances and prepare a report outlining any apparent contraventions (s. 81(6)). The auditor's powers are set out in s. 81(8).

4. The council must consider the compliance audit report within 30 days of receiving it and determine whether to commence legal proceedings against the candidate (s. 81(10)). The decision to commence legal proceedings for any apparent contravention must be made in accordance with the ordinary principles of administrative law and is amenable to judicial review.

5. The last stage is the legal proceeding itself, in which the candidate has full natural justice protection and *Charter* rights.

³ *Mastroguiseppe v. Vaughan (City)*, 2008 ONCJ 763 (CanLII) at para. 62.

[29] The application judge reviewed the relevant jurisprudence and noted the governing legal principles set out in *Nova Scotia Pharmaceutical Society* at pp. 639-40, 642.⁴ A statutory provision is not impermissibly vague if it sets out boundaries of permissible and impermissible conduct so as to provide a basis for legal debate. Language is not an exact tool; all it can do is give fair notice by delineating a zone or area of risk. In cases where conduct falls along those boundaries, the statutory language is not vague if a conclusion can be reached as to its meaning, through reasoned analysis applying legal criteria. Legislation must not give unfettered discretion to a decision maker because doing so will deprive the judiciary of the means of controlling the exercise of the discretion. The provision must give a sufficient indication as to how decisions are to be reached and the determinative factors or elements that are to be considered.

[30] With respect to the specific examples of vagueness alleged by the appellant and set out above, the application judge found that in carrying out the audit, the auditor is not exercising discretion in the legal sense of the word. The auditor will need to interpret the *Act* and may be incorrect in that interpretation. However, any errors in that regard are subject to judicial oversight through the prosecution process.

[31] The nature of a compliance audit emerges from s. 81(6) of the *Act*. The word “compliance” refers to compliance with a provision of the *Act* relating to election campaign finances. There is nothing vague or ambiguous in the word “compliance”. It is

⁴ See also *Cochrane v. Ontario (Attorney-General)* (2008), 92 O.R. (3d) 321 at paras. 37-39, 44 (C.A.).

not for the auditor to determine whether an apparent contravention is a real contravention. That determination is made by the judge of the Ontario Court of Justice hearing the prosecution. Thus, there is no impermissibly broad delegation of power to the auditor. The compliance audit need not relate only to the matters in the initial application. Section 81(1) is a threshold requirement only. The audit is intended to be comprehensive, even if the trigger is but a single apparent contravention.

[32] The phrase “reasonable grounds” is not impermissibly vague. The law is replete with provisions using the standard of “reasonable grounds” and courts have had little difficulty in applying the term to specific fact situations.

[33] The fact that terms such as “compliance audit” and “apparent contravention” are not defined does not render s. 81 impermissibly vague. Read in the context of the statute, a “compliance audit” refers to an auditor’s report addressing whether provisions of the *Act* relating to campaign finances have been complied with and outlining any apparent contraventions by the candidate. As explained above, it is not the task of an auditor to determine whether an “apparent contravention” is an actual contravention.

[34] The failure to articulate factors that a council is to take into consideration when determining whether to commence legal proceedings does not lead to the conclusion that the council may exercise that power arbitrarily. As the application judge explains at paras. 99 -101 of his reasons, there is no “unfettered discretion” in a municipal body:

The overriding principles are expressed in *Baker, supra*, at para. 53:

... [D]iscretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute ... [D]iscretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law ..., in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*....

Among the relevant administrative law principles are that: power must be exercised for the purpose for which it was granted and not for another purpose; the decision maker cannot decline to decide an issue remitted to it; the decision must be made on the basis of relevant considerations and must not take into account irrelevant considerations; decision-making power may not be improperly delegated; there must be some evidence to justify decisions of fact; statutory preconditions to the exercise of power must be met; there should not be errors in the interpretation of legislation; and the decision must not be grossly unreasonable.

Without being exhaustive, it is easy to see how these principles would apply to a decision on whether to prosecute under s. 81 (10) of the MEA. Possible examples abound. A decision based on concerns about maintaining the confidence of the electorate, the integrity of the election process and the values of public accountability and transparency would be consistent with the statutory purpose and would also be political considerations in the highest sense. On the other hand, a decision made to advance political ambition by ousting a rival would be for an improper purpose. A decision taking into account the scale of the apparent contraventions would be taking into account relevant considerations, but one based on personal animosity or bias would be improper. A

decision to prosecute the slightest apparent contravention would run into problems of unreasonableness.

[35] As for the appellant's assertion that the *Act* was interpreted differently for the purposes of preparing the Frustaglio and Jackson reports, the application judge found that the reports were substantially the same in terms of format, methodology and interpretation of the relevant legislative provisions. As the reports use the same approach and make the same findings based on similar facts, any differences between them are a result of factual differences.

[36] I would dismiss this ground of appeal because, as the application judge explained, s. 81 is not impermissibly vague. A law will not be struck down for vagueness simply because reasonable people might disagree as to its application to particular facts: see *Nova Scotia Pharmaceutical Society* at p. 640; *Cochrane* at paras. 43-44. A lack of precision will not defeat a law which provides a degree of clarity capable of supporting intelligible debate.⁵ When the words of s. 81 are given their ordinary meaning and read grammatically, in the context of the legislation as a whole including sections 66-82.1, they delineate boundaries for actions in respect of campaign finances that are neither vague nor arbitrary. Instead, they set out the boundaries of permissible and impermissible campaign finance activities which give fair notice and operate to limit enforcement discretion. As well, the administrative law principles that apply to municipalities and the terms of the City's by-laws limit Council's enforcement discretion.

⁵ *Cochrane* at para. 44.

And, ultimately, whether a candidate has contravened the *Act* is a determination made by a judge, thereby ensuring judicial oversight of the auditor's conclusion of an apparent contravention.

[37] In short, there is a sufficient basis within the legislation for legal debate and reasoned legal analysis, leading to a coherent judicial interpretation of s. 81. Accordingly, s. 81 is not unconstitutionally vague.

DOES SECTION 81 BREACH THE APPELLANT'S RIGHTS UNDER S. 7 OF THE CHARTER?

[38] The appellant has a twofold argument in relation to s. 7 of the *Charter*. First, she argues that she faces a “real or imminent deprivation of life, liberty or security of the person”, contrary to s. 7 of the *Charter*. She bases this argument on the fact that, if convicted, she may forfeit the office to which she was elected and be deemed ineligible to be elected or appointed to any office until the next regular election has taken place. Given that a person may enter politics as a vocation, such consequences could potentially have a serious and profound effect on the person's psychological integrity, it is argued, thus amounting to a breach of the right to security of the person protected by s. 7 of the *Charter*. The second argument is that the powers of the auditor under s. 81(8), which require a candidate in a municipal election to participate in a compliance audit, breach the appellant's right against self-incrimination contrary to s. 7.

[39] Again, I reject these submissions, essentially for the reasons given by the application judge.

[40] The application judge held that the compliance audit and prosecution processes under s. 81 do not engage s. 7 of the *Charter*. In respect of the first argument, based on *R. v. Jarvis*, [2002] 3 S.C.R. 757, he concluded that it was “plain” that the audit/prosecution process, which is aimed at securing compliance with the rules concerning election campaign finances, is regulatory in nature rather than criminal or quasi-criminal. If the appellant is convicted, she may be fined and/or removed from office. There is no risk of incarceration. By contrast, prosecution under the *Act* for corrupt practices engages a risk of incarceration on conviction. While there is quasi-criminal “penal liability” associated with corrupt practices, contraventions of the campaign finance provisions carry administrative or “regulatory penalties” in the language of *Jarvis*. Furthermore, the interests of the candidate are not understood in law to constitute a protected aspect of “life, liberty and security of the person” within the meaning of s. 7 of the *Charter*. Loss of the ability to hold elected office for a term may trigger stress, anxiety and stigma, but it does not rise to the level of “serious and profound” state-imposed psychological harm necessary to engage protection under s. 7 of the *Charter*: see *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 81-83.

[41] In relation to the second argument, the application judge reasoned that by participating as a candidate in the municipal election, the appellant voluntarily subjected herself to the provisions of the *Act*. Those legislative provisions required her to maintain and file detailed information regarding her election expenses; they also entitled the auditor to obtain that information during the compliance audit. In such circumstances, she had no reasonable expectation of confidentiality concerning any of the matters required to be reported and cannot assert the right against self-incrimination to avoid providing information to the compliance auditor.

[42] Furthermore, the information being considered by the auditors was not collected at a time when the relationship between the appellant and the City was adversarial in nature. The information was statutorily compelled and provided in response to a defined regulatory requirement. That requirement was not coercive in nature as it arose only after the appellant made the conscious choice to participate in the election. In such circumstances, it does not appear that the principle against self-incrimination is engaged: see *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 at paras. 33-46.

[43] Finally, I do not accept the premise underlying the appellant's position on this ground of appeal, namely, that s. 81 gives investigative powers to the auditors and delegates to them the power to determine whether the appellant should be prosecuted. In *Jarvis*, the Supreme Court of Canada states that the distinction between audits and investigations under the *Income Tax Act* is whether the predominant purpose of the

auditor's inquiry is penal liability: see para. 88. This is a contextual determination that is made after a consideration of all the factors that bear on the inquiry. Generally, however, where there is an important state interest at stake – such as maintaining the integrity of democratic elections – courts should be careful to avoid creating “procedural shackles” and rendering nugatory the state's ability to investigate and obtain evidence of offences: *Jarvis* at paras. 89-90.

[44] As the application judge states at para. 131 of his reasons, the purpose of the compliance audit is to determine whether the candidate is in apparent contravention of the legislative requirements for campaign finances. That is, the predominant purpose is fact finding, not determining penal liability. In any event, where the audit report indicates that there is an apparent contravention, prosecution is not automatic. It is the municipal council that must determine whether to commence legal proceedings.

[45] A final comment is warranted in relation to this issue. The application judge found that once Council decided to commence legal proceedings in relation to the appellant, an adversarial relationship between her and the municipality came into being. On the principles enunciated in *Jarvis*, the use of the auditor's powers respecting the appellant thereafter would violate her s. 7 rights. Consequently, once the decision to prosecute was made, the application judge viewed the auditors' mandate as having been exhausted, leaving them without further authority to proceed.⁶

⁶ At para. 154 of the reasons for decision of the application judge.

[46] The respondent auditors ask that this determination be set aside. They argue that they were not in possession of all of the documentation that had been requested from contributors and third parties when the compliance audit report was given to Council and that the report reserves the right to issue a supplementary report should the additional information be obtained. In my view, the application judge was correct in his determination. Accordingly, I would not interfere with it.

WAS MR. WILKIN’S APPOINTMENT AN UNLAWFUL DELEGATION OF COUNCIL’S POWER TO PROSECUTE?

[47] The appellant argues that By-law No. 205-2008 is *ultra vires* because Mr. Wilkin’s appointment to prosecute the appellant constituted a wholesale and unlawful delegation of authority. By-law 205-2008, it is contended, gives Mr. Wilkin unfettered discretion to determine what charges to lay against the appellant and how to handle them but the *Act* requires that those decisions are to be made by Council itself. In her additional submissions on this issue, the appellant makes the further argument that the powers delegated to Mr. Wilkin are quasi-judicial in nature and their delegation is prohibited by s. 23.2 of the *Municipal Act, 2001*.

[48] I reject the appellant’s submissions on this issue.

[49] The *Act* does not require Council to decide what charges to lay and how to handle them. Section 81(10) of the *Act* gives Council the power to commence a legal proceeding against a candidate for any apparent contravention of the *Act* relating to election

campaign finances. Based on the compliance audit report, Council exercised that power. In para. 1 of the Resolution that was confirmed by By-law No. 205-2008, Council instructed the City to “institute the laying of charges” against the appellant under the *Act*. In so doing, Council exercised its statutory power – that is, it made the decision to commence a legal proceeding against the appellant.⁷

[50] There is a difference between making a decision (to commence a legal proceeding) and implementing that decision (deciding what charges to lay and how to handle them). As I have said, it was Council who had the power to decide whether a legal proceeding would be commenced against the appellant and it was Council who exercised that power. However, as a corporate body, the municipality can only act through its agents. Having made the decision to prosecute, it was necessary to give effect to that decision. Council did so by retaining outside counsel. In the circumstances, not only was it reasonable to delegate the prosecution to a person with the appropriate expertise and qualifications, it was necessary as it would have been difficult, if not inappropriate, for any City employee to act as the prosecutor in the proceedings. The difficulties inherent in the situation are reflected in one of the recitals to the Resolution, which says “Whereas it is important for all concerned to avoid any perception of bias as legal proceedings move forward”.

[51] Mr. Wilkin’s appointment as prosecutor was the mechanism that Council used to implement its decision. Contrary to the appellant’s assertion, By-law No. 205-2008 does

⁷ It will be apparent that I reject the submission that Council thought it had an obligation to commence legal proceedings. It clearly knew it had a discretion in that regard.

not give Mr. Wilkin unfettered discretion. In the Resolution that By-law No. 205-2008 ratifies, Council imposed conditions within which Mr. Wilkin must act. He is directed to proceed in a timely manner (para. 2) and to lay charges only where reasonable and probable grounds exist, in his legal opinion, for believing that an offence has been committed (para.3).

[52] I accept that para. 4 gives Mr. Wilkin discretion in respect of certain specified matters. He may: withdraw charges if the available evidence does not provide a reasonable likelihood of obtaining a conviction; conduct pre-trial and trial proceedings as necessary; enter into negotiations for the purposes of establishing an agreed statement of facts, a plea bargain or a joint submission to the court in respect of penalty; enter into a plea bargain agreement; establish what penalty is to be sought on conviction; and, provide regular status reports to the City solicitor. However, I understand from the City that the powers given to Mr. Wilkin by para. 4 do nothing more than give him the kind of prosecutorial discretion normally exercised by municipal officials who prosecute infractions of municipal by-laws.

[53] Delegation of the prosecution to outside counsel was necessary, reasonable and prudent. Was it lawful? A municipality is the recipient of delegated authority. Accordingly, it is trite law that in the absence of express statutory authority to delegate, a municipality must exercise the powers it has been given – it cannot delegate their exercise to another. Having said that, the courts have recognized that it is necessary for

municipalities to delegate to others the implementation of their decisions. Thus, the common law has permitted municipalities to delegate administrative or ministerial functions, so long as the standards which are to govern the exercise of those delegated functions are sufficiently clearly spelled out. Put another way, where the delegated administrative function requires the exercise of discretion, the by-law must give clear direction on how the discretion is to be exercised. Some examples are illustrative of this point.

[54] In *Bridge v. The Queen*, [1953] 1 S.C.R. 8, the City of Hamilton passed a by-law in which, among other things, it gave the City Clerk the power to issue permits authorizing service stations to remain open during stated hours and to grant extension permits to occupiers of gasoline shops except those who “according to evidence satisfactory to the City Clerk” were found to have failed to keep their shops open during the authorized times. The by-law was attacked on the basis that there had been an unlawful delegation of power to the City Clerk.

[55] The Supreme Court of Canada held that the parts of the by-law permitting the Clerk to issue permits were valid because Council had provided “sufficient particularity”.⁸ In making this determination, the Court referred to the fact that Council had laid down, in the by-law, the times during which the permits could authorize shops to remain open, the proportion of total occupiers which were to make up the groups entitled

⁸ At p. 14.

to receive permits on certain days, that permits were to be issued to groups in rotation, and that all occupiers were entitled to receive permits except those who failed to remain open in accordance with the terms of their existing permits. However, the Court held invalid those parts of the by-law which permitted the Clerk to grant extensions on “evidence satisfactory to the City Clerk” because Council had not prescribed the state of facts which would render an occupier ineligible to receive a permit. Absent express authorizing language in the enabling legislation, it was an impermissible delegation as it gave the Clerk the power to decide such matters on the basis of evidence that the Clerk found to be sufficient.

[56] In *Regina v. Joy Oil Co. Ltd.*, [1964] 1 O.R. 119, this court upheld a by-law that delegated to the Chief of the Fire Department the power to direct the location and quantities of specified fire-extinguishing materials because the by-law was “as specific as it could possibly be”.⁹

[57] More recently, this court held that the delegation of power to issue licenses to the Chief License Inspector and the Chief of Police was lawful as the by-law in question set clear standards to which they had to have regard when deciding whether to approve or not approve the issuance of a license: see *Adult Entertainment Assn. of Canada v. Ottawa (City)* (2007), 33 M.P.L.R. (4th) 1 (Ont. C.A.) at paras. 34 - 36.

⁹ At p. 121.

[58] It may be that delegation of the prosecution to Mr. Wilkin is sufficiently circumscribed that it was permissible at common law. Recall in this regard that para. 3 of the Resolution establishes a standard by which Mr. Wilkin is to determine what charges are to be laid, namely, those for which there are reasonable and probable grounds for believing an offence has been committed.

[59] In any event, however, ss. 23.1 and 23.3(2) of the *Municipal Act, 2001*, authorize Council to delegate the prosecution to Mr. Wilkin. Section 23.1 was added by the *Municipal Statute Law Amendment Act, 2006*, S.O. 2006, c. 32, Sched. A., s. 15, and came into force on January 1, 2007. The relevant parts of ss. 23.1 and 23.3(2) read as follows:

23.1(1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to delegate its powers and duties under this or any other Act to a person or body subject to the restrictions set out in this Part.

23.3(2) Nothing in subsection (1) prevents a municipality from delegating its administrative powers.

[60] In *The Annotated Municipal Act*¹⁰, Auerback and Mascarin describe the purpose of s. 23.1 as follows:

Clearly one of the purposes of conferring the broad powers of delegation is to permit a municipal council to delegate powers and authorities to a person or body that is, in the view of the council, better able to deal with or handle issues or matters

¹⁰ Stephen Auerback & John Mascarin, *The Annotated Municipal Act*, 2d ed., looseleaf (Toronto: Carswell, 2009) vol. 1 at MA2-135.

given the person or body's expertise, qualifications or background... .

[61] For a period of time in the 1990's, municipal councils were statutorily empowered to delegate administrative powers but only to a committee of council or a municipal employee.¹¹ It is worthy of note that this statutory provision did not include the power to delegate to agents.

[62] In her additional submissions on this issue, the appellant argues that the prosecutorial powers delegated to Mr. Wilkin are quasi-judicial in nature and that s. 23.2 of the *Municipal Act, 2001*, precludes their delegation. I do not agree.

[63] As Mr. Reuter explains on behalf of the respondents, LECG Canada Ltd. and Ken Froese, it is not the functions associated with prosecutorial discretion *per se* that qualify as quasi-judicial. It is the combination of prosecutorial discretion and the special status of the person exercising the function that can make it quasi-judicial. Prosecutorial discretion becomes a quasi-judicial function when exercised by the Attorney General (or his or her delegate, a Crown Attorney) because the authority of the Attorney General

¹¹ See s. 102.1 of the *Municipal Act*, R.S.O. 1990, c. M. 45, as amended by S.O. 1996, c. 32, Part II, s. 14, which was in effect from December 19, 1996, to January 1, 2003. Section 102.1 reads as follows:

Delegation of administrative functions

102.1(1) The council of a municipality may, by by-law, delegate to a committee of council or to an employee of the municipality any powers, duties or functions that are administrative in nature.

(2) The council may, in the by-law, impose conditions on the exercise or performance of the delegated powers, duties and functions.

(3) Subsection (1) does not authorize the delegation of powers, duties, or functions that are legislative or otherwise non-administrative in nature, such as the power to pass by-laws, adopt estimates, levy, cancel, reduce or refund taxes, or appoint persons to and remove them from offices created by statute.

derives from the royal prerogative.¹² The quasi-judicial role and function of the Attorney General and Crown Attorneys arise by virtue of being “ministers of justice”.¹³ That is, the concept of prosecutorial discretion being the exercise of quasi-judicial power is dependent on the person exercising the prosecutorial discretion being clothed with the constitutional powers inhering in the Attorney General’s office.

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.¹⁴

[64] In laying charges and prosecuting the appellant, Mr. Wilkin does not stand clothed with the constitutional authority of the Attorney General. Rather, as I have explained, he is an agent of the municipal corporation and the powers he has been given are properly characterized as administrative, in the sense that they are required to implement Council’s decision to commence legal proceedings. Accordingly, Council made no delegation of quasi-judicial powers and s. 23.2 of the *Municipal Act, 2001* has no application on the facts of this case.¹⁵

¹² *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at paras. 29 - 32. See also *Miazga v. Kvello Estate* 2009 SCC 51 at para. 47.

¹³ *Krieger* at para. 29.

¹⁴ *Krieger* at para. 43.

¹⁵ Additionally, even if the powers were quasi-judicial, it is not clear that the City could rely on s. 23.2(1) of the *Municipal Act, 2001*. However, that question need not be decided in this appeal.

[65] It may be that, at least in part, the appellant's argument on this ground of appeal is directed at the question of oversight. Absent a requirement that Mr. Wilkin report back to Council, has Council overstepped the boundaries of permissible delegation? In my view, it has not. As the application judge noted, returning to Council for instruction is permissible but unnecessary since Mr. Wilkin must operate within the constraints established by the Resolution. In addition, however, there are two other forms of oversight which operate. First, s. 23.1(2) of the *Municipal Act, 2001*, lists six rules that apply to a by-law delegating any of a municipality's powers or duties. Included in those rules is the power of a municipality to revoke the delegation at any time and without notice. Consequently, Council has the power to revoke Mr. Wilkin's appointment as prosecutor at any time. In my view, this means that Council retains an overriding oversight power. Second, the court hearing the prosecution has the power to prevent prosecutorial abuse.¹⁶

[66] Finally, it is worth repeating that the exercise of power by Council in deciding whether to commence legal proceedings for any apparent contraventions of the *Act* must be made in accordance with the ordinary principles of administrative law and is amenable to judicial review.

¹⁶ For example, Mr. Wilkin was retained by the City of Ottawa to carry out the prosecution of Mr. Shawn Little for apparent contraventions of the *Act* relating to election campaign finances. Part way through the trial, Mr. Little successfully moved for a stay of proceedings on the basis that the prosecutor's failure to disclose evidence had breached his s. 7 *Charter* rights: a fact stated in *Little v. Ottawa (City)* (2004), 49 M.P.L.R. (3d) 115 (Ont. S.C.) at para. 3.

[67] Accordingly, I would dismiss this ground of appeal.

DID COUNCIL ACT IN BAD FAITH IN ENACTING THE BY-LAWS?

[68] The appellant submits that the application judge erred in law by mischaracterizing her position on the bad faith issue. She says that her position before the application judge was that Council acted in a manner that was so markedly inconsistent with the relevant legislative authority that a court could not conclude the acts had been performed in good faith. Instead, the appellant contends, the application judge treated her submission as allegations of capricious behavior, corrupt motivation or bias on the part of Council.

[69] I do not accept this submission. At para. 157 of his reasons for decision, the application judge states:

In oral argument, Mr. Manning [counsel for the appellant] was at pains to say that his bad faith complaint was about non-compliance with the relevant elements of the statutory context. He was not, he advised, impugning the integrity of the Councillors, but was instead saying that they were using their power for an improper purpose, one for which it had not been designed In his factum, [counsel for the appellant] stated:

A finding of bad faith does not require any wrongdoing on the part of any council members, but only that council acted unreasonably and arbitrarily in the circumstances without the degree of fairness, openness and impartiality required of a municipal government. Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary

or unfair conduct by the municipality, usually marked by unfairness, partiality, secretiveness, unreasonableness, improper motives, oppression, fraud or the absence of procedural fairness.

[70] It is clear from this passage that the application judge understood the appellant's submission on this issue. He did not mischaracterize her position. Both here and in the summary portion of his reasons, at para. 7, he frames the issue in a manner consistent with that expressed by the appellant, namely, whether Council's actions were so "markedly inconsistent with the relevant legislative context that they amounted to bad faith".

[71] The application judge went through each of the complaints levied against Council in this regard, noting that many were simply a restatement of the complaints dealt with when resolving other issues. He concluded that Council's acts were not so markedly inconsistent with the legislation that they amounted to bad faith.

[72] The application judge did go on to find that the evidence did not support the appellant's allegations of capricious behavior, corrupt motivation, bias, bad faith or otherwise unlawful action, response or purpose by Council. However, it will be apparent from the passage quoted above that the application judge did this in order to deal with the arguments raised in the appellant's factum.

[73] I see no basis on which to interfere with his findings on this issue – the record amply supports them. Accordingly, I would reject this ground of appeal.

DISPOSITION

[74] Accordingly, I would dismiss the appeal with costs to (1) the respondents, the City and Timothy Wilkin, fixed at \$25,000 and (2) the respondents, LECG Canada Ltd. and Ken Froese, fixed at \$10,000, both sums being inclusive of disbursements and G.S.T.

RELEASED: February 12, 2010 (“E.E.G.”)

“E.E. Gillese J.A.”

“I agree K. Feldman J.A.”

“I agree. E.A. Cronk J.A.”

SCHEDULE “A”

Municipal Elections Act, 1996, S.O. 1996, c. 32

Compliance audit

81. (1) An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate’s election campaign finances. 1996, c. 32, Sched., s. 81 (1).

Requirements

(2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate’s last supplementary filing date, if any, or the end of the candidate’s extension for filing granted under subsection 80 (6), if any; it shall be in writing and shall set out the reasons for the elector’s belief. 1996, c. 32, Sched., s. 81 (2); 2002, c. 17, Sched. D, s. 32 (1).

Decision

(3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected. 1996, c. 32, Sched., s. 81 (3).

Delegation to committee

(3.1) A council or local board may, before voting day in an election, establish a committee and delegate its powers and functions under subsection (3) alone or under subsections (3), (4), (7), (10) and (11) with respect to applications received under subsection (2) and the council or local board, as the case may be, shall pay all costs in relation to the operation and activities of the committee. 2002, c. 17, Sched. D, s. 32 (2).

Powers and limitations

- (3.2)** A committee established under subsection (3.1),
- (a) shall exercise the powers and duties delegated to it under that subsection with respect to all applications received under subsection (2) in relation to the election for which it is established; and
 - (b) shall not include employees or officers of the municipality or local board, as the case may be, or members of the council or local board, as the case may be. 2002, c. 17, Sched. D, s. 32 (2).

Appeal

(3.3) The decision of the council or local board under subsection (3) and of a committee under subsection (3) pursuant to a delegation under subsection (3.1) may be

appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision the council, local board or committee could have made. 2002, c. 17, Sched. D, s. 32 (2).

Appointment of auditor

(4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances. 2002, c. 17, Sched. D, s. 32 (3).

Licensed auditor

(5) Only an auditor who is licensed under the *Public Accounting Act, 2004* may be appointed under subsection (4). 1996, c. 32, Sched., s. 81 (5); 2004, c. 8, s. 46.

Duty of auditor

(6) An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate. 1996, c. 32, Sched., s. 81 (6).

Who receives report

- (7) The auditor shall submit the report to,
- (a) the candidate;
 - (b) the council or local board;
 - (c) the clerk with whom the candidate filed his or her nomination; and
 - (d) the applicant. 1996, c. 32, Sched., s. 81 (7).

Powers of auditor

- (8) For the purpose of the audit, the auditor,
- (a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate and of the municipality or local board; and
 - (b) has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to the audit as if it were an inquiry under that Act. 1996, c. 32, Sched., s. 81 (8).

Costs

(9) The municipality or local board shall pay the auditor's costs of performing the audit. 1996, c. 32, Sched., s. 81 (9).

Consideration of report, legal proceeding

(10) The council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent

contravention of a provision of this Act relating to election campaign finances. 1996, c. 32, Sched., s. 81 (10).

Recovery

(11) If the report indicates that there was no apparent contravention and the council or local board finds that there were no reasonable grounds for the application, the council or local board is entitled to recover the auditor's costs from the applicant. 1996, c. 32, Sched., s. 81 (11).

Immunity

(12) No action or other proceeding for damages shall be instituted against an auditor appointed under this section for any act done in good faith in the execution or intended execution of the audit or for any alleged neglect or default in its execution in good faith. 1996, c. 32, Sched., s. 81 (12).

SCHEDULE “B”

Municipal Act, 2001, S.O. 2001, c. 25

23.1 (1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to delegate its powers and duties under this or any other Act to a person or body subject to the restrictions set out in this Part.

Scope of power

(2) The following rules apply to a by-law delegating any of the municipality's powers or duties:

1. A delegation may be revoked at any time without notice unless the delegation by-law specifically limits the municipality's power to revoke the delegation.
2. A delegation shall not limit the right to revoke the delegation beyond the term of the council which made the delegation.
3. A delegation may provide that only the delegate can exercise the delegated power or that both the municipality and the delegate can exercise the power.
4. A delegation or deemed delegation under paragraph 6 of a duty results in the duty being a joint duty of the municipality and the delegate.
5. A delegation may be made subject to such conditions and limits as the council of a municipality considers appropriate.
6. Where a power is delegated, the power is deemed to be delegated subject to any limits on the power and to any procedural requirements, including conditions, approvals and appeals which apply to the power and any duties related to the power are deemed to be delegated with the power. 2006, c. 32, Sched. A, s. 15.

Same

(3) The conditions and limits referred to in paragraph 5 of subsection (2) may include such matters as the following:

1. A requirement that the delegate act by by-law, resolution or otherwise, despite subsection 5 (3).
2. Procedures that the delegate is required to follow.

3. The accountability of the delegate and the transparency of the delegate's actions and decisions.

Restriction re delegation of legislative and quasi-judicial powers

23.2 (1) Sections 9, 10 and 11 do not authorize a municipality to delegate legislative and quasi-judicial powers under any Act except those listed in subsection (2) and the legislative and quasi-judicial powers under the listed Acts may be delegated only to,

- (a) one or more members of its council or a council committee;
- (b) a body having at least two members of whom at least 50 per cent are,
 - (i) members of its council,
 - (ii) individuals appointed by its council,
 - (iii) a combination of individuals described in subclauses (i) and (ii); or
- (c) an individual who is an officer, employee or agent of the municipality. 2006, c. 32, Sched. A, s. 15.

Restriction re applicable Acts

(2) For the purposes of subsection (1), the listed Acts are this Act, the *Planning Act*, a private Act relating to the municipality and such other Acts as may be prescribed. 2006, c. 32, Sched. A, s. 15.

Restriction re certain corporations

(3) Despite clause (1) (b), no delegation of a legislative or quasi-judicial power shall be made to a corporation incorporated in accordance with section 203. 2006, c. 32, Sched. A, s. 15.

Restriction re officers, employees, etc.

(4) No delegation of a legislative power shall be made to an individual described in clause (1) (c) unless, in the opinion of the council of the municipality, the power being delegated is of a minor nature and, in determining whether or not a power is of a minor nature, the council, in addition to any other factors it wishes to consider, shall have regard to the number of people, the size of geographic area and the time period affected by an exercise of the power. 2006, c. 32, Sched. A, s. 15.

Same

(5) Without limiting subsection (4), the following are examples of powers considered to be of a minor nature:

1. The power to close a highway temporarily.
2. The power to issue and impose conditions on a licence.
3. The powers of the council of a municipality that are described in the following provisions of the old *Municipal Act*, as those provisions read on December 31, 2002:
 - i. Paragraphs 107, 108, 109 and 110 of section 210.
 - ii. Paragraph 3 of section 308.
 - iii. Subsection 312 (2) and clauses 312 (4) (a) and (b). 2006, c. 32, Sched. A, s. 15.

Regulations

(6) The Minister may make regulations prescribing Acts for the purpose of subsection (2). 2006, c. 32, Sched. A, s. 15.

Powers that cannot be delegated

23.3 (1) Sections 9, 10 and 11 do not authorize a municipality to delegate any of the following powers and duties:

1. The power to appoint or remove from office an officer of the municipality whose appointment is required by this Act.
2. The power to pass a by-law under Parts VIII, IX and X.
3. The power to incorporate corporations in accordance with section 203.
4. The power to adopt an official plan or an amendment to an official plan under the *Planning Act*.
5. The power to pass a zoning by-law under the *Planning Act*.
6. The powers to pass a by-law under subsections 108 (1) and (2) and 110 (3), (6) and (7).
7. The power to adopt a community improvement plan under section 28 of the *Planning Act*, if the plan includes provisions that authorize the exercise of any power under subsection 28 (6) or (7) of that Act or under section 365.1 of this Act.
8. The power to adopt or amend the budget of the municipality.

9. Any other power or duty that may be prescribed. 2006, c. 32, Sched. A, s. 15.

Delegation of administrative powers

(2) Nothing in subsection (1) prevents a municipality from delegating its administrative powers. 2006, c. 32, Sched. A, s. 15.