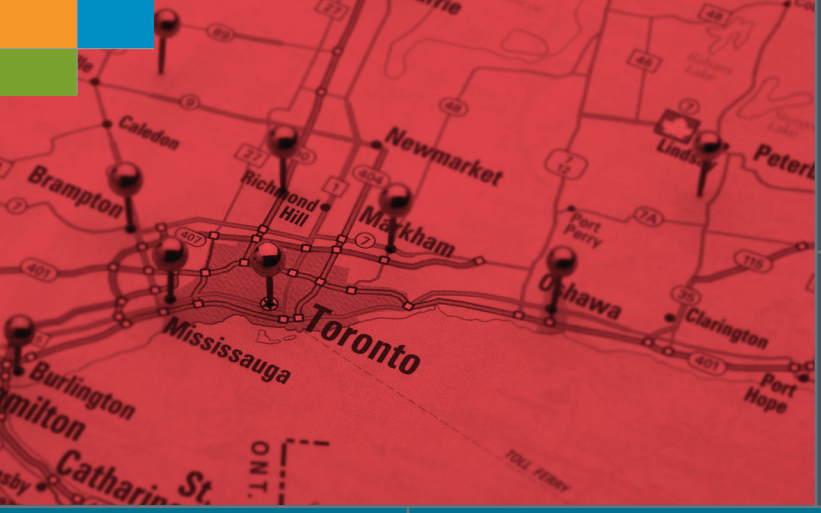

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GOVERNMENT UPDATE

SPRING 2009

Municipal Election Expenses: Greater Clarity For Audit Procedures

A recent decision of the Ontario Superior Court – Jackson v. Vaughan (City of) et al.[1] – *provides municipalities, councillors and auditors with important guidance on how the* Municipal Elections Act ("MEA") *should be interpreted and applied where a candidate's election expenses are subject to an audit.*

By Raivo Uukkivi

The decision in the Jackson case emphasizes the importance of the use by municipal councils of confirmatory by-laws as an integral part of the decision-making process that governs everyday municipal affairs.

Mayor Challenges Campaign Expense Audit And Prosecution

Linda Jackson ("Jackson"), the Mayor of the City of Vaughan ("City"), won the 2006 municipal election by only 90 votes. Two residents applied to the City for a compliance audit of Jackson's campaign finances under s.80(1) of the MEA. The City deferred the question, but the residents sought and obtained a court order, under s.80(3.3) of the MEA, requiring the City to conduct a compliance audit of her campaign expenses.

City Council appointed LECG Canada Inc. as the independent auditor. In conducting the audit, LECG reviewed Jackson's books and records and interviewed members of Jackson's campaign team. However, the interview process was not completed because the campaign team members refused to answer further questions. Despite this fact, LECG elected to issue an audit report in which it outlined several "apparent contraventions" of the MEA. On the basis of the report, the City appointed a prosecutor and authorized the prosecution of Jackson for the alleged breaches of the MEA. A prosecution has not yet taken place and there has been, to date, no finding of contravention.

In a bold and potentially pre-emptive move, Jackson brought an Application to:

- quash the by-law appointing the auditor
- quash the confirmatory by-law used by the City to confirm the appointment of the prosecutor, and
- strike down s.81 of the MEA on various constitutional grounds.

Neither the Attorney's General for Canada or the Province responded.

Vaildity Of Confirmatory By-Laws Upheld

Both before and after Jackson had commenced her Application, the City passed a confirmatory by-laws ratifying all decisions made by City Council related to the Jackson compliance audit and prosecution. Jackson argued that passing confirmatory by-laws after an Application was commenced was evidence of conduct so markedly inconsistent with the standard expected of a municipal government that it amounted to bad faith.

The Court disagreed, and found that a municipality has the power to ratify, by by-law, any previous decision lawfully made and without a time limit where there is no deprivation of a previous private right.

Jackson's allegation of bad faith, bias and other wrongdoing was not supported by the use of a confirmatory by-law. Thus, the use of by-laws to confirm actions of municipal governments that are otherwise lawfully made remains an acceptable practice.

MEA Does Not Provide Unbridled Enforcement Discretion

A second argument advanced by Jackson was that

[1] Unreported decision of Lauwers J., dated March 11, 2009 (S.C.J.). The appeal period will expire on April 10, 2009. We do not know whether the decision will be appealed.

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the MEA violates the rule of law because it provides a municipality with unbridled enforcement discretion. The Court rejected this argument by identifying the five stages or "checks" in the MEA's legislative scheme that provide an appropriate limit on enforcement discretion. These checks are as follows:

1. Council has an obligation to consider an application for a compliance audit;

2. Where council refuses an application, the applicant can appeal to the Ontario Court of Justice;

3. Where an audit is undertaken, it must be performed by an independent auditor licensed under the *Public Accounting Act*;

4. When council considers the results of the compliance audit and makes a decision whether or not to prosecute, this decision is subject to judicial review; and

5. If there is a prosecution, the election candidate has the opportunity for a full answer and defence.

Constitutionality Of The MEA Upheld

A third argument advanced by Jackson was that the MEA was unconstitutional on the alleged grounds that it is (a) void for vagueness; and (b) in violation of s.7 of the Charter because it requires a candidate to provide incriminating evidence to LECG in the course of its compliance audit.

The Court rejected the argument that the MEA is unconstitutionally void for vagueness, noting that legal rules and statutory language need only delineate a risk zone and provide fair notice to citizens. A legal rule cannot hope to do more, unless it is directed at individual instances. The Court was satisfied that the MEA provides fair notice of conduct that will constitute an offence.

The Court also found that s.7 of the Charter did not apply to the investigation of campaign election spending. No person who participates in a municipal election has any reasonable expectation of privacy with respect to their campaign expenses. Further, unlike MEA contraventions known as "corrupt practices", election campaign finance contraventions are less serious and do not expose a person to the possibility of incarceration. Therefore, s.7 of the Charter did not apply in this situation.

However, the Court concluded that once the City decided to prosecute Jackson, s.7 of the Charter was triggered giving rise to substantive protection. LECG could not continue its investigation to complete its audit because the circumstances had changed from compliance audit to prosecution.

As such, the broad rights to obtain information from the candidate under the MEA ceased and the more stringent rights afforded to a defendant facing a criminal or quasi-criminal prosecution applied, including the right against making incriminating statements. This means that a municipality and auditor should ensure an investigation gathers all available evidence and information before making a decision on whether or not to prosecute. This will ensure that the municipal decision is based on complete information. □

Toronto Property Tax Relief Program Approved For Building Development Or Renovation

Toronto City Council recently approved a new program – the Imagination, Manufacturing, Innovation and Technology (IMIT) financial incentive grant program – which can provide property owners who develop new buildings or expand or renovate existing buildings with significant tax relief.

By Constance Lanteigne

The IMIT grant program applies to a number of named sectors and building uses, from business offices to film studios. The program also applies to the remediation of contaminated brownfield properties where the property is being developed for non-retail employment uses. To apply, property owners must submit a grant application before the issuance of the first above-grade building permit, with applications being accepted until 2013.

Qualified applicants may save an average of 60% of the resulting tax increase in their municipal property tax over a 10-year period, with the City giving back a portion of the property tax paid each year as a grant.

To be considered for a grant, the property must not be in arrears of taxes or other charges and the development must have a construction value of at least $1 million and conform to all City processes and permits. Property owners must also agree to meeting the minimum requirements of the Toronto Green Standard and participate in a city-endorsed hiring initiative. □

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