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Recent Amendments to the *Municipal Elections Act, 1996* by the *Municipal Elections Modernization Act, 2016* and a Comparison of Provincial Legislation

by Eric Davis and Brittany Thompson

Introduction

After each municipal election, Ontario's Ministry of Municipal Affairs and Housing (the "**Ministry**") reviews the *Municipal Elections Act, 1996* (the "**MEA**") to determine whether the legislation should be amended.

In May 2015, the Ministry began its review of the MEA, which resulted in Bill 181, the *Municipal Elections Modernization Act, 2016* (the "**MEMA**"), which received Royal Assent on June 9, 2016.

The MEMA is the most significant update to the MEA in over 20 years.

Most of the commentary in relation to the MEMA has been about how it permits municipalities to adopt a ranked balloting system and the new election calendar, however, those are not the only changes that were made. The MEMA also makes amendments to the campaign finance provisions in the MEA.

For example, candidates are no longer required to open a bank account if they do not raise or spend funds, and the minimum amount that is to be considered a contribution has increased from $10.00 to $25.00.

The MEMA also made larger-scale changes to the campaign finance rules, including:

1. prohibiting trade unions and corporations from making contributions to candidates;

2. requiring candidates to file financial statements and auditor's reports within a prescribed time period; and

3. the new provisions that require municipal clerks to review candidates' financial statements for contraventions.

No Contributions from Corporations or Trade Unions

One of the most significant changes made to the MEA is section 88.8(4), which prohibits corporations and trade unions from making contributions to candidates.

The term "contribution" is now defined in section 88.15 of the MEA (formerly section 66 of the MEA). It includes, "money, goods and services given to and accepted by a person for his or her election campaign, or given to and accepted by another person who is acting under the person's direction".

Section 88.8(4) of the MEA states:

> 88.8(4) For greater certainty, and without limiting the generality of subsection (3), the following persons and entities shall not make a contribution:

1. A federal political party registered under the *Canada Elections Act* (Canada) or any federal constituency association or registered candidate at a federal election endorsed by that party.

2. A provincial political party, constituency association, registered candidate or leadership contestant registered under the *Election Finances Act*.

3. A corporation that carries on business in Ontario.

4. A trade union that holds bargaining rights for employees in Ontario.

5. The Crown in right of Canada or Ontario, a municipality or a local board.

Previously under the MEA, such contributions were permitted. The City of Toronto was the only municipality authorized to prohibit contributions from corporations and trade unions under the former section 70.1 of the MEA.

Such contributions are still permitted in other provinces, such as Alberta, Saskatchewan and BC, though BC's new NDP government is considering a similar ban on corporate and union donations for municipal elections.

However, despite the total prohibition accomplished by section 88.8(4), corporations and trade unions will be permitted to register as third parties and make contributions to third-party advertisers under section 88.12(3) of the MEA, which will come into force on April 1, 2018.

Filing Financial Statements

Section 88.25 of the MEA, like the former section 78(1), still requires a candidate to file a financial statement and auditor's report with the Clerk on or before 2 p.m. on the filing date.

It states:

88.25(1) On or before 2 p.m. on the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances,

(a) in the case of a regular election, as of December 31 in the year of the election; and

(b) in the case of a by-election, as of the 45th day after voting day.

In addition, many of the other provisions that deal with financial statements have also remained the same, including the significant penalties listed for failing to file a financial statement on time or at all.

The former section 80 of the MEA is now section 88.23 following the amendments made by the MEMA.

Subsections 88.23(1) and 88.23(2) of the MEA state:

> 88.23(1) A candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act,
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> (a) if the candidate fails to file a document as required under section 88.25 or 88.32 by the relevant date;
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> (b) if a document filed under section 88.25 shows on its face a surplus, as described in section 88.31, and the candidate fails to pay the amount required by subsection 88.31 (4) to the clerk by the relevant date;
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> (c) if a document filed under section 88.25 shows on its face that the candidate has incurred expenses exceeding what is permitted under section 88.20; or
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> (d) if a document filed under section 88.32 shows on its face a surplus and the candidate fails to pay the amount required by that section by the relevant date.
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> (2) Subject to subsection (7), in the case of a default described in subsection (1),
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> (a) the candidate forfeits any office to which he or she was elected and the office is deemed to be vacant; and
>
> (b) until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which this Act applies.

The lack of amendment in this area is somewhat surprising given the relevant case law, which reveals that, for the most part, the Courts have been interpreting the MEA (and using section 98 of the *Courts of Justice Act* (the "**CJA**")), in a manner that renders the requirement to file financial statements and an auditor's report by a set deadline, as well as the penalties imposed for so doing, rather meaningless.

1. *Niagara Falls (City) v. Diodati*

In *Niagara Falls (City) v. Diodati*, (2011) 82 M.P.L.R. (4th) 140 (Ont. S.C.J.), the respondent, James Diodati, who was elected Mayor of Niagara Falls, submitted a financial statement and auditor's report showing his campaign expenses exceeded the prescribed maximum by $72.74, contrary to the former section 80(1) of the MEA [now section 88.23(1)].

Though Mr. Diodati subsequently submitted corrected financial documents, he did so after the prescribed deadline. As a result, the penalties under section 80(2) of the MEA applied.

Both the applicant (the City Clerk for Niagara Falls) and the respondent asked the Court to make an order granting relief from forfeiture of the mayor's office and an order declaring that Mr. Diodati was the mayor of Niagara Falls.

In that case, the Court granted the relief sought pursuant to section 98 of the CJA. Section 98 of the CJA states:

> A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

The Court also held that, if it were wrong in holding that section 98 of the CJA applied, the provisions of the former section 92(6) of the MEA, which permit a court to relieve a candidate from the forfeiture provisions contained in the MEA if the candidate has been charged and convicted of an election offence, should be applied to the present case.

The Court found that Mr. Diodati acted in good faith and that the error contained in the financial documents was made inadvertently. As such, the penalties imposed by section 80(2) of the MEA did not apply.

2. *Braid v. Georgian Bay (Township)*

In *Braid v. Georgian Bay (Township)*, (2011) 83 M.P.L.R. (4th) 335 (Ont. S.C.J.), the applicant was elected Mayor of the Township of Georgian Bay, but filed a flawed audited financial statement within the time period prescribed by the MEA. The applicant then applied for relief from the penalties prescribed under section 80(2) of the MEA [now section 88.23(2)], which the Township supported.

In that case, the court outlined the test to be applied when an offence is committed under the former section 92(5)(a) of the MEA. The Court held:

> I believe that the correct approach to be taken to this task is to follow the reasoning process and make the findings that would have been required of the judge presiding over a prosecution under section 92 of the Act. This is a two part process. First comes the determination of whether an offence has been committed. If the answer to that is in the affirmative then there must be a finding as to whether or not the candidate, acting in good faith, committed the offence inadvertently or because of an error in judgment. If the answer to that question is also

> in the affirmative then a declaration should issue that the office is not forfeited and the candidate is Mayor of the Township.

Following the above noted test, the Court found that an offence had been committed (the applicant admitted that the auditor's report he filed did not comply with the requirements of section 78 of the MEA), but the Court also found that the applicant acted in good faith and committed the offence inadvertently.

As a result, the penalties imposed by section 80(2) of the MEA [now section 88.23(2) of the MEA] did not apply.

3. *Ecker v. Hamilton-Wentworth Catholic District School Board*

In *Ecker v. Hamilton-Wentworth Catholic District School Board*, (2012) 98 M.P.L.R. (4th) 134 (Ont. S.C.J.), the applicant failed to file a financial statement and sought relief pursuant to the former section 92(6) of the MEA.

This case is interesting, because it found the applicant guilty of failing to file a financial statement and arguably applied the MEA as written.

The Court held that:

> The relief available through subsection 92(6) is referable to the offences mentioned in subsection 92(5). Since failure to file is not one of those offences, that relief is not available to the applicant.

In finding that the applicant's conduct was unreasonable and not in good faith, the Court held as follows:

> I agree with the submission by counsel for the City of Hamilton that Mr. Ecker's breach was very grave indeed in that it rendered it impossible for any elector to inquire into the appropriateness of his campaign finances. The actual amounts involved are not a relevant consideration in the circumstances. To relieve the applicant from the consequences imposed by subsection 80(2) of the Act would defeat the primary purpose of the financial filing requirements.
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> [...]
>
> In the circumstances, there is no basis for granting the relief sought by exercise of the court's discretion pursuant to section 98 of the Courts of Justice Act.

As a result, the Court dismissed the application.

4. *Obina v. Ottawa (City)*

In *Obina v. Ottawa (City)*, (2014) 28 M.P.L.R. (5th) 116 (Ont. S.C.J.), the applicant ran unsuccessfully for Ottawa City Council in 2010 and failed to file an audited financial statement

of her campaign finances within the required time period – she filed *unaudited* financial statements 3 minutes after the deadline. She later claimed that she did not have the financial resources at the time to get her financial statements audited.

As she wanted to run for Ottawa City Council again in 2014, she brought an application for relief from the penalty imposed under s. 80(2)(b) of the MEA [now section 88.23(2)(b) of the MEA].

Ms. Obina ultimately obtained and filed an auditor's report of her campaign finances dated July 10, 2014, which was 3 years and 4 months after the deadline, but prior to her application being heard.

The Court granted the applicant's requested relief. The Court held:

> In this case I find that Ms. Obina acted in good faith and committed an error of judgment by failing to file an audited financial statement by the deadline because she lacked the financial resources to pay for the audit. She has now paid for and filed the required audited financial statement. I also have found that there is no prejudice to anyone if the penalty of prohibiting her from being elected in the upcoming 2014 municipal election is waived.

5. *Giannini v. Toronto (City)*

Lastly, in *Giannini v. Toronto (City),* 2017 CarswellOnt 3010, 2017 ONSC 1489, 277 A.C.W.S. (3d) 761, the applicant ran unsuccessfully for a seat on Toronto City Council. She failed to file the audited financial statements required by the MEA. In her application, the applicant was seeking relief from forfeiture and permission to file her financial statements.

Justice Dunphy of the Superior Court of Justice declined to exercise discretion to relieve the applicant from her failure to file the audited financial statement. In coming to that decision, Justice Dunphy stated:

> I am not satisfied that the applicant's failure to comply with the mandatory financial disclosure provisions of the MEA was inadvertent nor that she has been sufficiently diligent in her attempts to repair the problem so as to merit what is exceptional relief. The equitable jurisdiction of the court is not to be applied incautiously, particularly where as important an expression of public policy as the campaign finance disclosure rules of the MEA are concerned.
>
> Rights seldom come without corresponding obligations – the right to present oneself to the people as a candidate for election carries with it the responsibility to make fair and timely disclosure of financial returns in the manner prescribed.

As a result of the foregoing, one might have expected the provincial Legislature to have made amendments to section 80 of the MEA [now section 88.23 of the MEA] in order to perhaps provide a level of clarity and guidance as to how the penalties under the MEA are to be

enforced and by whom. However, that has not occurred. The relevant provisions remain largely unchanged.

However, despite not addressing the issue that continues to exist in section 88.23 of the MEA, the MEMA created a new provision, section 88.23(9), which states:

> 88.23(9) The penalties set out in subsection (2) for a default described in clause (1)(a) do not take effect if, no later than 2 p.m. on the day that is 30 days after the applicable day for filing the document, the candidate files the relevant document as required under section 88.25 or 88.32 and pays the clerk a late filing fee of $500.

Now, a candidate who fails to file a financial statement or auditor's report pursuant to section 88.23(1)(a), can avoid the automatic penalties under section 88.23(2), because they can submit it up to 30 days late ***if*** they pay a late filing fee of $500.

In addition, as provided by the new section 88.23(10), the money that is paid pursuant to section 88.23(9) of the MEA becomes the property of the municipality.

It will be interesting to see how frequently late financial statements are filed by candidates under section 88.23(9) and whether it reduces the number of individuals that come before the courts to seek relief from the penalties imposed by section 88.23(2) of the MEA.

In addition to creating a negative consequence for failing to file a financial statement by the deadline, the MEMA also introduced a provision that applies positive reinforcement for so doing. The former section 34 of the MEA stated:

> 34. A candidate is entitled to receive a refund of the nomination filing fee if he or she,
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> (a) withdraws the nomination under section 36;
>
> (b) is elected to the office; or,
>
> (c) receives more than the prescribed percentage of the votes cast in the election for the office.

However, the new section 34 of the MEA states:

> 34. A candidate is entitled to receive a refund of the nomination filing fee if the documents required under subsection 88.25(1) are filed on or before 2 p.m. on the filing date in accordance with that subsection.

Ontario is not alone in requiring its candidates to file some sort of financial statement or report outlining their finances for an election period. Like Ontario, some provinces, such as Alberta and British Columbia, also allow a candidate to file their financial documents late if they pay a late filing fee to allow the candidate to avoid further penalties.

Review of Financial Statements

In the former MEA, the onus was clearly on the candidate to ensure that any contributions received stayed within the prescribed limits. For example, under the former section 69(1)(m) and (n) of the MEA, a candidate was responsible for returning a non-compliant campaign contribution to a contributor.

The former section 69(1) stated:

> 69(1) A candidate shall ensure that,
>
> [..]
>
> (m) a contribution of money made or received in contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention;
>
> (n) a contribution not returned to the contributor under clause (m) is paid to the clerk with whom the candidate's nomination was filed.

Section 69(1) is now section 88.22 of the MEA. Subsections (m) and (n) have become (o) and (p).

To be clear, a candidate still has a responsibility to ensure contributions that exceed the prescribed limits are returned.

However, a new section of the MEA has been created by the MEMA (which comes into effect on April 1, 2018), namely section 88.34, which now requires the Clerk to also ensure that contributions are within the prescribed limits.

Under section 88.34 of the MEA, the Clerk is required to review the contributions reported on each candidate's financial statement to determine whether any contributor appears to have exceeded any of the contribution limits as outlined in section 88.9 of the MEA.

Section 88.34(1) states:

> 88.34(1) The clerk shall review the contributions reported on the financial statements submitted by a candidate under section 88.25 to determine whether any contributor appears to have exceeded any of the contribution limits under section 88.9.

It should be noted that the contribution limit has been increased as a result of the MEMA. Previously, the total contribution limit was $750. Section 88.9(1) of the MEA has increased that amount to $1,200. Now, unless the candidate is running for the office of mayor of the City of Toronto, section 88.9 states that a contributor cannot contribute an amount that exceeds $1,200. Section 88.9(2) states that $1,200 is the maximum amount, even if the individual is a candidate for more than one office. If the individual is a candidate for the

office of the mayor of the City of Toronto, the maximum total contribution that a contributor can make is $2,500.

As stated in section 88.34(1) of the MEA (which will come into force on April 1, 2018), a Clerk must ensure that the contributions reported on a financial statement do not exceed any of the contribution limits under section 88.9.

In addition, a Clerk must also look across financial statements, because according to section 88.9(4) of the MEA, the Clerk must also ensure that a contributor does not exceed the total contribution limit of $5,000 for two (2) or more candidates who are running for the office on the same Council. Section 88.9(4) states:

> 88.9(4) A contributor shall not make contributions exceeding a total of $5,000 to two or more candidates for office on the same council or local board.

If a Clerk finds a contravention, he or she is required to prepare a report that identifies the contributor who appears to have contravened any of the contribution limits established in section 88.9 and the specific contributions that were made. If the contributor's contributions exceed the $5,000 limit for two (2) or more candidates running for office on the same Council, the report must also include this information. A report must be made for each contributor who contravenes section 88.9. This is quite a demanding task, to say the least.

Once complete, each report is to be forwarded to the compliance audit committee. Within thirty days of receipt, the audit committee will determine whether to commence a legal proceeding against the contributor.

In the past, fines have in fact been imposed on contributors who contravened the contribution limits.

For example, in *R v Losani Homes (1998) Ltd.*, 2007 ONCJ 685, Losani Homes (1998) Ltd. ("**Losani**") was convicted for contributing $500 more than permitted under the MEA.

At the sentencing hearing, Justice of the Peace Dechert of the Ontario Court of Justice fined Losani $1,000 for the contravention. In coming to this decision, his Worship discussed the sentencing principles applicable to the MEA. At paragraphs 7 and 8 of the ruling, he stated that the most important sentencing principles are specific and general deterrence, and ease of enforcement. In speaking about ease of enforcement, Justice of the Peace Dechert wrote:

> It might be also arguable, and I do so consider it to be appropriate, that the general principle of "ease of enforcement" is also a principle of sentencing that must be considered in regulatory statutes, where sentences should be crafted that send a message to the public that violations of matters such as municipal election campaign finance rules may be enforced in a way that emphasizes the importance of those rules and ensures some "ease of enforcement" in the public interest.

Despite being very clear about which sentencing principles applied to the MEA, his Worship determined that general deterrence was the most important principle of the three. At paragraphs 14 and 15 he stated:

> As I indicated earlier, general deterrence is, in my view, the paramount principle of sentencing to be applied in this sentencing hearing. In my view, the *Municipal Elections Act, 1996*, especially as it relates to matters of election campaign finances, is an important public welfare statute. Its purpose is to set fair rules for municipal elections so that all citizens in our democracy can feel that the process of electing our municipal governmental officials is conducted in a fair and open manner. Rules such as those set out in the *Municipal Elections Act, 1996* serve to strengthen our democracy and therefore enhance the freedoms that our forefathers carefully and thoughtfully created in Ontario for our benefit.
>
> Accordingly, the rules set out for electoral fairness, set out in the *Municipal Elections Act, 1996* must be rigidly enforced and, following conviction on a violation of these rules, a sentence must be imposed that sends an adequate message that substantial financial consequences will flow from even inadvertent transgressions of the legislation.

The ruling in *R v Losani Homes (1998) Ltd.* establishes a very clear precedent that contributors who contravene the contribution limits should be penalized in some fashion. However, few other cases have surfaced regarding the same.

Conclusion

As indicated above, the MEMA made significant changes to the MEA's campaign finance rules. It prohibited trade unions and corporations from making contributions to candidates, it amended the rules in relation to the filing of financial statements and auditor's reports and it created new provisions that require municipal Clerks to review candidates' financial statements for contraventions.

Given the nature and the scope of the amendments, the MEMA is truly the most significant update to the MEA in over 20 years.

It is interesting to note that several provinces are contemplating similar municipal election reforms, such as Alberta and British Columbia. What will happen in relation to municipal elections in those provinces remains to be seen.

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