

Case Update

The following are recent cases of interest as provided by John Mascarin, Partner in the Toronto office of Aird & Berlis, LLP

Municipal Conflict of Interest Act

The appellant was the mayor of the City of Toronto. Prior to being elected as mayor, he was a member of city council at which time he solicited donations to a children's football foundation from city lobbyists using city letterhead which was prohibited by several provisions in the city's code of conduct for members of council. A complaint was made to the city's Integrity Commissioner who investigated the matter. Her report to city council recommended that council take steps to require him to reimburse $3,150 in donations made by the donors. Council considered the report and approved it. A reconsideration motion was put forward and the appellant voted on the motion even though he was alerted to a potential conflict of interest. The appellant failed to comply with the Integrity Commissioner's recommendation and the reimbursement requirement.

The Integrity Commissioner wrote a further report to council asking that it require the appellant to provide proof of reimbursement. A motion was moved to rescind council's previous decision ordering the appellant to reimburse the funds. The appellant spoke to the matter and voted at council. The motion to rescind was passed. The respondent elector applied pursuant to s. 9 of the Municipal Conflict of Interest Act for an order removing the appellant from office for contravening s. 5 of the statute by speaking or voting on the motion to rescind. The application was allowed and the respondent was ordered removed from office. He appealed.

Held - The appeal was allowed.

Section 5 of the Municipal Conflict of Interest Act provided that if a member of municipal councillor has a pecuniary interest in a matter before council, that the member must disclose the interest and not take part in any discussion or vote on the matter. The respondent both participated in the discussion and voted on the matter of whether he had to repay $3,150 to donors. However, the respondent did not have a pecuniary interest at the time because council's decision to require him to personally reimburse the improperly solicited funds was made without authority. The City of Toronto Act, 2006 authorized two penalties for a breach of the city's code of conduct: a reprimand or a suspension of pay for up to 90 days. There was no authority for council to order the mayor to repay the funds. That decision was a nullity and, accordingly, the appellant could not have had a pecuniary interest in the matter when he spoke to and voted on the motion. In all other respects, the decision of the application judge was correct. The appellant's action would not otherwise have been saved by the remote and insignificant exception in s. 4(k) of the statute. His contravention was not an honest error in judgment under s. 10(2). Finally, there was nothing to preclude the application of the Municipal Conflict of Interest Act on code of conduct matters. *Magder v. Ford* (January 25, 2013), Doc. 560/12, Then J., Leitch J. and Swinton J. (Ont. Div. Ct.)

Time Limits Under Controverted Municipal Elections Act

The relator brought an application pursuant to s. 19 of The Controverted Municipal Elections Act for an order that the election of the respondent as a municipal councilor be declared null and void. The relator alleged that several ineligible voters were permitted to vote. The respondent argued that the application was out of time due to the failure of the relator to serve the notice of motion within the time limitation set out under s. 23 of the statute.

Held - The application was dismissed.

The relator was obliged by s. 23 of The Controverted Municipal Elections Act to serve the notice of motion within two weeks from the date of the fiat granted by a judge. In this case, the fiat was issued on May 7, 2012. Legislation relating to controverted elections is to be strictly construed. Since the respondent was not served upon the respondent until June 8, 2012 (well beyond the two week period), the proceeding was out of time. *Quinn v. Deyell* (January 3, 2013), Doc. Estevan Q.B. 46/12, Barrington-Foote J. (Sask. Q.B.)

Defamation - Qualified Privilege

The appellant was a member of council in the City of Hamilton. He appealed a finding of liability for defamation with regard to an exchange of heated emails sent between himself and the individual respondent regarding the use of revenues from a racetrack. The emails were copied to all other members of council and the mayor. The emails were exchanged over a period of 3 days following a raucous public meeting. At trial, it was found that the words that the councilor used in his email defamed the respondent (who was referred to as "a destructive mean spirited liar that does not deserve the time of day"), and that the defence of qualified privilege was not available to the councillor, because he had not acted with a good faith belief in the truth of the impugned words and had published them "negligently and maliciously." The respondent was awarded damages of $15,000.

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