

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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Clean Water Act

18. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559, 112 S.Ct. 2130 (1992).
19. 33 U.S.C. § 1365(g).
20. *Laidlaw*, 528 U.S. 181.
21. *Id.* at 176-77.
22. *Id.* at 181-83.
23. *Id.* at 201.
24. *Id.* at 494.
25. *Id.*
26. *Id.* at 495.
27. *Laidlaw*, at 189.
28. *Id.*
29. *Id.* at *7-8.
30. *Id.*
31. *Id.* at 1021.
32. 33 U.S.C. § 1365(b).
33. 40 C.F.R. § 135.3(a).
34. *Hallstrom, supra*, 493 U.S. at 33.
35. The United States Court of Appeals for the Ninth Circuit has repeatedly stated that the 60-day notice requirement is jurisdictional. Center for Biological Diversity v. Marina Point Development Co., 535 F.3d 1026, 1031 (9th Cir. 2008) ("the giving of a 60-day notice is not simply a desideratum; it is a jurisdictional necessity"); Waterkeepers Northern California v. A.G. Industrial Manufacturing Inc., 375 F.3d 913, 916 (9th Cir. 2004) ("In our circuit, compliance with this notice provision is required for jurisdiction").
36. *Center for Biological Diversity, supra* at 1033-34.
37. *Id.* at 1034.
38. *Id.*
39. *Id.* at 1034-35.
40. *Id.* at 1142.
41. *Id.* at 1143.
42. *Id.*
43. 33 U.S.C § 1319(g)(6)(A)(ii).
44. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
45. *Laidlaw, supra*, 890 F. Supp. at 478-79.
46. *Id.* at 486-87.
47. *Id.* at 489-90, 490-92.
48. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).
49. *Chesapeake, supra*, 769 F.2d at 208.
50. *Id.*
51. 33 U.S.C. § 1319(g)(6)(B)(ii) (brackets added).
52. *Black Warrior Riverkeeper, supra*, 548 F.3d at 991. ML

FLSA Myth Busters *Cont'd from page 13*

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 766-767.
69. *Id.* at 765 & 767-771.
70. *Id.* at 767-768.
71. *Id.* at 768.
72. *Id.*
73. *Id.* (internal quotation marks omitted).
74. Hartman v. Arlington County, 720 F.Supp. 1227, 1228 (E.D. Va. 1989).
75. *Id.* at 1229.
76. *Id.*
77. *Id.*
78. *Id.*
79. Anunobi v. Eckerd Corp., No. SA-02-CV-0820-XR, 2003 WL 22368153, 2003 U.S. Dist. LEXIS 18535, at *5 (W.D. Tex. Oct. 17, 2003).
80. *Id.* at 2003 U.S. Dist. LEXIS 18535, at *1.
81. *Id.*
82. *Id.* at *2-*17.
83. *Id.* at *5.
84. *Id.*
85. *Id.* at *9.
86. *Id.*
87. *Id.* at *10.
88. *Id.* at *12-13.
89. *Id.* at *5.
90. *Id.*
91. D.O.L. Wage & Hour Division Opinion Letter, 1997 WL 998013 (March 17, 1997).
92. *Id.* (emphasis in original). ML

The Power of Clarity *Cont'd from page 19*

16. In the author's opinion, "etc." in an ordinance is universally a bad idea. It creates no boundaries or limits.
17. Cosmopolitan Nat'l Bank of Chicago v. City of Chicago, 27 Ill. 2d 578 (1963).
18. This is a fairly standard provision in many state laws, stemming from the Standard Zoning Enabling Act. Sometimes local regulations refer to a "final recommendation" which may require more than a "report." This leads to lively city attorney discussions about what constitutes a recommendation: Is a memo from a planning commission that states, "we have no recommendation (but please get this off our plates)" sufficient? What about a tie vote?
19. Walter Dellinger, Assistant Attorney General, "The Legal Significance of Presidential Signing Statements," Memorandum for Bernard N. Nussbaum, Counsel to the President (November 3, 1993).
20. *See, e.g.*, Berry v. Dept. of Justice, 733 F.2d 1343 (9th Cir. 1984) (citing President Lyndon Johnson' signing statement regarding the Freedom of Information Act, Public Law 89-487 on July 4, 1966.). It is not clear that the Supreme Court would give any weight to such statements; there are five opinions that reference signing statements, perhaps the most interesting being Justice Scalia's mention in his concurrence in Hamden v. Rumsfeld, 548 U.S. 547, at 666 (2006), where he appears to chastise the majority for not considering it part of the legislative history. ML

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Held - The appeal was allowed.

The defence of qualified privilege applies to the occasion when a defamatory statement is made and not to the statement itself. In this case, a response to a community activist about an issue of municipal taxation, in the context of an ongoing public debate on the issue, fell squarely within the ambit of qualified privilege for an elected municipal official. For qualified privilege to apply, a defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. The trial judge considered that qualified privilege did not apply because the communication itself was malicious.

This was not the correct analysis. The first step in the analysis is to determine whether the occasion in which the statement is made is one in which qualified privilege applies. If it does, then the court must decide whether the defence of qualified privilege is defeated because the impugned words are published maliciously. The trial judge's factual findings were not sufficient to enable the court to apply the correct law to the facts to arrive at a judgment. This necessitated a new trial to determine whether the council member's

defence of qualified privilege was defeated by malice. *Sarachman v. Whitehead* (December 21, 2012), Doc. Toronto 229/12, Corbett J., Swinton, Wilton-Siegel JJ. (Ont. Div. Ct.)

Zoning – Definition of "Utility"

The respondent regional district sought to establish and operate a recycling facility on its own property. The petitioner opposed the location of the recycling facility, arguing that it was contrary to the applicable zoning by-law. The regional district took the position that the recycling facility was permitted under the zoning by-law as a "utility" which was expressly defined by a list of uses that did not explicitly refer to a recycling facility (but which did refer to "facilities established or licensed by a government"). The petitioner argued that the definition of "utility" in the by-law did not expressly include recycling facilities, and that recycling facilities could not be included or read into the definition of "utility."

Held - The petition was allowed.

There was no genuine ambiguity regarding the definition of "utility". A plain reading of the definition indicated that the drafters of the zoning by-law intended to create five enumerated categories of services that could be considered a "utility" under the by-law. The words "facilities established or licenced by a government" did not create a sixth category of utility under which the recycling facility could fall. Furthermore, the implied exclusion principle of statutory interpretation applied. Because recycling facilities were comparable to the enumerated facilities listed in the definition of "utility," an inference could be drawn that the drafters of the by-law intended to exclude recycling facilities from that definition. *Quast v. Cowichan Valley (Regional District)* (December 31, 2012), Doc. Victoria 11-2945, Gaul J. (B.C. S.C.)

Community Charter – "Indirect Pecuniary Interest"

The appellants, a group of Salt Spring Island electors, appealed a trial decision regarding an apparent conflict of interest which arose when the two respondents, acting as elected trustees of a local trusts committee, introduced a resolution and voted to award to service contracts to non-profit environmental societies of which they were directors. At the time of voting, the respondents failed to disclose their roles as directors of the environmental societies. At trial, the chambers judge had held that, pursuant to subsection 101(1) of the Community Charter, the respondents did not have a "direct or indirect pecuniary interest in the matter[s]", because they derived no personal financial benefit from the contracts.

Held - The appeal was allowed.

The object of subsection 101(1) of the Community Charter is to prevent elected officials from having divided loyalties in deciding how to spend public funds. The respondents owed fiduciary duties to their respective societies and their duties as directors to put the societies' interests first were in direct conflict with their duties as elected officials to put the general public's interest first. It made no difference that the respondents derived no personal financial benefit from the contracts. The public was disadvantaged by their conflict because the public did not have the undivided loyalty of their elected officials. *Schlenker v. Torgrimson* (January 11, 2013), Doc. Vancouver CA039685, Donald, Newbury, Hinkson JJ.A. (B.C. C.A.)

Res Judicata – Re-litigation Is Abuse of Process

The appellant city sought to re-litigate an issue regarding the compliance of the respondent corporation's property with a property standards by-law. Identical litigation had been brought unsuccessfully in 2005 under a former version of the same property standards by-law. The respondent brought a motion to have the city's appeal of a decision of its property standards committee set aside in order to avoid a new trial on the merits. The respondent argued that the matter was *res judicata*, and that re-litigation was barred by the doctrines of issue estoppel and/or abuse of process.

Held - The motion was granted.

The amendment to the property standards by-law created a new legislative basis for the city's appeal that did not exist at the time of the original decision. The by-law amendment intervened to change the issue to a sufficient degree such that issue estoppel did not apply. However, the courts have an inherent jurisdiction to prevent any abuse of process that might arise from unnecessary duplication of proceedings. As a new trial would result in the same evidence and testimony to be brought forward as was tendered in the original trial, to allow the city's appeal to proceed would amount to an abuse of the court's process. The city's appeal of the property standards committee's decision was accordingly dismissed. *Toronto(City) v. Rexlington Heights Ltd.* (January 10, 2013), Doc. CR-12-00000091-00AP, Morgan J. (Ont. S.C.J.)

Municipal Elections Act-Power to Reject Nomination Papers

The individual applicants sought election as municipal councilors. Two weeks before the election, the respondent returning officer revoked the applicants' candidacies and removed their names from the ballot because they were volunteer members of municipal committees. The applicants brought an application to have the elections for their respective districts declared void pursuant to s. 158(1) of the Municipal Elections Act, on the basis that the returning officer did not have jurisdiction to reject the applicants' nomination papers after having accepted them.

Held - The application was allowed.

The Municipal Elections Act does not grant returning officers the power to reject a candidacy after accepting nomination papers. Once nomination papers have been accepted, the determination of whether a candidate is qualified is to be made by the court. By rejecting the applicants' candidacies outright, the returning officer breached a duty of procedural fairness owed to the applicants. Volunteer members of municipal committees, whose relationship with those committees is not in the nature of an employment-like relationship, are not disqualified from being nominated for municipal elections pursuant to s. 18(1)(d) of the Municipal Elections Act. In light of the facts that (i) the applicants were not disqualified by reason of their volunteer membership with municipal committees, (ii) the returning officer's revocation of the applicants' candidacies was without jurisdiction, and (iii) the election results were likely affected by the returning officer's decision, the elections for the position of municipal councilor in the applicants' respective districts was declared void. *Winsor v. Kings (County)* (December 21, 2012), Doc. Ken 408859, Warner J. (N.S. S.C.)