



# Getting Your Ducks in a Row before “Lame Duck” 2022 Municipal Election Training

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AIRD BERLIS



## *Disclaimer*

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*This presentation may contain general comments on legal issues of concern to organizations and individuals.*

*These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.*

# Overview

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- 1. *Legislative Updates***
- 2. *Code of Conduct “Blackout Period”***
- 3. *Compliance Audit Committees***
- 4. *Nominations and Eligibility 101***



# ***Legislative Updates Since 2018***

# Legislative Updates

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- New Nomination Day, s. 31 of the *MEA*:
  - previously “fourth Friday in July”, now “third Friday in August”
- Authority to accept nominations electronically, s. 33 of the *MEA*
- If council passed by-law authorizing use of voting equipment, alternative methods of voting (by May 1), clerk must establish procedures and forms (*MEA*, s. 42)
  - Previous deadline was Dec. 31 in year before election year
  - Currently, June 1, 2022

# Legislative Updates

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- Ranked Ballot Elections have been scrapped
  - City of London only municipality to use ranked ballots in 2018 Election
  - Kingston, Cambridge held referenda on use of ranked ballots in 2018; other municipalities were considering use of ranked ballots in 2022.
- Starting 2024, new office of the Chief Electoral Officer will be involved in municipal elections
  - responsible for administering voters' list, voting subdivisions
  - replaces role of MPAC



# ***Code of Conduct “Blackout Period”***

# Code of Conduct “Blackout Period”

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- **March 1, 2019:** all municipalities required to:
  - adopt a Code of Conduct
  - appoint an Integrity Commissioner
- Integrity Commissioner responsible for independently conducting investigations, reporting to council on Code-compliance
- Statutory authority in Part V.1 “Accountability and Transparency”, *Municipal Act, 2001*
- Clerk often point-person, liaison between Integrity Commissioner and Council



# Code of Conduct “Blackout Period”

- Powers of the Integrity Commissioner (and Council) restricted after Nomination Day – August 19, 2022:
  - all active or outstanding investigations must be terminated on Nomination Day (s. 223.4(7))
  - no new complaints may be filed (s. 223.4(9) 1.)
  - Integrity Commissioner cannot report to council (s. 223.4(9) 2.)
  - Council cannot consider whether to impose a penalty (s. 223.4(9) 3.)
- Note: blackout period commences on Nomination Day (as per s. 31 of the *MEA*), NOT on the commencement of the nomination period

# Code of Conduct “Blackout Period”

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What next?!

# Code of Conduct “Blackout Period”

- No restriction on Council consideration of report after Voting Day
- Integrity Commissioner may resume investigations which were terminated:

## Same

**223.4** (8) If an inquiry is terminated under subsection (7), the Commissioner shall not commence another inquiry in respect of the matter unless, within six weeks after voting day in a regular election, as set out in section 5 of the *Municipal Elections Act, 1996*, the person or entity who made the request or the member or former member whose conduct is concerned makes a written request to the Commissioner that the inquiry be commenced.

# Code of Conduct “Blackout Period”

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- Manage expectations:
  - of residents – no complaints during election
  - of Councillors – no consideration of conduct by Council during election
- Confirm what is outstanding with the Integrity Commissioner; timing considerations for investigations
- Ensure the Integrity Commissioner is aware of the blackout dates



***Compliance Audit Committee: forming,  
norming, performing***

# Compliance Audit Committee

- Compliance Audit Committee tasked with hearing requests for compliance audits of candidates' campaign finances
- Prior to 2009, Council could hear requests for compliance audits
  - In 2009, function moved from Council to an impartial tribunal
- Not like an ordinary committee of council:
  - Independent
  - Adjudicative
  - Quasi-judicial

# Compliance Audit Committee

- On or before October 3, 2022, council shall establish a compliance audit committee; between 3 and 7 members, appointed by council
- Members cannot be:
  - municipal employees
  - members of council
  - candidates in the 2022 Municipal Election
  - registered third parties in the municipality
- No other eligibility criteria prescribed

***MEA, s. 88.37***

# Compliance Audit Committee

- Questions to ask:
  - Should the municipality have its own eligibility criteria?
  - Recruitment process?
  - Should a “short list” of candidates be recommended to council? Should council consider all candidates?
  - Should the municipality establish a Joint Compliance Audit Committee?
  - Fixed number of members, or rotating roster?



# Compliance Audit Committee

- The Clerk's role is twofold:

## **Role of clerk or secretary**

**88.37(6)** The clerk of the municipality...shall establish administrative practices and procedures for the committee and shall carry out any other duties required under this Act to implement the committee's decisions.

1. Act as secretary/clerk before, during and after hearings
2. Establish "administrative practices and procedures"

# Compliance Audit Committee

- Administrative Procedures – a procedural rules for the committee
  - less like a procedure by-law, closer to rules of court
  - goal of providing for a clear, predicable and fair hearing process
  - should cover such matters as:
    - calling, conduct and proceedings of meetings
    - requirements for filing of evidence and other materials
    - order business of hearing, including establishing time limits for oral submissions
- Note: as a backstop, the Compliance Audit Committee is subject to the *Statutory Powers Procedure Act*, the basic procedural rule book

# Compliance Audit Committee

- Things to think about:
  - Forming: establishing Compliance Audit Committee, Terms of Reference appointment criteria, selecting members for appointment
  - Norming: training for members, understanding roles
  - Performing: preparation for hearings, administrative procedures



***Nominations and Eligibility 101: a crash course on accepting and processing nominations***

# Nominations and Eligibility 101:

- A tale of two dates:
  - May 2, 2022 – opening of “nomination period”
  - August 19, 2022 – Nomination Day
- Nomination Papers must be examined before 4:00 PM on the Monday following Nomination Day (August 22, 2022)
- *MEA*, s. 33 governs process for submitting nominations
- *MEA*, s. 33(2), nominations must be:
  - In the prescribed form
  - Endorsed by 25 persons (i.e. electors)
  - Accompanied by declaration of qualification
  - Accompanied by prescribed nomination filing fee

# Nominations and Eligibility 101:

- *MEA*, s. 35 requires the Clerk to examine nomination forms to satisfy themselves of two questions:
  - Does the individual qualify to be nominated?
  - Does the nomination comply with the *MEA*?
- If “yes” to both, the Clerk shall certify the nomination paper
- If “no” to either, the Clerk shall reject the nomination paper
- the Clerk’s decision is “final”
  - no direct appeal, but judicial review possible
  - Clerk’s decision reviewed on the standard of “reasonableness”

# Nominations and Eligibility 101:

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- Potential issue: technical irregularities, errors
- It is the responsibility of the person nominated to file a complete and accurate nomination paper: *Winters v. Newcastle (Town)* (1992) (Ont. C.A.)
- Case law suggests that in review of nominations under s. 35 of the *MEA*, technical irregularities, if previously accepted by the Clerk, cannot result in rejection of nomination

# Nominations and Eligibility 101:

## *Walters v. Friesen (2000) (Ont. S.C.J.)*

- two candidates filed nominations with technical issues, did not pay nomination fee with prescribed method, one allegedly submitted after 5:00 PM
- Despite this, Clerk accepted nominations, swore consent and declaration forms, issued receipts for payments
- On review of nominations, Clerk rejected both nominations
  - One candidate alleged file late, payment did not comply with regulations
  - Other candidate, payment did not comply with regulations
- Candidate applied to Divisional Court for a mandatory order requiring City Clerk to accept nominations



# Nominations and Eligibility 101:

## *Walters v. Friesen* (2000) (Ont. S.C.J.)

- Superior Court granted the application
- Clerk's acceptance of nominations, even with irregularities, constituted satisfaction with filing requirements
- On review of nominations under s. 35 of the *MEA*, Clerk could only concern herself with two things:
  - whether the person was qualified to be nominated
  - whether the nomination paper, not its accompaniments, complied with the *MEA*
- Procedural errors or deficiencies should be corrected at the filing stage, not the review stage

# Nominations and Eligibility 101:

## *Walters v. Friesen* (2000) (Ont. S.C.J.)

- Takeaways:
- Two separate issues in nomination paperwork:
  - what can be corrected by nominee: errors, omissions, mistakes
  - what cannot be corrected by nominee: residency, age, is a corporation etc.
- Nominations should be screened to ensure all procedural irregularities, deficiencies are corrected at the time of filing
- Late is late; if a nomination is file late, refuse to accept, or accept with notation it was filed late



# Eligibility Rules

# Nominations and Eligibility 101:

- Eligibility rules are set out in the *Municipal Act, 2001*, with reference to the *Municipal Elections Act, 1996*:

## Eligibility, local municipality

**256** Every person is qualified to be elected or to hold office as a member of a council of a local municipality,

(a) who is entitled to be an **elector** in the local municipality under section 17 of the *Municipal Elections Act, 1996*; and

(b) who is **not disqualified by this or any other Act** from holding the office. 2001, c. 25, s. 256.

- Similar rules for upper-tier municipality

# Nominations and Eligibility 101:

- An “elector” is defined in section 17 of the *Municipal Elections Act, 2006*
- A person is an elector if, on voting day, the person:
  - a) resides in the local municipality or is the owner or tenant of land there, or the spouse of such owner or tenant;
  - b) is a Canadian citizen;
  - c) is at least 18 years old; and
  - d) is not prohibited from voting under subsection (3) or otherwise by law

***MEA, s. 17(2)***



# **Residency, Ownership, Tenancy – who qualifies?**

# Nominations and Eligibility 101:

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- A candidate must either:
  - reside in the municipality
  - own or rent land in the municipality
  - be the spouse of an owner or tenant of land

# Nominations and Eligibility 101:

## *“...reside in the municipality”*

- General rule: a person’s residence is the permanent lodging place to which, whenever absent, they intent to return: *MEA*, s. 2
  - a person may only have 1 residence at a time
  - place where a person’s family resides is also their residence, unless they move elsewhere with intention of changing permanent lodging place
  - if no permanent lodging, place where they occupy a room or to which they habitually return
- Exception: students may have residences in two municipalities



# Nominations and Eligibility 101:

## *“...resides in the municipality”*

- If no permanent lodging place, the following rules apply:
  1. Place to which person returned most frequently to sleep or eat in the 5 weeks before the determination is their residence
  2. If person returns to two places with equal frequency to sleep at one and eat at another, place where they sleep is their residence
  3. Multiple returns to the same place during a single day to eat or sleep is considered one return
  4. A person’s own declaration regarding the places where they eat or sleep is conclusive, absent contrary evidence

# Nominations and Eligibility 101:

## *“owner or tenant of land”*

- Defined term under the *MEA*:
  - “a person who is the owner or tenant shown on the assessment roll of land assessed under the *Assessment Act* and a non-residential tenant of land assessed under the *Assessment Act*, whether or not the tenant is shown on the assessment roll,”
  - does not include a time share contract
  - Must be for a period of 6 weeks during election year, or on voting day
- “Tenant” also defined: includes an occupant, and a person in possession other than the owner

# Nominations and Eligibility 101:

## *Residency, Ownership, Tenancy*

- Case law suggests some room for interpretation
- Purpose of residency requirements:

“It seems to me that a clear purpose of the *Municipal Elections Act* is to ensure that a person who seeks to be elected as mayor of a municipality has a real and substantial connection to the municipality including a property interest.”: *Hill v. Di Lullo* (2014) (Ont. S.C.J.)
- *Hill v. Di Lullo* (2014) (Ont. S.C.J.): mayoral candidate rented office space in the municipality through a corporate entity; Court found they were eligible



**Prisoners, Politicians, Judges – what do they have in common?**



**Cannot for municipal office...**

# Nominations and Eligibility 101:

- The following persons are prohibited from voting, and, therefore, running for office:
  1. A person serving a sentence of imprisonment in a penal or correctional institution.
  2. A corporation.
  3. A person acting as an executor or trustee, or in any other representative capacity.
  4. A person who was convicted of a “corrupt practice” (s. 90(3), *MEA*) if voting day is within 5 years of the voting day in respect of the conviction

***MEA, s. 17(3)***

# Nominations and Eligibility 101:

- Other individuals not entitled to hold office under the *Municipal Act, 2001*:
  1. An employee of the municipality, or an appointed clerk, treasurer, Integrity Commissioner, Auditor General, Ombudsman, or Closed Meeting Investigator, or who holds any administrative position.
  2. A judge of any court.
  3. An MP, MPP, or Senator.
  4. A “public servant” of the Provincial government.

***Municipal Act, 2001, s. 258(1)***

# Nominations and Eligibility 101:

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- Common misconception: you cannot hold municipal office if you have a criminal record
- Incorrect – language in the MEA: “...*serving a sentence of imprisonment in a penal or correctional institution*”
  - Incarcerated persons are ineligible
  - Conviction is not relevant, only sentence
  - Probation, absent some custodial sentence, does not count



# Nominations and Eligibility 101:

- A rare case: MP, MPP seeking to run for municipal office
  - cannot be an MP, MPP on the day the nomination is filed
- *Nunziata v. Toronto (City)* (2000):
  - MPP John Nunziata wanted to run for Mayor of Toronto; filed nomination, but asked City Clerk consider his eligibility as of Nomination Day, not filing day
  - Clerk rejected nomination; on filing his nomination, Nunziata was prohibited from holding office
  - Nunziata applied to court; argued that City Clerk could not reject nomination before Nomination Day as per *MEA*, s. 35(1)
  - Application dismissed by Divisional Court; upheld by Court of Appeal

# Nominations and Eligibility 101:

- Common Issue: municipal employees running for office
- Not strictly prohibited, but subject to the following rules:
  1. Employee must take an unpaid leave of absence between the day the employee is nominated until voting day.
    - The employee is entitled to take unpaid leave for this purpose (s. 30(3)).
    - The employee is entitled to be paid out for vacation pay, overtime pay owing (s. 30(3.1)).
  2. Employee must give council written notice in advance.

***MEA, s. 30***

# Nominations and Eligibility 101:

- Common Issue: municipal employees running for office can't
  3. If elected, the employee is deemed to resign immediately before taking oath of office
  4. If not elected, employee goes back to work, and leave of absence not counted in determining length of service, and service before and after leave deemed to be continuous.
  5. Exception: volunteer firefighters are not considered employees

***MEA, s. 30***

# Nominations and Eligibility 101:

## *Zeppleri v. City of Toronto (2000) (Div. Ct.)*

- candidate was employed as a City Building Inspector; wanted to run for City Council in 2000 Municipal Election
- Filed nomination papers with City Clerk in March 2000; City Clerk rejected nominations because candidate was an employee and therefore ineligible
- April 2000, candidate informed superiors of intention to take unpaid leave during campaign period; request approved
- April 2000, candidate again attempted to file nomination papers; again rejected by City Clerk
  - Clerk's interpretation of the legislation: employee must be on unpaid leave of absence at the time nomination is filed

# Nominations and Eligibility 101:

## *Zeppleri v. City of Toronto (2000) (Div. Ct.)*

- Candidate applied to Divisional Court for a mandatory order requiring City Clerk to accept nomination
- Divisional Court refused the Application:
  - plain meaning of s. 30(1) of the *MEA* – employee must be on unpaid leave at time nomination papers are filed
  - otherwise, employee would be performing municipal duties and being paid by municipality while seeking elected office
- Note: language of s. 30(1) changed after this case

# Nominations and Eligibility 101:

- Takeaways:
  - Screen nomination forms and accompanying documents at the time of filing; insist that errors, irregularities be correct immediately
  - Train front-line staff on filing requirements, timing consideration; put a plan in place for dealing with irregularities
  - To confirm residency, ownership, tenancy, request any documents or information to assist in satisfying yourself person has a “real and substantial connection to the municipality”

# Q & A

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