SUPERIOR COURT OF JUSTICE

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DATE: April 21, 2011

FROM: The Honourable Madam Justice Hoy

RE: *Cusimano v. City of Toronto*
Court File No. CV-11-419251

AND RE: *Sullivan v. City of Toronto*
Court File No. CV-11-418325

TOTAL NO. OF PAGES (including cover): 23

MESSAGE: Attached is a copy of the Reasons for Decision of Justice Hoy in the above matter, dated April 21, 2011.

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CITATION: Cusimano v. Toronto (City), 2011 ONSC 2527
COURT FILE NOS.: CV-11-419251
CV-11-418325
DATE: 20110421

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	**COURT FILE NO.:** CV-11-419251
AGUSTINE G. CUSIMANO Applicant	**Lorne Honickman, Rory Barnable and Meredith Rady**, for the Applicant
- and -	
CITY OF TORONTO Respondent	**Susan L. Ungar and David A. Gourlay**, for the Respondent
	COURT FILE NO.: CV-11-418325
AND BETWEEN:	
MICHAEL SULLIVAN Applicant	**Raivo Uukkivi**, for the Applicant
- and -	
CITY OF TORONTO and STEPHANIE PAYNE Respondents	**Susan L. Ungar and David A. Gourlay**, for the Respondent City of Toronto **Julian Heller** for the Respondent Stephanie Payne
	HEARD: March 29, 2011

Hoy J.

REASONS FOR DECISION

I OVERVIEW

[1] Two applications are before me arising out of irregularities in the addition of persons to the voters' list in the City of Toronto's municipal elections held October 25, 2010. Agustine Cusimano, who lost the election for the position of City Councillor in Ward 9 by 89 votes, seeks a declaration that as a result of the irregularities the election of Maria Augimeri as City Councillor was invalid. Michael Sullivan, who lost the election for the position of school trustee for Ward 4 of the Toronto District School Board (Wards 7 and 8 of the City) by 56 votes seeks a declaration that the election of Stephanie Payne as trustee was similarly invalid. Each asks that I order a by-election.

[2] Section 51(1) of the *Municipal Elections Act*, 1996, S.O. 1996, c. 32 (the "MEA"), provides that an elector whose name appears on the voters' list for a voting place is entitled to vote there, subject to certain qualifications. There were numerous voting places in each Ward. As is not uncommon, some people who sought to vote were not on the voters' list for the voting place.

[3] Section 24 of the MEA provides that a person may make an application to be added to the voters' list, such application shall be in writing, and, if satisfied that the person is entitled to be added to the list, the clerk of the City of Toronto (the person responsible for conducting municipal election) shall endorse the application to indicate approval. Pursuant to section 12 of the MEA,[1] the clerk created a form of application for this purpose, called the Voters List Change Request Form (the "VLCRF"). It includes a space entitled "Signature of Election Official".

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[1] Powers of clerk

12. (1) A clerk who is responsible for conducting an election may provide for any matter or procedure that,

(a) is not otherwise provided for in an Act or regulation; and

(b) in the clerk's opinion, is necessary or desirable for conducting the election. 1996, c. 32, Sched., s. 12 (1).

Forms

(2) The power conferred by subsection (1) includes power to establish forms, including forms of oaths and statutory declarations, and power to require their use. 1996, c. 32, Sched., s. 12 (2).

Proof of identification, qualification, etc.

(3) The power conferred by subsection (1) includes power to require a person, as a condition of doing anything or having an election official do anything under this Act, to furnish proof that is satisfactory to the election official of the person's identity or qualifications, including citizenship or residency, or of any other matter. 1996, c. 32, Sched., s. 12 (3); 2002, c. 17, Sched. D, s. 4.

[4] Section 52(2) of the MEA provides that on receiving an approved application under section 24 to amend the voters' list, the deputy returning officer shall amend the voters' list in accordance with the application.

[5] The most significant irregularity pointed to by Messrs. Cusimano and Sullivan is that persons were added to the voters' list and voted when neither the clerk nor any of her delegates[2] had signed the VLCRF. Three hundred and seventy-four of the VLCRFs in Ward 9 were not signed[3] by an election official. Two hundred and twenty-four of the VLCRFs for Ward 4 of the TDSB reviewed by Mr. Sullivan were not signed by an election official.

[6] The legislature has recognized that some irregularities occur in virtually every election. Candidates and, in this case, the City of Toronto, have incurred expenses. People have exercised their right to vote, and their votes should not be discounted without good reason. Section 24 of the MEA provides that a court shall not determine an election to be invalid if the irregularity did not affect the result of the election and the election was conducted in accordance with the principles of the MEA. The issue on these applications is therefore whether the irregularities at issue affected the result of the election or the election was not conducted in accordance with the principles of the MEA. If so, the election must be declared invalid.[4]

[7] Mr. Cusimano and Mr. Sullivan argue that as a result of the failure of any election official to comply with the statutory requirement to endorse the VLCRF, the people added to the voters' list were not entitled to vote and permitting them to do so was contrary to the principles of the MEA. The number of people added without an election official signing the VLCRF exceeded the margin of votes by which Messrs. Cusimano and Sullivan lost their elections and therefore, they argue, affected the result of the election.

[8] The City of Toronto and, in the case of Mr. Sullivan's application, Ms. Payne, oppose the relief sought. They admit that VLCRFs were not signed by election officials and that irregularities occurred. They argue that the requirement in section 24 of the MEA that the clerk "endorse" the application, properly interpreted, does not require an election official to sign the VLCRF. They argue that the persons at issue would not have been added to the voters' list and given ballots if the election officials had not been satisfied that they were entitled to vote, the failure of any election official to sign the VLCRFs in issue was an insignificant procedural irregularity in the course of a very busy municipal election with record turnout and did not affect the result of the election and the elections were conducted in accordance with the principles of the MEA.

[9] For the reasons that follow, I am not satisfied that the irregularities did not affect the outcome of the elections. Both elections are accordingly declared invalid, and by-elections ordered.

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[2] Section 15(2) of the MEA authorizes the clerk to delegate to a deputy returning officer or other election official any of the clerk's powers and duties in relation to an election, as she considers necessary.

[3] In these reasons, "sign" or "signed" means writing one's name, or initials or other special mark in one's own hand.

[4] As noted in *O'Brien v. Hamel*, (1990), 73 O.R. (2d) 87 (Div. Ct.), para. 32, the section is somewhat awkwardly expressed in the negative and should be transformed to the positive to show when an election is to be declared invalid.

II RELEVANT PROVISIONS OF THE MEA

[10] Qualifications

17. (2) A person is entitled to be an elector at an election held in a local municipality if, on voting day, he or she,

(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. 2002, c. 17, Sched. D, s. 5 (2); 2005, c. 5, s. 46 (1).

Persons prohibited from voting

(3) The following are prohibited from voting:

1. A person who is serving a sentence of imprisonment in a penal or correctional institution.

2. A corporation.

3. A person acting as executor or trustee or in any other representative capacity, except as a voting proxy in accordance with section 44.

4. A person who was convicted of the corrupt practice described in subsection 90 (3), if voting day in the current election is less than five years after voting day in the election in respect of which he or she was convicted. 1996, c. 32, Sched., s. 17 (3); 2006, c. 9, Sched. H, s. 4.

Application for change re own name

24. (1) During the period that begins on the Tuesday after Labour Day and ends at the close of voting on voting day, a person may make an application to the clerk requesting,

(a) that the person's name be added to or removed from the voters' list; or

(b) that information on the voters' list relating to the person be amended. 1996, c. 32, Sched., s. 24 (1).

Form and manner of application

(2) The application shall be in writing and shall be filed,

(a) in person, by the applicant or his or her agent; or

(b) by mail, by the applicant. 1996, c. 32, Sched., s. 24 (2).

Application approved

(3) If satisfied that the applicant is entitled to have the requested change made, the clerk shall,

(a) endorse the application to indicate approval; and

(b) return the endorsed application to the applicant or notify the applicant that the application has been approved and the voters' list will be changed to reflect the approved application. 1996, c. 32, Sched., s. 24 (3); 2002, c. 17, Sched. D, s. 6.

Application refused

(4) If not satisfied that the applicant is entitled to have the requested change made, the clerk shall,

(a) note the reason for refusal on the application; and

(b) return the annotated application to the applicant. 1996, c. 32, Sched., s. 24 (4).

. . .

Clerk's decision final

26. The clerk's decision under section 24 or 25 is final. 1996, c. 32, Sched., s. 26.

. . .

Voters' list

28. (1) The clerk shall prepare and certify the voters' list for use in each voting place established under section 45. 1996, c. 32, Sched., s. 28 (1).

Same

(2) In preparing the voters' list, the clerk,

(a) shall determine which electors appear on the voters' list for each voting place;

(b) shall remove the names that are shown in the interim list of changes as names to be removed; and

(c) may make any other changes approved under section 24. 1996, c. 32, Sched., s. 28

. . .

Elector's right to vote

51. (1) An elector whose name appears on the voters' list for a voting place is entitled to vote there, subject to subsection (2).

. . .

Voting procedure

52. (1) The following procedure shall be followed when a person enters a voting place and requests a ballot:

1. Subject to paragraph 3, the deputy returning officer shall give the person a ballot only if,

i. the deputy returning officer is satisfied that the person is entitled to vote at the voting place, and

ii. the person presents the prescribed proof of identity and residence or completes an application in the prescribed form, including a statutory declaration that he or she is the elector shown on the voters' list.

. . .

Amendment of voters' list

52. (2) On receiving an approved application under section 24 to amend the voters' list, the deputy returning officer shall amend the voters' list in accordance with the application.

. . .

Application

83. (1) A person who is entitled to vote in an election may make an application to the Superior Court of Justice requesting that it determine,

(a) whether the election is valid;

(b) whether a person's election to an office in the election is valid;

(c) if a person's election to an office is not valid, whether another person was validly elected or is entitled to the office;

(d) if an election is not valid or a person's election to an office is not valid, whether a by-election should be held. 1996, c. 32, Sched., s. 83 (1); 2002, c. 17, Sched. D, s. 34 (1).

. . .

Effect of procedural irregularities

(6) The court shall not determine an election to be invalid if,

(a) an irregularity described in subsection (7) occurred at the election but did not affect the result of the election; and

(b) the election was conducted in accordance with the principles of this Act. 1996, c. 32, Sched., s. 83 (6).

Same

(7) Clause (6) (a) applies to the following irregularities:

1. An irregularity on the part of the clerk or in any of the procedures before voting day.

2. Failure to have a voting place open at the appointed location and time.

3. Non-compliance with a provision of this Act or of a regulation, by-law, resolution or procedure made, passed or established under this Act, dealing with voting, counting of votes or time requirements.

4. A mistake in the use of forms, whether prescribed or not. 1996, c. 32, Sched., s. 83 (7).

III THE MEANING OF "ENDORSE" IN SECTION 24(3)

The Parties' Positions

[11] The respondents argue that the word "endorse" in section 24(3), interpreted, as it is agreed it must be, in its entire context, in its grammatical and ordinary sense, in harmony with the object and scheme of the MEA, and the intent of the Legislature[5] does not require that the clerk in fact sign the VLCRF .

[12] As the respondents also note, the *Legislation Act*[6] states:

> 64. An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[13] The respondents point to the definition of "endorse" in the Canadian Oxford Dictionary:

> Endorse transitive verb 1. declare one's approval of (a candidate etc.), confirm (a statement or opinion). 2.a Sign on the back of (a cheque) either as payee or to make (it) payable to someone other than the stated payee. b sign (a bill) to accept responsibility for paying it. 3. write (a supplementary or official explanation, comment or instruction) on a document, often to extend of limit its provisions.

[14] They submit that the election official endorses, in the sense of declaring his or her approval of the application to be added to the voters' list, by the act of adding the applicant to the voters' list pursuant to section 52(2). They point out that prior to the 1996 amendments to the MEA, which significantly shortened and simplified the legislation, the predecessor to the VLCRF was prescribed by the Act, and the predecessor to section 24(3) specifically required the " clerk or assistant revising officer shall certify accordingly by signing the application." They argue that the use of the work "endorse" instead of "sign" is significant.

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[5] See *Canada 3000 Inc., Re; Inter-Canadian (1001) Inc. (Trustee of)*, [2006] S.C.J. No. 24 (S.C.C.) para. 36, quoting E.A. Dreidger, *Construction of Statutes* (2nd ed. 1983) at p. 87.)

[6] *Legislation Act*, 2006, S.O. 2006, C. 21, Schedule F

[15] They further submit that the purpose of section 24(3) is to ensure that a person who seeks to be added to the voters' list is in fact entitled to vote in that ward, which can be done be checking the identification and address of the applicant, and that this supports the interpretation of the word "endorse" as merely requiring that the official approve the application.

[16] In support of their argument that "endorse" should be given a meaning that could not result in the election being declared invalid, the respondents cite Cory J. in *Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, (S.C.C.) paras 129-131:

> 129 The right to vote is of fundamental importance to Canadians and to our Canadian democracy.
>
> 130 In the interpretation of all enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the stature to enfranchise the voter.
>
> 131 Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

[17] The applicants argue that, applying the well-established principles of statutory interpretation "endorse" in this context clearly means "sign".

Analysis and Conclusion

[18] Interpreted in the context of the provision itself, the word "endorse" in my view means "sign". If it does not, then the requirement that the clerk endorse the application would be surplus and add nothing to the provision, or the MEA. The purpose of the requirement that the clerk endorse the application is to provide accountability and certainty and safeguard the integrity of the electoral process. Section 24 does not sustain the interpretation advanced by the respondents.

[19] In my view, section 52(2) also supports this interpretation. It reads, "On receiving an approved application under section 24 to amend the voters' list, the deputy returning officer shall amend the voters' list in accordance with the application." If endorse did not mean "sign", then this section should read, "On approving an application under section 24...the returning officer shall amend the voters' list...".

[20] Moreover, in establishing a form for the purpose of section 24 the clerk set out a place for the signature of the election official. This indicates to me that the clerk was of the view that a signature was required. There was no evidence from the clerk to the contrary.

[21] *Haig v. Canada* is not, in my view, a basis for abandoning the usual principles of statutory interpretation.

[22] *Haig v. Canada* arose out of a constitutional referendum with respect to the "Charlottetown Accord" held in October of 1992 pursuant to federal legislation in all provinces and territories, except Quebec. Quebec was to hold a separate referendum on the

same date and on the same question, but in accordance with provincial legislation. As a result of the different requirements as to residency in the federal and provincial legislation, Mr. Haig was not qualified to vote in either referendum. He had moved from Ontario to Quebec within six months of the referendum date, and was admittedly ordinarily resident in Quebec at the time of the election. Under the federal legislation, every person who had attained eighteen years of age and was a Canadian citizen was a qualified as an elector and was entitled to have his name included in the voters' list for the polling division in which that person was ordinarily resident.

[23] Mr. Haig argued, among other things, that the federal legislation should be interpreted to include someone ordinarily resident in Ontario at any time within 6 months prior to the referendum. He asserted that the Chief Electoral Officer had the discretion to interpret the residency requirement in the manner argued by Mr. Haig pursuant to the provision of the federal act empowering him where,"...by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may...adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation."

[24] The majority dismissed these arguments, holding that while Mr. Haig was a qualified voter, he was not entitled to vote. Residence was a pivotal feature of the referendum scheme. The object of the federal legislation was to ensure that those who were entitled to vote were given the opportunity to do so, not to enfranchise those who were not entitled to vote. The interpretation proposed by Mr. Haig would "do violence to all cannons of interpretation as well as to legislative integrity...the court would be required to alter the clear meaning of provisions drafted by the federal government in order to accommodate exigencies arising from provisions drafted by a completely different legislative body...".[7] The majority found that the discretion given to the Chief Electoral Officer to adapt the legislation did not extend to authorize a fundamental departure from the legislative scheme.

[25] While coming to the same result as the majority, Cory J. disagreed on the issue of statutory interpretation; he would have interpreted the "ordinarily resident" requirement in the federal act broadly to include Mr. Haig had Mr. Haig made an application to be added to the voters' list in his former riding in Ontario and provided evidence based on which it could be possibly said that he retained a substantial connection to his former riding. The fundamental importance to Canadians and to our democracy of the right to vote acknowledged by Cory J. is undisputed. The interpretation principle Cory J. advocated was not, however, applied by the majority.[8]

[26] Before me, the respondents argue that: the MEA's object is to enfranchise persons who are, pursuant to section 17(2) of the MEA, set out in its entirety above, entitled to be electors; the statutory requirements in order to be entitled to be added to the voters' list are unimportant procedural requirements; and "endorse" should be interpreted in a manner that promotes enfranchisement. While section 17(2) of the MEA incorporates the requirement for residence in the municipality, it seems to me that this is somewhat the same argument that

[7] para. 44

[8] Lamer J., who dissented, agreed with Cory J. on the proper approach to the definition of residency.

was rejected by the majority in *Haig v. Canada*, which recognized the dual requirement of qualification (here, the section 17(2) requirement of the MEA), and actual entitlement to vote at a particular polling station (here, section 51(1), by getting one's name on the voters list for that polling station.) In any event, while the MEA seeks to enfranchise qualified electors, it also seeks to protect the integrity of the electoral process.

[27] I also note that what is at issue on this application is not, as it was in the case of *Haig v. Canada*, whether or not persons will be permitted to vote. It is whether the test established by the legislature for determining if an election should be declared - which establishes a balance between an individual's right to vote and the integrity of the voting system, for the benefit of all - has been met. When an the election is declared invalid, the persons affected have another opportunity to vote.

[28] I conclude that the failure of an election official to sign the VLCRF breached the MEA.

IV A PRELIMINARY ISSUE: ARE THE IRREGULARITIES COMPLAINED OF DESCRIBED IN SUBSECTION 83(7) OF THE MEA AND THEREFORE SUBJECT TO THE TEST IN SUBSECTION 83(6)?

[29] Counsel for Mr. Sullivan argues that the failure of any election official to sign the VLCRF is not an irregularity described in subsection 83(7), and that the test in subsection 83(6) therefore does not have to be met in order for the court to determine that the election is invalid. He submits that the reference in subsection 83(7)3. to non-compliance with a provision of the MEA dealing with voting was intended to be restricted to provisions, such as section 54 of the MEA, dealing with the counting of votes.

[30] Counsel for Mr. Cusimano submits and the respondents concede that the irregularities in relation to the completion of the VLCRFs fall within section 83(7) of the MEA. They are either within subsection (7)3., referred to above, or (7)4.(mistake in the use of forms). As the City argues, subsection 83(6) is a remedial provision and should be broadly, rather than narrowly, construed. It does not make sense to make the fundamental issue addressed in section 54 of the MEA - which ballots are to be rejected - subject to the saving provision of subsection 83(6), and not similarly make the addition of voters to the voting list subject to such provision. Thus, the irregularities at issue are subject to subsection 83(6).

V DID THE FAILURE OF AN ELECTION OFFICIAL TO SIGN THE VLCRFS AFFECT THE RESULT OF THE ELECTION?

The Parties' Positions

[31] The parties provided me with a great number of cases decided between 1902 and 2010 dealing with elections - federal, provincial and municipal - in different parts of the country. I have read them all. The analysis ultimately turns on the competing approaches reflected in two cases.

[32] The applicants rely on *O'Brien v. Hamel*, (1990), 73 O.R. (2d) 87 (Div. Ct.) in support of their argument that votes cast by persons whose VLCRFs were not signed by an

election official must be declared invalid, and that since the number of such votes exceeds the margin by which the election was determined, the election of each of Maria Augemeri and Stephanie Payne was invalid.

[33] The respondents argue that this case can be distinguished from *O'Brien v. Hamel.* They submit that case was primarily with respect to the practice of "vouching" for persons not on a voters' list and involved a federal not a municipal election, the statutory requirement at issue here that the clerk "shall" endorse the VLCRF is permissive or directive, rather than mandatory or imperative, failure to comply with it therefore does not render the votes cast invalid and the result of the election was accordingly unaffected. They say I should be guided by *Flookes v. Shrake*, [1989] A.J. No. 1011 (Q.B.) and, moreover, that the applicants have the onus of proving that the irregularity affected the outcome of the election.

Mandatory v. Directory: an explanation

[34] The use of the word "shall" alone is not determinative of whether a mandatory or imperative obligation is imposed. It is, however, some evidence of legislative intent.[9]

[35] *Flookes v. Shrake* discussed in more detail below, relied on the distinction between "mandatory" and "directory" provisions in legislation in finding the election valid. It explained that mandatory provisions must be obeyed or fulfilled exactly, but directory enactments need only be obeyed or fulfilled substantially; there is no general rule as to when statutes are mandatory or directory; and in determining whether a statute or a provision in a statute is mandatory or directory the court must look at the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the statute. It noted that where a statutory provision imposes a public duty and declaring an act invalid because of the failure of the person entrusted with the duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the aims of the statute, such a provision seems to be generally understood as directory only.

O'Brien v. Hamel

[36] *O'Brien v. Hamel* involved a federal election. The applicable legislation provided that, in urban areas, electors could vote only if on the voters' list for the poll. The legislation provided only two exceptions to this. The first was for election officials required to be at another polling station on election day. The second was that, if not on the voting list, the elector could apply to the returning officer and obtain a certificate which would permit him or her to vote and be added to the official list. The process was different for rural voting divisions. A person resident in a rural polling division not on the voters' list was entitled to vote upon being vouched for by an elector whose name appeared on the voting list, was ordinarily resident in the polling division and personally attended with the person at the polling station and took an oath in prescribed form. The applicant was also required to take an oath. Twenty people who were not on the voters' list for urban polling divisions, and were not added to the list in accordance with the statutory procedure, were permitted to vote after producing identification. One hundred and one people at a rural polling division were

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[9] *R. v. J.H.*, [2002] O.J. No. 268 (C.A.) , para. 23

permitted to vote although vouched for by persons not on the voting list for that polling division. The election, decided by a margin of 77 votes, was declared invalid.

[37] The saving provision at issue in *O'Brien v. Hamel* was section 83 of the *Canada Elections Act*, S.C. 2000, c. 9. It provided that no election was to be declared invalid if the tribunal was satisfied that "the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance did not affect the result of the election".

[38] The Divisional Court held, "We have no doubt that the election officials carried out their duties diligently and tried to ensure that the principles of the Act were properly followed. However the fact of the matter is that these methods did not comply with the statute." The fact that the methods used by election officials to satisfy themselves of the identity of the electors may have been as good as that provided for in the statute did not save the votes. The court cited, with approval, *Stoddart v. Owen Sound (Town)* (1912), 8 D.L.R. 932 (H.C.J.); leave to appeal refused (1912), 7 D.L.R. 377 (C.A.): "It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody."

[39] It rejected the argument that non-compliance of an election official with the provisions of the statute should not disenfranchise a voter, the provision at issue was directory and the impugned ballots therefore should not be declared invalid.

[40] The court held that this argument did not take into account the concluding wording of the saving provision at issue, which, as in section 83 of the MEA, is that the non-compliance must not have affected the result of the election, and, as the number of ballots exceeded the margin of votes by which the election had been determined, if the impugned ballots were declared invalid non-compliance with the statute might well have affected the result of the election. Accordingly, it was not an irregularity that could be cured by the saving provision in the federal statute.

Flookes v. Shrake

[41] *Flookes v. Shrake* is a decision of the Alberta Queen's Bench. There, a member of the provincial legislature was elected by a margin of 127 votes. There were a number of irregularities:

1. The applicable legislation provided that no person may be appointed as a deputy returning officer who was not resident in the electoral division. As enough qualified persons resident in the division could not be found, persons not resident were appointed. One hundred and twelve persons completed oaths of elector's forms. It was argued that such votes should not be counted because the oaths may have been taken by persons not entitled to be returning officers. The court ultimately counted these votes.

2. Three polling subdivisions, each with a separate voters' list, based on geographical area of the electors, were at the same voting location. A large number of Canadians who had not been enumerated and required the assistance of an interpreter arrived at once. As required by the legislation, each produced identification that

established his or her identity and swore an oath as to his or her residency, thereby satisfying the statutory requirements to be added to the voters' list for the polling subdivision in which they resided. They were then directed, in roughly equal numbers, to the three voting polls. In the result, 126 persons voted in a polling subdivision where they did not ordinarily reside. At the end of the day, the voters' lists were "trued up" so that the 126 people were listed on the correct voters' list. The court counted these votes, presumably because there was accountability.

3. Contrary to the legislation, 14 residents of a retirement home were permitted to vote although they had not been first enumerated and added to the voters' list. These votes were excluded by the court.

4. The legislation provided that to be added to the voters' list prescribed identification had to be produced and required the deputy returning officer to indicate on the oath form the nature of the identification accepted.

(a) Two persons were permitted to vote although they did not produce identification. The court did not count their votes.

(b) The deputy returning officer failed to note on the form the nature of the identification produced by 29 persons who did produce identification. The court counted these votes.

5. One person not resident in the subdivision voted at the poll in violation of the legislation. The court did not count his vote.

6. One person voted both at the advance poll, and on election day. The court did not count his second vote.

7. Three persons swore the required oath of an elector but did not sign the form, as required by the legislation. Their votes were counted.

8. Forty persons swore the required oath of an elector and signed the form, but the election official neglected to complete the *jurat*. The legislation required the elector to take the oath before the deputy returning officer but did not specifically require that the returning officer sign the *jurat*. The court counted these votes.

9. There was a discrepancy between the number of names on the voters' list and the number of ballots cast. This affected 11 ballots. The ballots were counted.

10. Sixty-three voters completed their affidavits before a poll clerk, as opposed to before a deputy returning officer. The legislation provides for the poll clerk to assist the deputy returning officer in the performance of his duties and the votes were counted.

11. Five voters swore their oaths before returning officers of an adjoining poll, received a ballot and then returned and voted at the proper poll. Their ballots were counted.

> 12. Three election officials swore the oath of election official but the *jurat* was not completed by the officer before whom the oath was sworn. Votes administered through these officials were counted.

[42] The saving provision in *Flookes v.Shrake* is slightly different than that in the MEA. It provided that an irregularity would not void the election if it is shown to the satisfaction of the court that the election was conducted in accordance with the legislation and the irregularity did not *materially* affect the result of the election.

[43] The Court in *Flookes* held that an election is "conducted in accordance with the Act" for the purposes of such test if there was "substantial compliance" with the legislation and that a review of the duties and tasks of the election officers and the manner in which they were performed or carried out must be reviewed and the election must be generally in accordance with electoral practice under the statute. The Court found that the election was conducted generally in accordance with the legislation and that most of the provisions not complied with were the result of breaches by election officials, and directory, and did not relate to improper influencing of votes or affect the will of the electors who cast their ballots. This latter comment appears to speak to the qualification in the Alberta legislation - which is not present in the MEA or in the saving provision considered in *O'Brien v. Hamel* - that the irregularity must have *materially* affected the result of the legislation. In *Flookes*, the Court held that as a result of the various irregularities, only 18 votes should not be counted.[10] The result of the election was accordingly not materially affected.

Analysis and Conclusion

[44] With respect to the respondents, *O'Brien v. Hamel* does not exclusively consider the procedure of vouching in rural polling divisions. The case also addressed the fact that persons were added to the official list and permitted to vote in urban polling divisions after presenting identification but without having obtained certificates from the returning officer as required by the legislation. It is analogous to this case.

[45] The four cases the parties refer me to involving the MEA since *O'Brien v. Hamel* was decided are not of assistance in this analysis. None involved a breach of a provision of the MEA.[11]

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[10] (3) 14 votes; (4)(a) 2 votes – no identification; (5) 1 vote -voter from outside the electoral division; (6) 1 vote - voted at advance poll.

[11] The first of these is *Thwaites v. Georgian Bay (Township)*, [2001] O.J. No. 2847 (S.C.J.). In that case, although not required by the MEA to do so, the municipality included addresses on the voters list. The candidates relied on the list to mail campaign materials. There were patterned errors on the list: the number "2" appeared before the correct address in about 1000 cases. There was no allegation of failure to comply with the MEA. The election was not declared invalid.

In the second, *Gomberg v. Toronto (City)*, (2002) 31 M.P.L.R. (3d) 52 (S.C.J.), a candidate in the 2000 Municipal Election in Toronto had a deficit and, through his campaign manager, sought an extension of the Campaign Period so that he could continue to collect funds and try and deplete the deficit. The Clerk of the municipality refused to extend the campaign period because Mr. Gomberg had not signed the form requesting the extension. The form, prescribed by regulation, was essentially a one-sentence form, advising that there was a deficit and requesting an extension. It included a place for signature by the candidate. The court noted that the

[46] Nor do the further four cases decided since *O'Brien v. Hamel* involving election legislation of other provinces that the City refers me to[12] in my view assist the City in its arguments on the issue of non-compliance with the MEA.

[47] Section 83(7)3. of the MEA refers to "Non-compliance with a *provision of* this Act" [emphasis added]; it does not, as in the case of the Alberta legislation in *Flookes*, refer to an election being "conducted in accordance with this Act." That difference alone makes it improper to read into section 83 the "substantial compliance with the Act" as a whole qualification read into the Alberta statute in *Flookes*. Section 83 is complete, and speaks for itself.

[48] In considering the failure of election officials to endorse the VLCRFs to indicate their approval that the applicant was entitled to be added to the voters' list, as required by section 24(3), I have also considered section 24(4), reproduced above. While not argued by the respondents, if subsection 24(4) were complied with, rejected applications would be returned and the only applications retained by the system would be those which had been approved. There was, however, no evidence as to uniform compliance with this provision and

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MEA contemplated the existence of others than the candidate being in control of the campaign finances and concluded that the MEA did not require the candidate to personally sign the form.

The third case, *DiBiase v. Vaughan (City)*, 2007 CarswellOnt 8775 (S.C.J.), arose out of the 2006 mayoral election in the City of Vaughan. As permitted by the MEA, vote tabulating machines ("VTMs") were used and programmed as directed by the Clerk. The VTMs were programmed not to return over-votes (established by the computer program in this case as ballots with more than one mark occupying more than 20 percent in the voting spaces for the office of Mayor) or under-votes (where no mark was detected or there is a visible mark occupying less than ten percent of the voting space) for correction. The 1,656 over-votes and under-votes were simply not counted. The margin of victory was only 94 votes. The court held that the election had not been conducted in accordance with the principles of the MEA (discussed below) and ordered a recount of the 1,655 ballots.

In the fourth case, *Goldie v. Brock (Township)*, [2010] O.J. No. 5650 (S.C.J.),which involved a mayoral election determined by a 13 vote margin, an application was made for a recount; a declaration under section 83 of the MEA that the election was invalid was not sought. Non-compliance with the MEA was not alleged. Votes cast by mail, where the voter did not sign the voter declaration form, as required by the procedures established by the Clerk were not counted; the court concluded that to do so would interfere with the principle of the MEA (discussed below) that the integrity of the process must be maintained throughout the election. A partial recount was ordered.

[12] In the first of these, *Beamish v. Miltenberger*, [1997] N.W.T.R. 160 (S.C.), the Court discounted proxies found invalid because they were contrary to the legislative requirements. The election was not declared invalid because the invalid votes did not affect the result of the election. The second case, *Bradwell v. Tie Lake Improvement District*, [1999] B.C.J. No. 2044 (S.C.), does not, on my reading, involve breaches of statute affecting votes in excess of the plurality. In the third case, *Reaburn v. Lorje*, [2000] S. J. No. 119 (Q.B.), there was first a judicial recount of ballots, and then an application to determine whether the election should be declared invalid. The judge on the application held that he was bound by the votes as determined by the recount judge, and that, on that basis, the outcome of the election was unaffected. While the recount judge counted some votes associated with non-compliance with the Saskatchewan statute (for example, the small white envelopes containing the ballots cast for the individual candidates were not contained in the large brown envelope provided for this purpose, as provided by the legislation), he did not count ballots which did not bear the initials of the returning officer, as required by the legislation, indicating that, "There is no required indicia of reliability and fairness where there are not the required initials." This is in my view analogous to the failure of the clerk or any of her delegates to sign the application in this case. The fourth case, *Monaghan v. Joyce*, [2004] N.J. No. 76 (S.C.), was a preliminary application to determine questions of interpretation of the Newfoundland and Labrador legislation. The approach of Cory J. in *Haig v. Canada*, discussed above, was applied.

compliance cannot in my view be assumed, in the face of the admitted irregularities with respect to subsection 24(3) and the evidence, discussed below, that one person succeeded in voting twice.

[49] Hundreds of VLCRFs in various polling divisions were not signed by an election official. This is not a case of isolated irregularities. Nor are the irregularities trifling.

[50] As indicated above, the saving provision in *Flookes* differs in significant respects from section 83 of the MEA. *O'Brien v. Hamel*, which is a decision of the Divisional Court of this province, was decided after *Flookes*. I am therefore guided by *O'Brien v. Hamel* and conclude, applying its reasoning, that because the number of votes at issue exceeds the margin of votes by which the elections at issue were won, the failure of an election official to sign the VLCRFs affected the result of the election, and the elections of Maria Augimeri and Stephanie Payne were therefore invalid.

Section 24(3): Mandatory or Directory?

[51] Counsel for the applicants argue that, the requirement that the clerk endorse the VLCRF is mandatory and not directory.

[52] In support of their argument that the requirement that the clerk endorse the application is merely directory, the respondents refer me to section 26 of the MEA, reproduced above, which provides that the clerk's decision under section 24 or 25 (which deals with applications to remove another person's name from the list) is final, and subsection 52(1), also reproduced above, which provides that a deputy returning officer shall only give a ballot to a person who requests one if the returning officer is satisfied that the person is entitled to vote there. I understand them to submit that given the protections already afforded to the system by subsection 52(1), and the fact that there is no appeal from a decision of the clerk that someone is not entitled to be added to, or should not be deleted from, the voters' list, which they submit indicates that sections 24 and 25 are not that important, subsection 24(3) is therefore directory, and not mandatory.

[53] It was unclear to me whether the Divisional Court's reasoning in *O'Brien v. Hamel* was that, assuming the provision considered by it was directory, and need only have been obeyed or fulfilled substantially, and not exactly, it was not, because the non-compliance might have affected the result of the election. Or, alternatively, whether they concluded, because of the existence of the saving provision, the intention of Parliament was that the provision was mandatory, and must be obeyed, subject only to the saving provision. Given *O'Brien v. Hamel* and the similarity of the test in section 83 of the MEA to that in section 83 of the *Canada Elections Act*, it does not seem to matter whether the "shall" in section 24(3) is mandatory or directory.

Onus

[54] The respondents rely on, among other cases, *Abrahamson v. Baker and Smishek* (1964), 48 D.L.R. (2d) 725 (Sask. C.A.); *Flookes v. Shrake*; *Camsell v. Rabesca*, [1987] N.W.T.R. 186 (S.C.); and *Beamish v. Miltenberger*, [1997] N.W.T.J. No. 19 (S.C.) to argue that the applicants have the onus of demonstrating that the irregularity affected the result of

the election. They say that it would be unreasonable and unfair to require the City to positively prove that each voter on each VLCRF had the right to vote.

[55] The applicants rely on *Stoddart v. Owen Sound (Town)*, *supra*, *Rose v. Cranbrook (City)*, [1982] B.C.J. No. 1600 (S.C.) (a decision of McLachlin J.) and *Warrington v. Lunenburg (Municipality)*, [2006] N.S.J. No. 256 (C.A.) to say the respondents must demonstrate that the irregularity did not affect the outcome of the election.

[56] It is unclear from the jurisprudence who, in Ontario, has the onus of demonstrating that the irregularity affected the result of the election.

[57] Ultimately, on the facts of this case, who has the onus was not a material issue. Based on *O'Brien v. Hamel*, the onus, if on the applicants, has been satisfied.

[58] Some of the cases on onus distinguish whether the test is phrased "affected the result of the election" or employs the negative, "did not affect the result of the election." I note that both section 83 of the *Canada Elections Act* considered in *O'Brien v. Hamel* and section 83 of the MEA phrase the test as whether the non-compliance "did not affect the result of the election".

[59] The information necessary to contact most of the voters whose VLCRFs were not signed is available from the VLCRFs. It may have been possible for the City to have contacted those voters, verified their entitlement to vote at the polling division where they cast their votes, ensure that the VLCRF was fully completed and have the clerk or one of her designates sign the VLCRF after the fact, to confirm that she was satisfied that the persons were entitled to be added to the voters' list. While the City argues that it would be unreasonable and unfair to expect the City to do this, it is not something that the applicants could have done. Doing so would not, in my view, have offended the principles of the MEA, discussed below. Had this been done, then this case would have been quite different from *O'Brien v. Hamel*. Only a number of votes equal to the number of VLCRFs which, after such a process, were not signed by the clerk or one of her designates would have needed to be discounted in determining whether the statutory non-compliance affected the result of the election, and if the votes so discounted did not exceed the plurality by which the elections were won, a by-election could have been avoided. The City might have been in a position to establish that the statutory non-compliance did not affect the result of the election. While not argued, I have considered whether it is open to me on this application to order such a process and possibly avoid declaring the elections invalid and ordering by-elections. I have concluded that I am bound by section 83(1) and the options open to me on this application are limited to determining, based on the record before me, whether or not the elections were valid and whether a by-election should be held.

Presumption of Regularity

[60] There was evidence before me that all persons working at the polling stations were required to undergo training and take an oath of office. Reference materials - including a laminated, two-sided, place-mat sized reference sheet for ready use at the polling stations - were developed for their assistance. The clerk, faced with the unenviable task of summarizing the applicable procedures on a two-sided reference sheet, did not specifically

remind the returning officers and ballot officers on the reference sheet of their statutory obligation to sign the VLCRFs.

[61] Some of the returning officers provided evidence to the effect that the ballot officers whom they supervised were competent and hard-working, followed the procedures on the reference sheet each was provided with, and went to the returning officers for assistance or guidance if they had any questions with respect to procedures. Some of the ballot officers who gave evidence indicated that it is possible that they may have forgotten to sign VLCRFs, but it would have been due to inadvertence, and they were confident that only those entitled to vote received ballots.

[62] Based on this evidence, and section 52(1) of the MEA, which provides that a deputy returning officer shall give a person who requests a ballot only if satisfied that the person is entitled to vote there, the City argues that only persons entitled to vote would have received ballots, the failure of an election official to sign the VLCRFs was therefore procedural and trivial, and the irregularity did not affect the result of the election.

[63] Only some of the returning officers and ballot officers who worked in Ward 9 and TDSB Ward 4 provided evidence.

[64] While in this case, as in *O'Brien v. Hamel*, the clerk carried out her duties diligently and tried to ensure that the principles of the MEA were properly followed, there was documented evidence of one person taking advantage of the lack of coordination between election officers when using voters' lists at the Ward 9 polling station to vote twice to demonstrate the problems with the manner in which the election was run.[13] At least one person not entitled to vote (again) received a ballot. Any general presumption of regularity is therefore inappropriate.

[65] In any event, *O'Brien v. Hamel* held that the fact that the methods used by election officials may have been as good as that provided for in the statute did not save the votes. Compliance with the statute was required to ensure the integrity of the system.

VI THE PRINCIPLES OF THE MEA

[66] As I have concluded that the irregularity affected the result of the election, it is not necessary for me to consider whether the election was conducted in accordance with the principles of the MEA. I will only briefly comment as follows.

[67] The principles of the MEA are not included in the MEA itself. They have been set out in case law[14] as follows:

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[13] In this municipal election, each returning officer and ballot officer at a subdivision had a complete copy of the voters' list and electors could show their identification and obtain a ballot from any of them. This was done to process voters more quickly. The voting place staff were directed to switch their voters' lists every few hours to maintain the integrity of the system. This process is in contrast to the system used in Toronto prior to 2000 when I understand each polling officer had only a portion of the list - for example, names starting with "A" through "D".

[14] See *Di Biase v. Vaughan (City of)* at paras. 15 and 16; *Goldie v. Brock (Township)*, at paras. 15-16

- the secrecy and confidentiality of the voting process is paramount;
- the election shall be fair and non-biased;
- the election shall be accessible to the voters;
- the integrity of the process shall be maintained throughout the election;
- there is to be certainty that the results of the election reflect the votes cast. So far as reasonably possible, valid votes shall be counted and invalid votes rejected; and
- voters and candidates shall be treated fairly and consistently.

[68] The applicants argue that if persons were added to the voters' list without satisfying the statutory requirement, designed to ensure qualification to vote, the integrity of the voters' list and thereby the election itself is critically undermined.

[69] Counsel for Mr. Cusimano points to the documented incidence, referred to above, of one person taking advantage of the lack of coordination between election officers when using voters' lists at the Ward 9 polling station to vote twice and argues that this raises the possibility that other individuals voted more than once. He also points to the following additional irregularities in the VLCRFs as supporting his argument that the integrity of the process was not maintained:

- On 284 VLCRFs there is no confirmation that a check of the applicant's identification was performed;
- on 118 VLCRFs, there is no date of birth of the applicant;
- on 52 VLCRFs, three or more problems were identified, the majority of which included a missing signature by any election official, missing confirmation that an identification check was performed and a missing date of birth of the applicant; and
- on 17 VLCRFs, there was no applicant signature.

[70] The respondents point to the significant efforts taken by the clerk to ensure that the election was carried out in accordance with the principles of the MEA, and renew their arguments that the requirement to endorse the application was simply a procedural requirement.

[71] In *O'Brien v. Hamel*, where, as here, the evidence was that the clerk carried out her duties diligently and tried to ensure that the principles of the legislation were properly followed, the Divisional Court concluded that the election was not conducted in accordance with the principles laid down in the *Canada Elections Act*. This conclusion was seemingly based on the non-compliance with the statutory procedures for adding persons to the voters list in urban areas, and entitling persons not on the voters' list to vote in rural areas.

VII COSTS

[72] Subsection 83(5) provides as follows:

> Compensation
>
> (5) If the court orders that a by-election be held, it may make such order as it considers just against a person whose act or omission unlawfully affected the result of the election, for the compensation of candidates at that election. 1996, c. 32, Sched., s. 83 (5).

[73] If the parties are unable to resolve the issue of costs, then the parties, other than the City, shall make brief written submissions to me within 14 days, and the City shall make brief written submissions in response within 10 days thereafter. No reply submissions shall be provided without leave. If the parties are of the view that it would be preferable to make any additional submissions orally, I may be spoken to, in order to arrange a time.

Hoy J.

Released: April 21, 2011

CITATION: Cusimano v. Toronto (City), 2011 ONSC 2527
COURT FILE NOS.: CV-11-419251
CV-11-418325
DATE: 20110421

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

AGUSTINE G. CUSIMANO
Applicant

- and -

CITY OF TORONTO
Respondent

AND BETWEEN:

MICHAEL SULLIVAN
Applicant

- and -

CITY OF TORONTO and STEPHANIE PAYNE
Respondents

REASONS FOR DECISION

Hoy J.

Released: April 21, 2011