COMMITTEE AGENDA

TO	**Municipal Election Compliance Audit Committee**
DATE	Thursday April 23, 2015
LOCATION	City Hall, Committee Room B
TIME	4:30 p.m.

MUNICIPAL ELECTION COMPLIANCE AUDIT COMMITTEE ORIENTATION

DISCLOSURE OF PECUNIARY INTEREST

1. Election of Chair and Vice Chair

2. Stephen O'Brien, City Clerk
   - Introduction and parliamentary procedures

3. Jody Johnson, Aird & Berlis LLP
   - review of legislated responsibilities (presentation to follow)

Attached links :

- Municipal Election Compliance Audit Committee
  - Terms of Reference http://guelph.ca/wp-content/uploads/ComplianceAuditCommitteeTermsofReference.pdf
  - Rules of Procedure http://guelph.ca/wp-content/uploads/ComplianceAuditCommitteeRulesofProcedure.pdf
- Statutory Powers Procedure Act http://www.ontario.ca/laws/statute/90s22
- Municipal Elections Act http://www.ontario.ca/laws/statute/96m32

Hearing Date: Wednesday May 6, 2015 at 5 p.m.

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The Compliance Audit Committee Process

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City of Guelph
Compliance Audit Committee

April 23, 2015

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Outline

- *Municipal Elections Act*, 1996 – Election Campaign Finances
- Compliance Audit Committees
  - Role and Duties of a Compliance Audit Committee
  - Decision Points for Compliance Audit Committee
- Financial Filing Requirements
- Candidate Responsibilities, Offences, Candidate Duties
- Application for Compliance Audit & Appeals
- Appointment of Auditor
- Consideration of Auditor's Report
- Prosecution & Related Issues
- Lessons Learned
- Questions

Municipal Elections Act, 1996 – Election Campaign Finances

- Sections **66-82.1** of the *Municipal Elections Act, 1996* ("MEA") govern election campaign finances
- Sections contain provisions regarding (among other things):
  - Contributions
  - Expenses
  - Election campaign period
  - Filing dates and reporting periods
  - Financial statement and auditor's report
  - Surplus and deficit
  - Compliance audit & compliance audit committee

Compliance Audit Committee

- Committee must be established
- Not fewer than 3 and not more than 7 members
  - Not employees/officers
  - Not members of council
  - Not candidate
- Municipal clerk establishes administrative practices & procedures, carries out duties under Act to implement CAC decisions
- Council pays all costs

Compliance Audit Committee (cont'd)

- What is the committee's role?
  - Consider requests for audits
  - Appoint auditor
  - Consider audit report
    - If no apparent contravention, consider reasonable grounds for application
    - Commence legal proceedings

Decision Points for Committee

- Decision to prosecute
- Consideration of a plea
- Purpose of the Act
- Penalties
- Cost

Candidate Responsibilities

- Campaign bank account – deposit all contributions of money
- Pay all expenses (except for nomination filing fee) from campaign account
- Value contributions of good & services (at fair market value)
- Issue receipts for contribution/obtain receipts for expenses

Candidate Responsibilities (cont'd)

- Keep records
  - Receipts issued for contribution (except "pass the hat", $10 or less)
  - Value of every contribution
  - Note if in form of money, goods or services
  - Name and address of contrbutor
- Every expense recorded
- Return contributions made in contravention of the act (as soon as aware)

Candidate Responsibilities (cont'd)

- Accept contributions only inside campaign period
- Accept only proper contributions
- Respect contribution limits
- Make only eligible expenses
- Pay attention to expense limits
- Prepare and file financial statements
- Pay surplus to the clerk

Filing Requirements

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

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

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

Filing Dates and Reporting Periods

77. For the purposes of documents to be filed under section 78,

(a) the filing date is,

(i) in the case of a regular election, **the last Friday in March following the election**, and

(ii) in the case of a by-election, **60 days after voting day**;

(b) the supplementary filing date is the last Friday in September; and

(c) the supplementary reporting period is,

(i) in the case of a regular election, the six-month period following the year of the election, and

(ii) in the case of a by-election, the six-month period following the 60th day after voting day.

Penalties

- Under section **80(1)** of the MEA, penalties may be imposed if:
  - A candidate fails to file a financial statement or auditor's report by the relevant date
  - A financial statement or auditor's report shows a surplus and the candidate fails to pay the required amount to the clerk by the relevant date
  - A financial statement or auditor's report shows a surplus and the candidate fails to pay the required amount by the relevant date

- The following penalties are set out in section **80(2)**:
  - The candidate forfeits any office to which he or she was elected and the office is deemed to be vacant; and

Penalties (cont'd)

- Until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which the MEA applies
- Section **80(1)** contains no provisions for relief from penalties
- However, courts have jurisdiction to "override" the penalties
  - *Niagara Falls (City) v. Diodati* (2011), 82 M.P.L.R. (4th) 140 (Sup. Ct. Jus.)
  - *Braid v. Georgian Bay (Township)* (2011), 83 M.P.L.R. (4th) 335 (Sup. Ct. Jus.)

Election Campaign Finance Offences

Offences by candidate

92(5) A candidate is guilty of an offence and, on conviction, in addition to any other penalty that may be imposed under this Act, is subject to the penalties described in subsection 80 (2), if he or she,

(a) files a document under section 78 or 79.1 [financial statement & auditor's report] that is incorrect or otherwise does not comply with that section; or

(b) incurs expenses that exceed what is permitted under section 76 [expenses]

Election Campaign Finance Offences (cont'd)

Exception

92(6) However, if the presiding judge finds that the candidate, acting in good faith, committed the offence inadvertently or because of an error in judgment, the penalties described in subsection 80(2) do not apply.

- This provision applies even where there is no prosecution
- MEA intends no absurd results

General offence

94. A person who contravenes any provision of this Act is guilty of an offence.

Compliance Audit Process

- Two broad steps:
  1. Compliance Audit
     - Application
     - Appeal (if necessary)
     - Appointment of Auditor
     - Decision to prosecute
     - Prosecution
  2. Prosecution
     - Appointment of an independent prosecutor by Compliance Audit Committee

1. Application

The Test (s. 81(1)) :

- Elector who is entitled to vote in an election
- Believes on reasonable grounds
- May apply for a compliance audit

> *"It is important to remember that this stage of the proceedings is merely to* ***determine if an investigation should be started****. It is a pre-investigatory stage. It is not a determination that the candidate has in any way actually violated the statute. Rather, what council must decide is,* ***does the elector have reasonable grounds to believe that the candidate contravened the Act****. It would be a function of an auditor to investigate the matter."*
>
> - *Defrancesca v. Vaughan (City)* 2008, 59 M.P.L.R. (4th) 305 (Ont. Ct. J.).

1. Application (cont'd)

Requirements

- Application to the clerk of the municipality or the secretary of the local board
- In writing, including reasons for elector's belief (s. 81(2))

Deadline

- Made within 90 days of the candidate's most recent filing date (s. 81(4))

Application to be forwarded to committee by clerk or secretary

- Within 10 days of receipt - Copy to the council or local board (s. 81(4))

Decision

- Within 30 days, Committee grants or rejects application (s. 81(5))

Role and Duty of a Compliance Audit Committee

***Gunn v. Halton District School Board*, 4 M.P.L.R. (5th) 267 (Ont. Ct. J.)**

- Elector filed application for review of financial statement of candidate elected trustee for Halton District School Board (HDSB)
- HDSB Compliance Audit Committee found that no reasonable grounds to believe candidate had contravened Act
- Applicant was not notified of nor present at audit
- Applicant appealed and filed additional affidavit material
- Court drew inference that committee did not have any established administrative practices and procedures clearly and transparently in place when considering applicant's application, notwithstanding mandatory provisions of s. 81.1(4) of Act

Role and Duty of a Compliance Audit Committee (cont'd)

***Gunn v. Halton District School Board*, 4 M.P.L.R. (5th) 267 (Ont. Ct. J.) (cont'd)**

- Absent such procedures, there was no clear notice to applicant regarding process that committee would follow, notwithstanding that she made every effort to find out in advance how process worked
- Existing record did not allow appeal court to make proper assessment
- Fair procedure requires fair notice of procedure to be followed, evidence to be considered, and transparent and complete record of what was before committee
- Only fair and transparent way of dealing with matter was to have de novo hearing on appeal

2. Appeals

Appeal

- Committee's decision may be appealed to the Ontario Court of Justice
- Within 15 days after the decision is made (s. 81 (6))
- On appeal of compliance audit committee decision to order or not order audit, the test is low:
  - Courts have recently confirmed: did the elector have reasonable grounds to believe that a contravention occurred
  - Compliance audit committee plays a "gatekeeper function", part of a process of enforcement
    - *Dickerson v. Compliance Audit Committee of the City of Pickering*, December 21, 2011, Ontario Court of Justice, Court File No. 2811999

2. Appeals (cont'd)

- If a candidate accepts an ineligible contribution and that contribution is returned to the contributor as soon as candidate becomes aware, if done before the compliance audit committee considers audit request, no reasonable grounds to believe a contravention occurred
    - *Lancaster v. Compliance Audit Committee of The Corporation of the City of St. Catharines et al*, February 9, 2012, Ontario Court of Justice
- An appeal is based on the record (i.e., not a de novo hearing)
    - *Li Preti v. Toronto* (City) (2012), 1 M.P.L.R. (5th) 163 (Sup. Ct.)
- But Applicant entitled to certain level of procedural fairness
    - *Vezina v. Mississauga Election Campaign Finances Committee* (2013), 10 M.P.L.R. (5th) 311 (Sup. Ct.)
    - The Compliance Audit Committee is not required to give reasons for its decision to order an audit
    - *Li Preti v. Toronto* (City) (2012), 1 M.P.L.R. (5th) 163 (Sup. Ct.)

2. Appeals (cont'd)

Dickerson v. City of Pickering (Compliance Audit Committee)

- Standard of Review:
  - Standard of review is correctness
  - Qualifications of committee members were not before the court and court could not therefore evaluate the expertise of the committee
  - Section 81(6) of the MEA on review provides broad discretion to the appellate court and provides no privative clause
  - Legal principles and tests to be applied in the MEA context are well within the expertise of the Court

2. Appeals (cont'd)

***Dickerson v. City of Pickering (Compliance Audit Committee)* (cont'd)**

- Decision:
  - Justice Bellefontaine found there were "credibly based reasonable grounds to support the request for an audit"
    - Significant spending amount over the limit set by the municipal clerk was sufficient to provide reasonable grounds
    - Significant expenditure beyond expenditures reported by other candidates

2. Appeals (cont'd)

Lancaster v. St. Catharine's (City) Compliance Audit Committee

- Application to compliance audit committee alleging four candidates received excess corporate contributions and did not complete financial statement in prescribed form
- Application rejected and Ontario Court dismissed appeal
  - Standard of Review:
    - Determined the standard of review was reasonableness
    - The committee was "entitled to deference" as it "possesses the necessary expertise to decide the initial application and is free from political interference"
    - Concluded the decision of the committee passed the test of reasonableness and dismissed the appeal

2. Appeals (cont'd)

***Lancaster v. St. Catharine's (City) Compliance Audit Committee* (cont'd)**

- Appeal to Superior Court
  - Counsel agreed before the appeal was heard that the standard of review was reasonableness
  - Reasonable for committee to find candidates did not contravene the MEA
  - Illegality arose if a candidate failed to return a contribution
  - Duty to file includes an implied requirement to completely and correctly fill out required form
  - Committee not bound to appoint an auditor in the face of a breach or contravention of the *MEA*
  - No costs were awarded – public interest

2. Appeals (cont'd)

***Vezina v. Mississauga Election Campaign Finances Committee* (2013), 10 M.P.L.R. (5th) 311 (Ont. Sup. Ct.)**

- Application for order compelling candidate to submit to compliance audit
- Committee declined to appoint compliance auditor
- Elector appealed , appeals judge held standard of review was reasonableness
- Appeals judge found arguable issues with respect to rental realty valuation
  - Appeal was accordingly allowed, committee was ordered to appoint auditor and candidate appealed

2. Appeals (cont'd)

***Vezina v. Mississauga Election Campaign Finances Committee* (2013), 10 M.P.L.R. (5th) 311 (Ont. Sup. Ct.) (cont'd)**

- Appeal allowed and decision of committee restored
- Appeals judge properly held that standard of review was reasonableness and that committee acting within jurisdiction was owed significant appellate deference
- However, by effectively substituting appeals judge's view of record for that of committee, appeals judge erred in law by in fact applying wrong standard of review, correctness
- Correct or not, committee's decision was within reasonable range of possible outcomes and appeal was accordingly properly allowed

3. Appointment of an Auditor

Appointment of auditor

- If the committee decides to grant the application, it must appoint a prescribed person or auditor licenced under the *Public Accounting Act, 2004* to conduct a compliance audit of the candidate's election campaign finances (s. 81(7))

Duty of auditor

- Promptly conduct an audit of the candidate's election campaign finances to determine compliance with the Act
- Prepare a report outlining any apparent contravention (s. 81(9))

Who receives report

- The auditor shall submit the report to,

  (a) the candidate; (b) the council or local board; (c) the clerk with whom the candidate filed his or her nomination; (d) the secretary of the local board, if applicable; and (e) the applicant (s. 81(10))

3. Appointment of an Auditor (cont'd)

Report to be forwarded to committee

- Within 10 days after receiving the report, the clerk of the municipality or the secretary of the local board shall forward the report to the committee (s. 81(11))

Powers of auditor

- For the purpose of the audit, the auditor,

  (a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate and of the municipality or local board; and

  (b) has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to the audit as if it were an inquiry under that Act (s.81(12))

Costs

- The municipality or local board shall pay the auditor's costs of performing the audit (s. 81 (13))

4. Decision to Prosecute

Power of committee

- The committee shall consider the report within 30 days after receiving it and may

  (a) if the report concludes that the **candidate appears to have contravened a provision of this Act** relating to election campaign finances, commence a legal proceeding against the candidate for the apparent contravention

  (b) if the report concludes that the **candidate does not appear to have contravened a provision of this Act** relating to election campaign finances, make a finding as to whether there were reasonable grounds for the application (s. 81.1 (14))

4. Decision to Prosecute (cont'd)

Recovery of costs

- If the report indicates that there was no apparent contravention and the committee finds that there were no reasonable grounds for the application, the council or local board is **entitled to recover the auditor's costs from the applicant** (s. 81(15))

4. Decision to Prosecute (cont'd)

Former Mayor Rob Ford

- Audit concluded the mayor had committed various apparent contraventions in his 2010 campaign and exceeded his $1.3-million spending limit by $40,168.00
- In February, 2013, Toronto's Compliance Audit Committee voted 2-1 against hiring a special prosecutor to pursue charges against Mayor Ford for alleged election finance violations
- Committee is not required to provide reasons for its determination

Prosecution

- In deciding to prosecute the candidate, the committee appoints an independent prosecutor
- Prosecutor's role consists of 5 main parts:
  - Determination of whether reasonable and probable grounds exist to believe that the candidate committed offences under the Act
  - Determination of whether there is a reasonable prospect of conviction on those charges
  - The laying of charges
  - Crown and judicial pre-trials
  - Trial itself

Prosecution (cont'd)

***Jackson v. Vaughan (City)* (2010) 68 M.P.L.R. (4th) 161 (Ont. CA)**

- Two residents sought compliance audit of candidate's campaign finances
- City declined, complainants appealed and court directed city to appoint auditor to conduct compliance audit
- Audit identified numerous apparent contraventions and city approved laying of charges against candidate
- Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute arguing they were an unlawful delegation of authority
- Trial judge found nothing vague, ambiguous or mysterious in term "compliance audit" and it was not auditor's function to determine whether apparent contravention of MEA is real contravention, this is for judge
- Court of appeal upheld lower court decision

Prosecution (cont'd)

Jackson v. Vaughan (City) **(2010) 68 M.P.L.R. (4th) 161 (Ont. CA) (cont'd)**

"The Act does not require Council to decide what charges to lay and how to handle them. Section 81(10) of the Act gives Council the power to commence a legal proceeding against a candidate for any apparent contravention of the Act relating to election campaign "

"In the circumstances, not only was it reasonable to delegate the prosecution to a person with the appropriate expertise and qualifications, it was necessary as it would have been difficult, if not inappropriate, for any City employee to act as the prosecutor in the proceedings. finances"

"[a prosecutor] is an agent of the municipal corporation and the powers he has been given are properly characterized as administrative, in the sense that they are required to implement Council's decision to commence legal proceedings"

Pleas

Former Councillor Doug Dickerson

- Plead guilty to two counts under the MEA:

Count #1: Filed an inaccurate financial statement

- Classified an $11,550 gift to common law spouse as an election campaign salary/ honoraria/ professional fee
  - Payment not technically unlawful but should have been classified as a gift
  - Not related to any actual work
- Classified a $14,594 purchase of alcohol as an expense for voting day party
  - Purchased 288 bottles of alcohol – when scrutinized, explained these were for post-election party planned for spring/summer 2011
  - However, when statement filed, in March 2011, it was no longer possible to legally incur any further expenses related to the party

Pleas (cont'd)

Former Councillor Doug Dickerson (cont'd)

- Failed to reflect a $750 campaign contribution received from and later returned to a business owned by Mr. Dickerson's former wife
  - Contribution and its return were not included in financial statement

Count #2: Expenses exceeding the spending limit

- Exceeded allowable campaign expense spending limit by $2,909.65

Pleas (cont'd)

Councillor Giorgio Mammoliti

- In December 2014, plead guilty to overspending (by at least $10,000), filing false financial records and failing to keep records of campaign expenses
  - Joint submission between Councillor's lawyer and special prosecutor
- Will pay back $17,500
- Agreed statement of facts included:
  - Campaign lacked in-house accounting expertise – volunteers filled out paperwork provided by an outside accountant
  - Campaign continued to fundraise during the campaign
  - Some expenses were not recorded at all (e.g., $3,390 order of "Team Mammoliti" jackets)

Pleas (cont'd)

Councillor Giorgio Mammoliti (cont'd)

- Justice of the peace accepted position that while Councillor Mammoliti did not prepare the financial statements he was ultimately responsible for them
- Found he acted in good faith at all times though there may have been an error in judgment in appointing financial assistant

Costs

Public Interest Litigation

- "Litigation that involves the resolution of a legal question of importance to the public as opposed to private-interest litigation which…involves the resolution of a legal question of importance mainly only to the parties."
  - *Incredible Electronics Inc. et al v. Attorney General of Canada*
- Costs in public interest litigation require special treatment and are to be awarded on a principled basis

Costs (cont'd)

- Factors considered:
  - litigation must be of public importance
  - litigant should have little to gain financially
  - public-interest litigant should have unselfish motives

- Other factors to consider (from *St. James Preservation Society v. Toronto*):
  - nature of the unsuccessful litigant
  - nature of the successful litigant
  - nature of the dispute – was it in public interest?
  - has litigation had adverse impact on public interest?
  - financial consequences to the parties

Costs (cont'd)

***Lancaster v. St. Catharines (City) Compliance Audit Committee* (2012), 100 M.P.L.R. (4th) 172 (Ont. Ct. J.)**

- There was a clear public importance and benefit of the applications and appeals – to improve financial accountability in public election campaigns
- There was no adverse impact on the public interest – without Lancaster's vigilance, the candidates would have kept the over-contributions
- No evidence that the candidates were "targeted" by Lancaster

Costs (cont'd)

Former Councillor Doug Dickerson

- Appeal from decision of the Compliance Audit Committee to grant applications
- Court awarded Compliance Audit Committee costs on a partial indemnity basis

> "Given the significant role that costs play in the Municipal Elections Act finances regime to discourage frivolous or unnecessary requests for an audit, I view costs to be a proper mechanism to discourage one side or the other from appealing decisions of the Compliance Audit Committee"

Issues and Lessons Learned

- Prosecutor can access auditor's records
- Admissibility issues
  - *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6
  - Spousal compellability
- Definitions of expense/categorization of expenses
- Contributions
- Court process issues
- Role of council vis a vis compliance audit committee

Questions?

Thank You

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