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Election Compliance Audit Committee Proposal

Appendix “B”

Changes to the Municipal Elections Act – Re-capped

**Municipal Elections 2018**

The *Municipal Elections Act* (MEA) sets out rules for electors and candidates and the role of the Municipal Clerk and Council in municipal and school board elections in Ontario.

The MEA, as amended effective January 1, 2010, introduced a new section, 81.1 to require the establishment of a Compliance Audit Committee (CAC) for all municipalities and local boards. To facilitate the creation of the CAC, Council’s may have endorsed a selection process and terms of reference. CAC’s have quasi-judicial responsibilities under the MEA, to that end it is not unusual that a retainer fee and a per diem apply to attendance at meetings and for subsequent work by the CAC members. A Terms of Reference may address the financial reimbursement to anyone appointed to the committee.

The next municipal election takes place on October 22, 2018 and there are a number of issues and options that the Clerk and Council must consider prior to that in order to meet the timelines stipulated in the legislation. After each municipal election, the Ministry of Municipal Affairs reviews the MEA to determine if it meets the needs of Ontario municipalities. The review that took place after the 2014 election included consultation with the public, municipal councils and staff across Ontario. As a result on June 9, 2016 the *Municipal Elections Modernization Act, 2016* received Royal Assent, making significant changes to the MEA for the 2018 municipal election.

While a number of wide-ranging changes were made to the MEA as a result of the adoption of the *Municipal Elections Modernization Act, 2016*, this proposal will only discuss the major<sup>1</sup> changes applicable to CACs.

In consideration of CACs, Municipal Clerks must consider changes to the MEA that include:

- a. A framework for third party advertising

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<sup>1</sup> A complete list of changes is attached as Appendix “A” with highlighted portions that could pertain to CACs

- b. Changes that are specific to the oversight of campaign financing
- c. Clarifications or new rules around campaigning and advertising

### Third Party Financing Framework

The vast majority of Clerks in Ontario will, at some time in their career, been questioned about whether certain types of endorsements or publicity appeared to be a “contribution” of advertising (as in service) to the campaign of a candidate. If so, such a contribution would need to be valued and included in the candidate’s financial statements.

The new rules introduced by the *Municipal Elections Modernization Act*, 2016 now provide much needed clarity with respect to:

- a. Whether or not incurring expenses related to advertisements is considered a contribution under the MEA and therefore be reportable.
- b. The circumstances under which an entity, as identified in the MEA, may incur expenses for advertisements.
- c. The incurring of expenses by third parties for third party advertising within the election period.

“Third Party Advertisement” is defined in the MEA (as amended) to include advertisements that support, promote, or oppose a candidate or an answer to a question proposed by referendum. It should be noted that advertising about both “issues” and by Candidates is not regulated by the rules for third party advertising. Interestingly enough, a subsection<sup>2</sup> of the MEA provides that an advertisement is not a third party advertisement if there is no expense incurred in relation to the advertisement.

### Individuals

While individuals may incur expenses related to third party advertisements, they must also register with the municipality as a Third Party. The MEA now also includes a list of who cannot contribute to registered third parties, obviously including Federal and Provincial political parties and their constituency associations but also the Crown, municipalities, and local boards.

There is a small list of who can make contributions to Registered Third Parties. These include:

- a. Residents of Ontario;
- b. Corporations carrying on business in Ontario
- c. Unions that hold bargaining rights for employees in Ontario

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<sup>2</sup> Subsection 1(2)

- d. The registered third party and in the case that the Registered Third Party is an individual, the spouse of the Third Party.

### **MEA Duties of Registered Third Parties.**

Paralleling the process for Candidates, registered third parties will be required to file financial returns with the Clerk of the municipality within a prescribed period of time. Also similar to candidates, the MEA imposes a number of financial management obligations on registered third parties with respect to candidate finances. These obligations include:

- a. A duty to ensure that all contributions and expenses flow through a campaign bank account established by the third party specifically for the election
- b. All funds in that campaign bank account must be used for the purpose of the election campaign
- c. Proper records must be kept of the subject contributions
- d. Proper valuations are made of any goods or services received by candidates.

### **Campaign Finances**

In addition to changes to key dates and candidate eligibility, campaign finances have changed in an effort to increase transparency. The key changes are as follows:

- a. The nomination fee is no longer deemed a campaign expense.
- b. A candidate does not have to open a bank account if they do not raise or spend money.
- c. Unions and corporations can no longer contribute to a candidate's campaign. However, they can register as a third party advertiser or contribute to other registered third party advertisers (refer to Third Party Advertising)
- d. The introduction of limits for gifts and events following the close of voting day.
- e. An item sold for \$25 or less to raise campaign funds is considered campaign income, not a contribution.
- f. Donations under \$25 made at fundraising events are not contributions.
- g. Anonymous contributions are to be paid to the Clerk, and cash contributions cannot exceed \$25.
- h. Contributions over \$25 have to be made in a way that links the contributor's name and account with the payment.
- i. Candidates are required to inform contributors of contribution limits.
- j. Following the 2018 election, campaigns deficits will not be carried forward from the previous campaign.

### **Third Party Advertising**

A significant amendment to the legislation includes the introduction of a framework for third party advertising. The Province defines a third party advertiser as an individual, corporation or trade union who pays for an advertisement that appears in any means of communication (eg. billboard, newspaper, radio, etc.). The advertisement can support or oppose a candidate and can answer to a question on the ballot, if applicable. The framework indicates that third party advertisers shall register with the Clerk of each municipality they want to advertise in. Candidates cannot register as third party advertisers, and third parties may not advertise under the direction of a candidate who filed a nomination. For the 2018 Municipal Election, individuals, corporations and trade unions may register as third party advertisers from May 1, 2018 to October 19, 2018.

### **Mandatory Components for All Advertisements**

Each advertisement must include the name of the registered third party, their contact information, and the municipality in which they are registered. The name of the candidate on the advertisement and contact information of the person placing the advertisement shall be provided to the broadcaster or publisher who must retain these records and a copy of the advertisement. The municipality is authorized to remove or require the candidate or advertiser, or property owner to remove the sign or advertisement if the provisions are not adhered to. For example, if a third party advertiser fails to provide the mandatory information to a broadcaster, the municipality would have the authority to remove the advertisement.

### **Compliance & Enforcement**

Candidates and third party advertisers can submit their financial filings and any corrections until the filing deadline. Should the financial documentation be late, a thirty (30) day grace period is granted for a fee of \$500.00. The Clerk is required to publically report which candidates and advertisers filed their statements and those that do not. Furthermore, the Clerk will review contributions on financial statements and report to the CAC if anyone exceeds the contribution limits, at which time the Committee will determine whether or not a penalty will be applied. Eligible electors can still apply to the Clerk or secretary of a school board for a compliance audit to be performed if they suspect a campaign finance rule has been contravened. CAC meetings are required to be open to the public and should a decision be made regarding a matter, the reason(s) for the decision shall be noted.

## Efforts of the Clerk

The changes introduced by the *Elections Modernization Act, 2016* will greatly impact the planning and conduct of municipal elections. The following identifies the major impacts of these amendments:

- a. Many election systems will require changes to respond to the various MEA amendments. For example, changes will be required to manage the registrations of Candidates, financial filings, financial disclosure, and election results. Although various municipalities may have begun work on some of the systems, the sector is still awaiting the final release of the applicable Provincial Forms and Regulations. Delays in the release of this information will place additional pressure on existing resources and timelines.
- b. Additional resources may be required to manage the processing of nominations within the shortened nomination period. Thankfully, unless your municipality has more than 4,000 electors, you won't have to be concerned with validating the supporting signatures for each nomination received.
- c. The full impact of third-party advertising is unknown at this time. It is anticipated that there will be significant new resource requirements to create new systems to administer third party advertising including managing registrations and reporting requirements.
- d. The requirement for the Clerk to review every financial statement, identify and report to the CAC any contributors who exceed the maximum contribution limits may require the need for specialized resources such as accountants and auditors. There is also the potential for incurring additional costs for the CAC.

## Traditional Areas of Responsibility for CACs.

Since the legislative requirement, CACs have had the following roles and responsibilities with respect to candidates' election campaign finances:

- a. Consider requests for an audit of a candidate's campaign finances;
- b. Appoint an auditor to commission a report if the committee grants a request for an audit; which is now subject to appeal to the Superior Court;
- c. Consider that auditor's report
- d. Choose whether or not to commence legal proceedings against the candidate and now contributors who apparently exceed contribution limits.

## Changes for CACs

The changes through the *Municipal Elections Modernization Act* now bring about new areas of responsibilities for CACs which substantially increase the complexity of the overall responsibility. These new areas are as follows:

- a. Any Elector may now apply to the committee for a compliance audit of a registered third party if the elector believes on reasonable grounds that the registered third party has contravened the *Act*.
- b. Requests for compliance audits can be made even where a candidate or a registered third party has not filed a financial statement as required by the MEA.
- c. Statutory obligations now obligate the Clerk to review contributions made to both candidates and registered third parties.
- d. Upon review of submitted financial statements, if the Clerk finds that the contribution limits were exceeded, the Clerk must report this exceedance to the CAC, which shall consider the report and may commence legal proceedings against the contributor.
- e. The reports noted in "c" and "d" above are mandatory on the Clerk and are not triggered by an elector's request or a compliance audit.
- f. Within 30 days of receiving a report from the Clerk, a CAC must consider the report and decide if the Committee will be commencing legal proceedings against contributors for apparent violations.
- g. Committees have always been required to adopt their own meeting procedures but the *Municipal Elections Modernization Act* imposes new procedural fairness requirements.
- h. The newly amended MEA now imposes an obligation on CAC's to provide brief written reasons for their decisions.
- i. Previously, the MEA did not require CAC's to provide reasons for their decisions. Courts have also noted, on several occasions, that there was no statutory obligation on CAC's to give reasons.
- j. The new requirement to provide reasons may lead to more discussion and deliberation between members on the issues before each Committee, as Committee members may be obligated to articulate how the law applies to the specific facts of each case when drafting their decisions.
- k. Written reasons will assist members of the public to better understand how and why the Committee reached its conclusion.
- l. Such reasons may also assist the courts in reviewing decisions of CACs, especially given that appeals are "appeals on the record" and a reasonableness standard is engaged in such reviews (as discussed below).

- m. The MEA confirms that all meetings of CAC's, including deliberations, must be open to the public.
- n. Accordingly, upon receipt of a Clerk's Report or of an application for a compliance audit of either a candidate or a registered third party, reasonable notice must be provided to the contributor, the candidate, and the public before the Committee may hold a meeting.
- o. Proceedings against candidates or third parties raise concerns about the collection and use of evidence, and admissibility (inspection, investigation, and adjudication)
- p. Proceedings against contributors raise similar concerns but also those regarding reasonable and probable grounds, the lack of an investigation, and the collection of evidence.
- q. Decisions to commence proceedings may be subject to preliminary scrutiny such as with a Judicial Review.

## **Conclusions and Next Steps for Municipalities**

The new reporting requirements for Clerks and the new rules around registered third parties along with the new obligation for CACs to provide reasons, certainly complicate the municipal election landscape. To that end, Clerks will need to consider the following:

- a. Providing additional training in order to equip committee members to better understand their new and expanded statutory responsibilities under the MEA and to provide a strong foundation going into the 2018 municipal election.
- b. Ensure that they are fully familiar with their new roles with respect to registration of third parties and with respect to the review of financial statements and reporting requirements in regard to individual contributors and their contribution limits.
- c. Engaging a Committee that is already well versed in items "a" and "b" above.

It is likely that courts will apply a standard of reasonableness when CAC decisions to proceed with are appealed. Municipalities should continue to have an eye to appointing CAC members with an existing understanding of law, accounting, and of the mechanics of municipal elections. Furthermore, courts will now have the benefit of the written record of the decisions made by CAC's on appeal or Judicial Review. Therefore, it goes to reason therefore that the success of CACs is now more dependent than ever on how well Committee members understand and are able to articulate the application of law and accounting principles to the specific facts in each case before them.