

Supreme Court of Nova Scotia

Between:

Angela Jones

Applicant

and

Returning Officer for the Halifax Regional Municipality and the Chief Administrative Officer for the Halifax Regional Municipality

Respondents

Memorandum of the Respondents

1. The purpose of the Respondents in responding to this application is to ensure that the election for the office of councillor in District Four is conducted in accordance with the *Municipal Elections Act*, and that the ballot includes only the names of properly qualified and properly nominated candidates.
2. There is no disagreement on the material facts. When she became a candidate and when she filed her nomination paper, the applicant was an employee of HRM who was on parental leave, and was not on leave granted under s. 17C of the *Municipal Elections Act* (referred to in this Memorandum as “electoral leave”).
3. There is agreement on most legal principles, but the remaining issue is whether, in those undisputed circumstances, Ms Jones is qualified or disqualified to be nominated and to serve as a councillor. Secondly, if she is disqualified by reason of being on parental leave and not on electoral leave at the time of filing nomination papers, is she entitled to be granted electoral leave retroactively? The respondents each acknowledge that the appropriate standard of review with respect to their interpretation and application of the *Municipal Elections Act* is correctness.
4. The issue between the parties relates to the nature of the returning officer’s determination, and ultimately on the qualification or disqualification of the Applicant, Ms

Jones, to be nominated or to serve as a councillor. The respondents submit that the Returning Officer has not rejected the applicant's nominating paper contrary to s. 48 (3), but rather has learned that Ms Jones is disqualified to be nominated or to serve. To conduct the election with her name on the ballot would result in the election not being conducted in accordance with the Act (s. 158) or in accordance with the principles of the Act (s. 164). The outcome of the election would be subject to be voided under s. 158.

5. In summary, the respondents submit:

- The applicant, a solicitor employed in the Legal Services department of HRM, is disqualified under subsection 18 (1)(d) of the *Municipal Elections Act*.
- She is not within the exception of the subsection 18 (1)(d) because she was not and is not on a leave of absence granted pursuant to subsection 17C (2).
 - Parental leave granted as a term of employment in accordance with HRM's *Human Resources Policies and Business Practices* is not a leave of absence granted pursuant to subsection 17C (2).
- The disqualification is created by the statute, and the acceptance of the nomination paper by the returning officer does not cure the disqualification.
 - It is the responsibility of the candidate to ensure his or her own qualifications (or lack of disqualifications), and to sign the oath of the candidate to that effect.
 - Nothing done or failed to be done by the returning officer can make qualified a person who is disqualified under the statute.
- The nomination paper has not been rejected by the returning officer - its acceptance is and was at all times void because of the disqualification of the candidate.

The action taken by the Returning Officer

6. The acceptance by the returning officer of a candidate's nomination paper is an administrative act, not an adjudicative one. The returning officer exercises no discretion. If the nomination paper is regular on its face, the returning officer must accept it, and cannot thereafter reject it.
7. The candidate is not required to provide evidence of eligibility, other than to swear the oath of the candidate which includes representations of the factors of qualification, including:

“7. I have read the sections of the Municipal Elections Act related to persons disqualified to vote, to be nominated or to serve on a council and none of the reasons for disqualification listed in those sections apply to me.”
8. The applicant swore the Consent and Oath or Affirmation of Candidate¹ on September 10 and presented it with her nomination paper on September 11. The nomination paper was therefore complete and regular on its face.
9. The respondents acknowledge the principle of *Mackinnon v MacEachern*² with respect to the inability of the returning officer to withdraw a nominating paper once accepted. Indeed, the principle was codified by addition to the Act of subsection 48 (3) in 1980, a few months following that case. However, the *MacEachern* case involved an irregularity in the nomination papers³ - not a candidate who was disqualified by statute. The court held that the returning officer could not reject a nominating paper after acceptance on learning that there was an error.
10. However, it is clear that where nominating papers are accepted and the candidate is in fact disqualified, the nomination is invalid and the election will be voided. The fact that

¹ Returning Officer's Record, Tab 1, Page 2

² (1980), 48 N.S.R. (2d) 509; Applicant's Authorities, Tab 4.

³ The candidate had provided the required certificate of payment of taxes, which the returning officer determined to be incorrect because the cheque in payment had been returned. The nomination paper had to be accompanied by a certificate, but the candidate was not disqualified by the fact of non-payment of taxes.

the returning officer accepted the nomination paper - advertently or inadvertently - does not make the candidate qualified.

11. In *Barrington (Municipality) v Hatfield*⁴ the winning candidate in an election to municipal council was determined to be the chair of a municipal committee, for which he was entitled to be paid on a per-meeting basis, with the last compensation having been paid five and a half months before his nomination was filed. His nomination paper was accepted, and he won the election. However, he was determined to be not qualified to be nominated or to serve as a councillor, the election was declared void.

12. In *Baxter v White*⁵ the nominee was not a Canadian citizen, although she hoped to be granted citizenship before the election date. She was unable to do so. Nevertheless, her name remained on the ballot and she received a number of votes. An unsuccessful candidate challenged the election on the basis that it had not been conducted in accordance with the Act. Justice Haliburton held that

The underlying principles to be implemented in this review include the right of electors to cast their vote on the basis of ballots which place before them a choice of qualified candidates only.

13. He concluded that, although the disqualified candidate did not secure enough votes to be elected, “I am unable to say that I am satisfied that the improper conduct of the election did not affect its results and I, therefore declare the election to have been invalid.”

14. In *Suttle v Ettinger*⁶, a nomination was incorrectly refused by the returning officer. The subsequent election (in that case, by acclamation) was ruled void because the election had not been conducted in accordance with the Act.

⁴ 2009 NSSC 68; 275 N.S.R. (2d) 45; Tab 2

⁵ 1997 CanLII 1498 (NS SC); [1997] N.S.J. no. 559; Tab 3

⁶ (1995) 145 N.S.R. 227 (NSCA); Tab 4 The returning officer rejected the nomination of a councillor for mayor because the resignation as councillor was conditional. The court pointed out that under the statute, the resignation of the candidate was automatic, and no written resignation was required.

15. The applicant argues that the action of the returning officer leads to an unjust result because too much time passed and it was no longer open to the applicant to seek electoral leave. The respondents submit that this is incorrect. Whether the returning officer takes action or not, the applicant is disqualified. If the returning officer had taken no action, there would not be a “just result” – there would be an election which would be subject to be voided by the court.

16. In order to avoid an election which is void, the question which must be determined in this application is whether or not Ms. Jones is disqualified under the Act.

Disqualification during employment

17. Section 18(1)(d) provides:

18(1) No person is qualified to be nominated or to serve as a councillor who

...

(d) accepts or holds office or employment in the service of the municipality ... to which ... remuneration of any kind is attached, for so long as he holds or is engaged in the office or employment unless the person is on a leave of absence granted pursuant to subsection 17C(2)

18. Under the plain reading of this text, Ms. Jones is disqualified as long as she holds employment as a solicitor in the legal services branch of HRM. There is no grammatical basis for the distinction proposed by the applicant – that the sentence must be read as if it read “so long as he holds the office or is engaged in the employment” and that one is “engaged in employment” only when actually working.

19. The Act makes no distinction between “office” and “employment” in the service of a municipality. Section 17A(1) provides that a person who “accepts or holds office or employment” is, for the purpose of s. 17C, an employee of the municipality.

20. Further, the language of the Act simply does not contemplate that a person is not “engaged in employment” when they are on leave. An employee who is given leave

pursuant to s. 17C continues to be an employee, but the disqualification is removed by the provision of the Act.

21. The proposed reading would lead to a nonsensical result, in that an office holder would be permanently disqualified, even if he or she was doing no actual work and receiving no actual remuneration (see *Barrington v. Hatfield*), whereas an employee would be qualified unless actually working. It cannot be said that a municipal employee is eligible to be nominated while on vacation, on weekends, and after working hours, when he or she is not “engaged” in the employment.

22. A person is engaged in employment as long as the relationship of employer and employee continues. That relationship, and the mutual obligations and duties that flow from it, continue during a parental – or other – leave. Mutual obligations are modified as agreed between the parties or with a bargaining agent. The employee is not obliged to attend and perform work, and the employer’s obligation to pay is reduced or eliminated. There may be continuing benefits (insurance, pension contributions, accrual of seniority) and, significantly, the right to return to work at the end of the leave.

Parental leave and electoral leave are different

23. The differences in benefits are relevant only to emphasize that a leave of absence under s. 17C is different from other types of leave of absence. The disqualification of the municipal employee does not depend on whether he or she is in receipt of benefits greater than those that would be available under s. 17C. A municipal employee is not excluded from the disqualification simply by virtue of being on “leave of absence” – it must be a leave of absence granted under s. 17C.

- Parental leave is an entitlement as a term of employment, in accordance with the contract of employment and HRM’s policies. It is administered by the Human Resources Department of HRM. Electoral leave is an entitlement under the Act, and is granted only upon specific application to the Chief Administrative Officer.
- An employee on parental leave is entitled to receive EI benefits, and to have those benefits “topped up” for up to 10 weeks. An employee on electoral leave is not

entitled to EI or to a top-up. (When she filed her nomination papers, Ms. Jones was no longer receiving the top-up.)

- An employee on parental leave continues to accrue sick leave and vacation credits. An employee on electoral leave does not accrue either.
- An employee on parental leave is entitled to continue with cost-shared group insurance benefits provided the employee on leave contributes the employee's share of the premium. An employee on electoral leave can continue the group insurance benefits if the employee pays both the employee's and the employer's share of the cost.
- An employee on parental leave must continue to participate in the pension plan. HRM will fund the employer and employee contributions during the period of leave, but the employee must reimburse HRM for the employee share. An employee on electoral leave has the option of continuing in the pension plan if the employee pays both the employer's and employee's share of the contributions on a current basis.⁷

24. The two types of leave are thus legally distinct in the way they arise and the mechanisms by which they are granted.

The CAO has no discretion to grant electoral leave retroactively

25. If it is determined that the applicant is disqualified for being nominated or serving as a councillor by reason of being an employee of the municipality, the Court must determine whether the applicant had a right to be granted electoral leave and thus take advantage of the exemption under subsection 18(1)(d). This exception permits an employee to be qualified to be nominated if the person "is on a leave of absence granted pursuant to subsection 17C(2)." The present tense indicates that the leave of absence must be in effect at the time of nomination, and this is reaffirmed in s. 17C (1), which provides that the employee "shall take a leave of absence beginning not later than the day the person becomes a candidate".

⁷ This is the practice of HRM. We understand the applicant to be arguing that this practice is not consistent with wording of s. 17C(9).

26. It is undisputed that the applicant made application to the CAO only on September 12, after the time for nominations had expired, asking that the leave be granted retroactively, backdated to the date of nomination. The CAO declined, on the basis that he had no power to grant leave retroactively.

27. The respondents submit that the CAO was correct. The idea of retroactive electoral leave is completely contrary to the scheme of the Act. Formerly, municipal employees were simply ineligible to run or to serve as councillors. The conflict of interest between the role of councillor and employee was considered unacceptable. In 2000 the Act was amended to permit municipal employees to seek and hold office under the conditions prescribed.

28. Those conditions ensure that the employee is receiving no benefits of employment so long as he or she is a candidate or office holder. The Act is designed to ensure that there is no ambiguity of the status of the person – sections 17, 17A, 17B, 17C and 18 create a clear code. The essence is:

- Everyone is qualified to be elected if he or she:
 - is a Canadian citizen at least 18 years old,
 - is ordinarily resident in the municipality for at least six months before nomination day and still so resident,
 - has a certificate from the clerk that the person has paid all applicable taxes, and
 - is not disqualified under the Act. [17(1)]
- A person is disqualified to be nominated or to serve as councillor if (among other things) he or she is an employee of the municipality, unless he or she is “on a leave of absence granted pursuant to subsection 17C(d).” [18(1)(d)]
- A person who “accepts or holds office or employment in the service of a municipality” is an “employee” of a municipality. [17A(1)]

- An employee of a municipality who intends to become a candidate “shall take a leave of absence beginning not later than the day the person becomes a candidate.” [17C(1)]
 - A person becomes a candidate when the person declares himself or herself a candidate – not just when the person files nomination papers. [2(1)(b)]
 - An employee who intends to become a candidate “shall apply for leave of absence to the Chief Administrative Officer of the municipality and the leave of absence shall be granted.” [17C(2)]
 - Where a leave of absence is granted, the employee ceases to be entitled to any benefits of employment, except that the employee may continue in certain pension and benefit plans at his or her own expense. The employer will not contribute during the period of electoral leave. [17C(9)]

29. This mechanism is intended to provide clarity as to which employees are and are not qualified to be nominated or elected for office. On being granted electoral leave, the employee does not cease to be an employee, but his or her rights change in significant ways. It is essential that it be clear that the employee has committed to this change of status *before* becoming a candidate.

30. The interpretation proposed by the applicant would permit an employee to be nominated and run in an election. If elected, the employee could then apply for retroactive electoral leave and, on the applicant’s interpretation, the CAO would be compelled to grant this retroactive leave, without discretion. However, if the employee was unsuccessful in the election, they might not apply for electoral leave and thus continue to receive the benefits of employment during their candidacy.

31. The proposed interpretation is inconsistent with the plain words of the Act and with the spirit and intent of the Act.

In summary

32. The respondents submit that the returning officer correctly determined that the applicant is not, and was not at the time she became a candidate, eligible to be nominated or to serve as a councillor.
33. To include a disqualified candidate's name on the ballot would not be consistent with the provisions or with the spirit and intent of the *Municipal Elections Act* and would result in the election being liable to be voided by the Court. The duty of the returning officer is to conduct the election in accordance with the *Municipal Elections Act*.
34. The respondents further submit a CAO's duty under the Act is to approve applications for electoral leave made in accordance with the Act, and that application must be made not later than the day the person becomes a candidate.
35. Acknowledging that the standard of review is correctness, the respondents submit that these determinations and actions by the returning officer and Chief Administrative Officer were correct and should be confirmed.
36. The respondents request that the Court determine and declare that the applicant, Angela Jones, is not qualified to be nominated or to serve as a councillor because she is an employee of Halifax Regional Municipality who is not on leave of absence granted pursuant to s. 17C(2) of the *Municipal Elections Act*.

Respectfully submitted, September 26, 2012.

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