SUPREME COURT OF NOVA SCOTIA
Citation: ***Winsor** v **Kings (County)***, 2012 NSSC 445

Date: 20121221
Docket: Ken No 408859
Registry: Kentville

Between:

***Jim Winsor**, **Rick Ackland** and*
Nancy Saul-Demers

Applicants

v.

***Robert Ashley**, Clerk of the County of Kings,*
***Heather Archibald**, Returning Officer of the Court of Kings,*
***Dale Lloyd** and **Ted Palmer**, Candidates in the 8th District, and*
***Eric Smith** and **Gary Connolly**, Candidates for the 11th District*

Respondents

Judge: The Honourable Justice Gregory M. Warner

Heard: December 6 and 10, 2012 at Kentville, Nova Scotia

Oral Decision and Written Release: December 21, 2012

Counsel: **David Daniels**, counsel for the applicants

Douglas Lutz and **Martin Glogier**, counsel for Robert Ashley and Heather Archibald

Daniel Weir, counsel for Dale Lloyd

Ted Palmer, Eric Smith and Gary Connolly, not participating

By the Court:

Part I Overview

[1] Rick Ackland ("Ackland") and Jim Winsor ("Winsor") sought election as municipal councillors for Districts 8 and 11 respectively for the Municipality for the County of Kings ("Municipality"). Their nomination papers were accepted by the Returning Officer. Two weeks before election day, the Returning Officer revoked their candidacies and removed their names from the ballot on the basis that they were disqualified from being nominated for, or elected as, or serving as, municipal councillors.

[2] Ackland and Winsor apply to have the election for Districts 8 and 11 declared void pursuant to *Section 158(1)* of the *Municipal Elections Act*, RSNS 1989, c. 300 ("*Act*").

[3] They claim that:

a) the Returning Officer was without jurisdiction to reject their nomination papers after having accepted them, whether or not they were disqualified;

b) if she did have authority to reject their candidacies, she owed each a duty of procedural fairness and failed to execute this duty; specifically, she revoked their candidacies without affording them the opportunity to make submissions on her intended action;

c) they were not disqualified from being nominated for, or elected or serving as, municipal councillors.

[4] The Respondent Returning Officer and Chief Administrative Officer ("CAO") of the Municipality reply that:

a) the Returning Officer had authority to revoke the candidacies of Ackland and Winsor after accepting their nomination papers;

b) the Returning Officer failed in her duty of procedural fairness, by failing to receive submissions from the candidates when she revoked their candidacies;

c) but the candidates were disqualified from running for office or serving as councillors;

d) and the candidates should have applied for a remedy to the Court between the date they were disqualified and election day; and,

e) since *Section 158(1)* provides that an election not conducted in accordance with the *Act* may, not must, be declared void, and *s. 164* provides that no election shall be declared invalid

by reason of an irregularity of the Returning Officer if it appears to the Court that the election was conducted in accordance with the principles of the *Act* and the irregularity did not affect the result of the election, the elections in Districts 8 and 11 should not be declared void.

[5] In effect, the Returning Officer submits that even if she did not conduct the election in accordance with the *Act*, because the candidates were "clearly" disqualified from running, the Court should exercise its discretion not to void the elections.

[6] Counsel for Dale Lloyd ("Lloyd"), the successful candidate for District 8, supports the Returning Officer's position. He submits that the integrity of the electoral system, and public faith in the process, would be adversely affected by declaring the elections void when the candidates were, in fact, disqualified from running or holding office as municipal councillors.

[7] Application of the principles of statutory interpretation to the *Act* is central to this application.

[8] Four issues, of which only three are contested, require analysis to determine whether the elections in Districts 8 and 11 should be declared void. They are:

(i) Did the Returning Officer have jurisdiction to reject the candidacies of Ackland and Winsor after having accepted their nomination papers?

(ii) Did the Returning Officer owe and breach a duty of procedural fairness in failing to permit the candidates to be informed of and make submissions before rejecting their candidacies? (The Respondents concede that she owed and breached her duty of procedural fairness.)

(iii) Were Ackland and Winsor disqualified from running for, or serving as, municipal councillors?

(iv) Should the Court: (a) void the election on the basis that the Returning Officer lacked authority to reject their candidacies after accepting their nomination papers and failing in her duty of procedural fairness; or (b) not void the elections on the basis that (i) Ackland and Winsor should have applied for a judicial remedy before the election, as Jones did in *Jones v Halifax,* 2012 NSSC 368, or (ii) neither Ackland nor Winsor were qualified to run for, or serve as, municipal councillors?

Part II Principles of Statutory Interpretation

[9] The general principles of statutory interpretation are not difficult. *Section 9(5)* of the *Interpretation Act*, RSNS 1989, c. 235, which applies to the *Act* reads:

> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

(a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;

(c) the mischief to be remedied;

(d) the object to be attained;

(e) the former law, including other enactments upon the same or similar subjects;

(f) the consequences of a particular interpretation; and

(g) the history of legislation on the subject.

[10] I adopt and incorporate in this decision my earlier analysis of the general principles in *Slauenwhite v. Keizer*, 2010 NSSC 453, paras 14 to 18, and *Pink v. Davis*, 2011 NSSC 237, paras 38 to 42.

[11] Many years ago Elmer Driedger wrote: "Today there is only one principle or approach, namely the words of an *Act* are to be read in their entire context, in their grammatical or ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the Parliament."

[12] In *Sullivan on the Construction of Statutes*, Fifth Edition (Markham, LexisNexis, 2008), Ruth Sullivan wrote that this statement incorporates a complex, multidimensional analysis. She divided Driedger's principle into three analytical steps. Her description of the three steps is consistent with the approach taken by the Supreme Court of Canada and applied by the Nova Scotia Court of Appeal in many decisions.

[13] The three steps are:

(1) Analysis of the "textual" meaning; that is, the words of the *Act* in their entire context. Sullivan notes that finding the grammatical or ordinary sense of the words may involve complex issues of linguistic convention, expression and understanding.

(2) Analysis of the legislative intent. Legislation has a purpose and is intended to achieve certain goals. Courts must try to identify purposes and goals, as well as the means devised to achieve them.

(3) Analysis of established legal norms, as part of the context for reading words in legislation. According to Driedger, there are four kinds of legislative intention: expressed, implied,

presumed and declared intention. Presumed intention embraces the evolving legal norms found primarily in the common-law, but also in constitutional, quasi-constitutional and international law.

[14] The three analyses are sometimes converted into three questions:

(1) What is the meaning of the text?

(2) What goals (purposes) and methods did the legislature intend to adopt?

(3) What are the consequences of adopting a proposed interpretation?

[15] When applying these analytical steps, the resulting interpretation must be justified in terms of its plausibility (compliance with the text), its efficacy (promotion of the legislative intent) and its acceptability (compliance with accepted legal norms).

[16] The key to the interpretative analysis is recognition that words cannot be interpreted in a vacuum. Meaning is determined by context.

Part III The Four Issues

First Issue. Did the Returning Officer have jurisdiction to reject the candidacies of Ackland and Winsor after having accepted their nomination papers?

Legislation

[17] The relevant sections of the *Act* are *ss. 6, 44* and *48*.

[18] The duties of the Returning Officer are as set out in *s. 6*:

6 The Returning Officer shall

(a) exercise general direction and supervision over the administrative conduct of all elections;

(b) appoint such enumerators, revising officers, deputy Returning Officers, poll clerks and other election officers as may be necessary;

(c) appoint substitute election officers to act in the stead of election officers who cannot act by reason of death, sickness, conflict of interest, resignation or other cause;

(d) fix such polling places as may be required for the various polling districts;

(e) instruct the election officers in the effective execution of their duties;

(f) require election officers to conduct themselves with fairness and impartiality and in compliance with this Act; and

(g) do all other acts required for holding elections in conformity with the provisions of this Act. R.S., c. 300, s. 6; 1994, c. 26, s. 3. [Underlining is the court's emphasis]

[19] The role of the Returning Officer in the process of filing a nomination is described in s. 44:

Form and filing of nomination

44 (1) A nomination shall be in writing in prescribed form or to the like effect.

(2) A nomination shall be filed at the office of the Returning Officer between the hours of nine o'clock in the forenoon and five o'clock in the afternoon on the second Tuesday in September.

(3) No nomination shall be valid or shall be accepted by the Returning Officer unless it has been completed and is signed by the candidate.

(4) The Returning Officer shall not accept a nomination unless there is attached to the nomination paper a certificate in the prescribed form of the clerk, treasurer, collector or other official having knowledge of the facts that the charges that are liens on the person's property due by the person to the municipality and the taxes due by the person to the municipality have been fully paid or all instalments or interim payments that are due as of nomination day have been paid.

(4A) Subsection (4) does not apply with respect to a candidate for election to a school board.

(5) The Returning Officer shall not accept the nomination of a person who he knows is not qualified under this Act to be elected.

(6) The Returning Officer shall not accept a nomination unless it contains the consent and oath of the candidate or his official agent in prescribed form.

(7) Where a deposit is required, the Returning Officer shall not accept a nomination unless it is accompanied by the deposit of

(a) legal tender of Canada;

(b) a certified cheque or demand drawn on a chartered bank, trust company or credit union and payable to the municipality; or

(c) a postal money order or chartered bank draft payable to the municipality.

(8) The nomination paper may contain an appointment by the candidate of his official agent.

(9) Notwithstanding subsection (2), a nomination may be filed by appointment with the Returning Officer during the five business days immediately preceding nomination day. R.S., c. 300, s. 44; 2000, c. 9, s. 27; 2003, c. 9, s. 20; 2007, c. 46, s. 10. [Underlining is the court's emphasis]

[20] The authority of the Returning Officer in respect of the nomination process is set out in *s. 48*.

Acceptance of nomination

48 (1) If the Returning Officer is satisfied that all requirements of this Act have been complied with, the Returning Officer shall sign the receipt on the nomination paper and transmit the deposit, if any, to the clerk and provide the candidate or his official agent with a copy of the final lists of all electors entitled to vote for the office for which the candidate has been nominated.

(2) The signing of the receipt on the nomination paper by the Returning Officer shall be evidence that the candidate has been officially nominated.

(3) A Returning Officer shall not reject a nomination paper after he has signed the receipt on the nomination paper.

(4) Once signed by the Returning Officer, a nomination paper is open to inspection by the public, but shall not be photocopied or otherwise reproduced for members of the public. R.S., c. 300, s. 48; 2003, c. 9, s. 21. [Underlining is the court's emphasis]

The Evidence

[21] On September 4, 2012, the Returning Officer signed the receipt and accepted Winsor's nomination papers. On September 7, 2012, the Returning Officer signed the receipt and accepted Ackland's nomination papers. Nomination day, the final day for accepting nominations, was September 11. Election day was October 20; advance poll days were October 11 and 16.

[22] As a result of information received on October 2 from unnamed sources, the Returning Officer inquired into the qualification of Ackland and in that process held meetings with the CAO and municipal solicitors. On the basis of information received on October 4 from unnamed sources, the Returning Officer inquired into Winsor's qualifications, which inquiries included consultations and meetings with the CAO and municipal solicitors.

[23] In the middle of Friday afternoon, October 5, the Returning Officer telephoned Ackland and Winsor, asking each of them to attend at her office on an urgent matter. Winsor attended immediately and was handed a letter revoking his nomination papers and candidacy as well as a copy of a press release from the CAO that he was told was being released immediately.

[24] When Ackland was contacted by phone, he was leaving a funeral home in Halifax so he could not attend the office. He was advised by the Returning Officer of her decision to revoke his candidacy and read a copy of the press release. He objected to the wording of the press release and to the fact that he was not consulted in her investigation. When told that his membership on the Grand View Manor Board was the basis of his disqualification, he complained that he had discussed his membership on the Board with her before he had filed the nomination papers.

[25] The October 5 letters contained four paragraphs, they were identical, except for the reference to the board or committee each served on.

[26] The second paragraph set out *s. 18(1)(d)* of the *Act* and states that it came to her attention, in the case of Winsor, that he was a member of the Trails Committee and, in the case of Ackland, that he was a member of the Grand View Manor Board, and neither had been granted a leave of absence. It stated they were appointed by council and received remuneration. For this reason, it stated they were not qualified to be nominated or to serve.

[27] The third paragraph states that if they continued to be candidates, the election result could be declared void by a Court, "... therefore, I have revoked your candidacy and removed your name from the list of candidates on the ballot."

Submissions

[28] Citing *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 50 and 59, and the *Jones v Halifax*, the Applicants submit that the standard of review regarding the jurisdiction of the Returning Officer to revoke their candidacies is correctness.

[29] The Respondents agree.

[30] I agree. It is not necessary to consider the four factors from para 64 in *Dunsmuir*. The third factor - the nature of the question, is a complete answer to the applicable standard of review for this issue. The first issue is a true jurisdictional issue.

[31] The Applicants note that this issue has been decided on two occasions in Nova Scotia with the same result. The Returning Officer was held not to have jurisdiction to revoke a candidacy after acceptance of the candidate's nomination papers.

[32] In *MacKinnon v MacEachern*, [1980] 48 NSR (2d) 509 (NSCtyCt), a candidate had obtained the requisite certificate that his municipal taxes were paid on the basis of a cheque delivered to the Municipality in payment of taxes. After his nomination papers were accepted by the Returning Officer, the cheque, upon which the tax collector issued the certificate, was returned NSF. The Returning Officer thereupon disqualified the candidate.

[33] Relevant provisions of *Act* in 1980 were identical to the present *Act* with two exceptions: (1) the numbering the sections, and (2) the *Act* did not contain *s. 48(3)*.

[34] After a review of the history of the role of Returning Officers in English and earlier Canadian jurisprudence, the Court concluded at para 28:

> There are no provisions in this Act which authorize a Returning Officer to make the inquiries which he made, and even if authority existed he would be required to hold such an inquiry in conformity with the rules of natural justice.

[35] This decision is dated January 24, 1980. The Applicants note that on March 25, 1980, two months after the *MacKinnon* decision, Bill #31, an *Act to Amend the Municipal Elections Act,* was introduced in the Nova Scotia legislature and passed. One of its provisions was to add what is now *s. 48(3)* to the *Act.* The Applicants note that, in "*The Interpretation of Legislation in Canada*", 4th Edition, 2011, at p 579, Pierre-Andre Cote writes that courts assume the legislature to have been aware of judicial decisions made prior to the statute's enactment, and such decisions can be deemed part of the context of the legislation and relevant to its interpretation. *Section 48(3)* expressly provides for what the court in *MacKinnon* decided: a Returning Officer shall not reject a nomination paper after he has signed the receipt on the nomination paper.

[36] In *Jones v Halifax*, LeBlanc J. adopted the *MacKinnon* decision. He rejected submissions that there were distinctions between the facts in *Jones* and the facts in *MacKinnon*. He added the following at paras 16 and 17:

> . . . This is a question of statutory interpretation and if, as the Respondents admit, the Returning Officer only performs administrative acts and not adjudicative acts, then it is not a determination that the Returning Officer was, by statute, permitted to make.
>
> . . . having accepted the nomination papers of a person whom she thought was qualified to serve under the Act, section 48(3) prevents the Returning Officer from subsequently removing Ms. Jones from the list of candidates. Once the Returning Officer officially accepted Ms. Jones as a candidate, she had no choice but to put her on the ballot.

[37] The Applicants cite the text, "*The Law of Canadian Municipal Corporations*" by Ian M. Rogers, 2d Edition, (Carswell, Looseleaf) para 146.3, for the proposition that the power of the Returning Officer to reject nomination papers, which on their face are valid, is limited, and nonexistent after the close of nominations.

[38] The Respondents refer the Court to *Suttle v Lockport (Town)*, (1995)145 NSR (2d) 227 (NSCA); *Simon v Samson Cree Nation*, [2002] 1 CNLR 343 (FCTD) and *Optiz v Wrzesnewskyj*, 2012 SCC 55.

[39] They submit that the modern approach requires the court "to take a broad and purposive interpretation of election law." They submit that *s. 6(g)* and *s. 44(5)* should be interpreted in a way that upholds the integrity of the electoral process. *Section 6(g)* is the residual clause that permits the Returning Officer to do all other acts required for holding elections in conformity with the provisions of the *Act*. *Section 44(5)* directs the Returning Officer not to accept the nomination of a person who he knows is not qualified under this *Act* to be elected.

Analysis

[40] The question to be answered in respect of the first issue is not whether the Court should exercise the discretion to declare the election void but rather whether the Returning Officer had the authority to reject a candidacy after accepting the nomination papers.

[41] The *Act* is clear. The function of the Returning Officer under the *Act* is to administer the election. The general provision in *s. 6(g):* to do all other acts required for holding elections in conformity with the provisions of the *Act,* cannot override the specific restriction on the authority of a Returning Officer.

[42] *Section 44(5)* directs a Returning Officer not to accept the nomination papers of a person "who he knows is not qualified under this *Act*." The duty is not a duty to refuse to accept the nomination of a person "who is not qualified." The use of the term "who he knows" is significant. No burden is placed on a Returning Officer to reject the nomination paper of a person who is not qualified. Her duty is to reject only the nomination paper of a person whom she knows is not qualified.

[43] *Section 44* deals with the process of accepting nominations. It does not authorize action respecting disqualification of a candidate after a nomination is accepted.

[44] The amendment to the *Act* in March 1980, immediately following the *MacKinnon* decision, clearly, and in plain language, prohibits the Returning Officer from rejecting a nomination paper after he or she has signed the receipt on the nomination paper.

[45] On cross-examination the Returning Officer interpreted her duty under *s. 48(3)* as not to reject a "legitimate" nomination paper. That is clearly not what the section states.

[46] Counsel for the Respondents submits that it would bring the electoral process into disrepute if the Returning Officer could not reject a nomination paper which, after it had been accepted, would clearly permit a disqualified candidate to remain on the ballot. He says such would inevitably lead to an application to the court to void the election after it was held.

[47] By enacting *s. 48(3),* the legislature has clearly decided that the mischief caused by a Returning Officer disqualifying a candidate after nomination day is greater than the mischief caused by a disqualified candidate remaining on the ballot.

[48] A Returning Officer need have no special qualifications or expertise to act as Returning Officer; that is, he or she need have no particular education, training or experience in respect elections or the *Act*. In this case, the Returning Officer was a term employee in the development department of the Municipality and had no prior knowledge, training or experience with elections or the *Act*. Her training consisted of a one day seminar with other Returning Officers. The absence of any qualifications for, or extensive training of, a Returning Officer differs from the special knowledge and experience of those administrative officials and tribunals to whom courts extend considerable deference in the exercise of their functions. The absence of special qualifications, expertise, and training is context that infuses the interpretative analysis of the extent of a Returning Officer's duty and authority to disqualify candidates.

[49] Based on cross-examination of the Returning Officer, it is apparent that her inquiry largely involved meeting with the CAO and municipal solicitors, and her decision was largely, if not entirely, based on their contribution.

[50] I agree with the Applicants that the scheme of the *Act* is that it is for a Court, not the Returning Officer, to make inquiries and determine who is and is not a qualified candidate, after nomination papers have been accepted.

[51] If the legislature grants a power in broad terms, then limits its exercise through specific provisions, the interpretation of that statute normally leads to the specific provision taking precedent over the general. In this case, the enactment of *s. 48(3)* was a specific legislative choice.

[52] There is no conflict between *s. 6(g),* the general residual authority of the Returning Officer, and *s. 48(3)*, the specific provision that prohibits the rejection by the Returning Officer of an accepted nomination. There is no room to infer authority in the Returning Officer, pursuant to *s. 6(g)*, to do that which she is expressly prohibited from doing in *s. 48(3)*.

[53] While counsel for the Returning Officer does not invoke the term "implausible" or "absurd," the thrust of his argument is that it is implausible that the legislature intended that the *Act* restrict a

Returning Officer from rejecting the candidacy of a disqualified candidate, at any time before the election.

[54] In my view, the scheme of the *Act* is that, where a Returning Officer does not know that a candidate is disqualified at the time of receipt of nomination papers pursuant to *s. 44* and *s. 48* of the *Act*, it is for a court to void the election, based on the disqualification of a candidate, unless the court is satisfied that the election was conducted in accordance with the principles of the *Act* and that any irregularity did not affect the result of the election.

[55] It is no more efficacious in the promotion of the legislative goals to expose the election process to the possibility of a court challenge by reason of an improper disqualification than by the election of a disqualified candidate.

Issue Two. Did the Returning Officer owe, and breach, a duty of procedural fairness, in failing to permit the candidates to be informed of and make submissions before rejecting their candidacies?

[56] As noted, during closing oral submissions, the Respondents acknowledge that Ackland and Winsor were owed a duty of procedural fairness and that the duty was breached. Neither candidate was provided an opportunity to make submissions before their candidacies were rejected. For the applicable law, I adopt *Baker v. Canada*, [1999] 2 SCR 817, *Mavi v Canada*, 2011 SCC 30, and my analysis in *Pink v. Davis*, 2011 NSSC 237, beginning at para 60.

Issue Three. Were Ackland and Winsor disqualified from running for and serving as municipal councillors?

Standard of Review

[57] Counsel did not address the standard of review of the Returning Officer's interpretation of *s. 18* of the ***Act***. If this court had found that the Returning Officer had jurisdiction to determine the qualifications of Ackland and Winsor, the application of the four factors from paragraph 64 in *Dunsmuir* would still, in the circumstances of this case, lead to a standard of review of correctness. First, there is no privative clause. Second, the role of the Returning Officer is to administer the election. Third, the question in issue is one of statutory interpretation. Fourth, the Returning Officer need not possess, and did not possess, any special expertise.

Legislation

[58] The relevant sections of the *Act* are:

Eligibility as councillor

17 (1) Except as otherwise provided in this Act, every person shall be qualified to be elected as councillor who

(a) is a Canadian citizen of the full age of eighteen years at the time of nomination;

(b) has been ordinarily resident in the municipality or in an area annexed to the municipality for a period of six months preceding nomination day, and continues to so reside;

(c) has obtained a certificate in the prescribed form from the clerk, treasurer, collector or other official having knowledge of the facts that, as of nomination day, the charges that are liens on the person's property and the taxes due to the municipality by the person have been fully paid or all instalments or interim payments that are due as of nomination day have been paid; and

(d) is not disqualified under this Act.

(2) A councillor who is otherwise qualified shall be eligible for re-election. R.S., c. 300, s. 17; 1998, c. 18, s. 568; 2003, c. 9, s. 7; 2003 (2nd Sess.), c. 5, s. 1; 2011, c. 68, s. 5.

Interpretation of Sections 17B and 17C

17A (1) A person who accepts or holds office or employment in the service of a municipality or any utility, board, commission, committee or official of the municipality is, for the purpose of Sections 17B and 17C, an employee of the municipality.

(2) A reference to the chief administrative officer of a municipality is, for the purpose of Sections 17B and 17C, a reference to the clerk of the municipality if there is no chief administrative officer of the municipality. 2000, c. 9, s. 20.

Nomination and service of employee as councillor

17B Notwithstanding Section 18 of the Municipal Government Act, an employee of a municipality, other than the chief administrative officer, may be nominated and serve as a councillor if the person is on a leave of absence pursuant to Section 17C. 2000, c. 9, s. 20; 2003, c. 9, s. 8.

Leave of absence

17C (1) A person who is an employee of a municipality, other than the chief administrative officer, and who intends to become a candidate shall take a leave of absence beginning not later than the day the person becomes a candidate.

(2) A person who

(a) is required by subsection (1) to take a leave of absence; or

(b) intends to become a candidate and wishes a leave of absence beginning sooner than required by the required leave of absence,

shall apply for a leave of absence to the chief administrative officer of the municipality and the leave of absence shall be granted.

(3) Where the person withdraws as a candidate and, before the election, notifies the chief administrative officer of the municipality of the person's intention to return to work, the person may return to the position the person held immediately before the leave of absence commenced two weeks after the notice is given, or at such other time as is agreed to by the person and the chief administrative officer.

(4) A leave of absence granted to a person pursuant to subsection (2) terminates on the day the successful candidate in the election is declared elected unless, on or before the day immediately before ordinary polling day, the person notifies the chief administrative officer of the municipality that the person wishes the leave of absence to be extended for such number of days, not exceeding ninety, as the person states in the notice and in such case the leave of absence terminates as stated in the notice.

(5) A person on a leave of absence granted pursuant to subsection (2) to be a candidate in an election and who is an unsuccessful candidate in the election may return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced.

(6) The leave of absence of a person who is a successful candidate is extended from ordinary polling day of the election at which the person was elected until two weeks after the latest of

(a) the resignation of the person from council, if the resignation occurs before the next election;

(b) the date nominations close for the next election, where the person is not officially nominated as a candidate in the next election; or

(c) declaration day for the next election, if the person is not declared elected in the next election.

(7) Where the person is elected for the second time, the leave of absence granted to that person pursuant to subsection (2) terminates on the day the person is declared

elected for the second time and the person ceases to be an employee of the municipality or to hold office for all purposes, including entitlement to all employee or office-related benefits.

(8) Notwithstanding Section 18 of the Municipal Government Act, a person who is not re-elected at the second election held during the leave of absence granted to that person pursuant to subsection (2) may, when the leave of absence expires pursuant to subsection (6), return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced or, where that position has been filled or eliminated, to an equivalent position.

(9) Where a leave of absence is granted pursuant to subsection (2), the person to whom the leave of absence is granted shall not be paid but the person, upon application to the chief administrative officer of the municipality at any time before the leave of absence commences, is entitled to pension credit for service as if the person were not on a leave of absence and to medical and health benefits, long-term disability coverage and life insurance coverage, or any one or more of them, if the person pays both that person's and the municipality's, utility's, board's, commission's, committee's or official's share of the cost. 2000, c. 9, s. 20.

Disqualified persons

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

(a) is a member of the House of Commons or Senate of Canada;

(b) is a member of the Legislative Assembly;

(ba) is a village commissioner;

(c) is a member of the council of another municipality;

(ca) is a judge of the Nova Scotia Court of Appeal, the Supreme Court or the Provincial Court;

(d) accepts or holds office or employment in the service of the municipality, or any utility, board, commission, committee or official thereof, to which any salary, fee, wages, allowance, emolument, profit or other 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), but this disqualification does not apply in respect of an office or employment

(i) as a volunteer fireman with a municipal fire fighting organization,

(ii) with a school board, or

(iii) with a joint body of two or more municipalities to which the municipality appoints at least one representative and to which the municipality provides funding; or

(e) repealed 1994, c. 26, s. 9.

(f) has been convicted of any corrupt practice or bribery contrary to this Act within five years preceding nomination day.

(1A) repealed 2003, c. 9, s. 9.

(1B) Where a person who is a councillor is convicted of an indictable offence that is punishable by imprisonment for a maximum of more than five years, the person ceases to be a councillor. [Underlining is the court's emphasis]

Submissions

[59] The Respondents submit that Ackland and Winsor were disqualified under *s. 18(1)(d)* because they 'held office in the service of a board or committee of the Municipality', to which remuneration was attached, without first having obtained a leave of absence under *s. 17C(2)*.

[60] The Respondents acknowledge that both candidates honestly believed they were not disqualified when they swore the oath in their nomination papers.

[61] The Respondents submit that this makes no difference because the onus is on the candidate to be qualified, and to prove that they are not disqualified.

[62] They submit that Ackland's membership on the Board of Grand View Manor, technically the "Kings County Senior Citizens Home," and Winsor's membership on the Trails Committee clearly constitutes holding office in the service of a board or committee of the municipality.

[63] The Respondents ask the Court to "cast a big net" in defining who "holds office in the service of a board or committee of the municipality." Counsel cites Black's Law Dictionary, which defines an office as "a position of duty, trust or authority, especially one conferred by a governmental authority for a public purpose." Counsel states that the express exemption from disqualification of a "volunteer fire fighter" in *s. 18(1)(d)(i)* makes clear the kind of person considered to be an office holder.

[64] In closing oral arguments, counsel refers to a quote within a quote in a case advanced by the Applicants. The reference was in response to the Court's question as to the mischief that the legislature intended to remedy by *s. 18.*

[65] The decision referenced is *Re: Digby Town Municipal Election*, [1948] 2 DLR 817 (Nova Scotia Supreme Court, In Banco). At paragraphs 15 and 16, the Court cited Chief Justice Duff in a 1934 Supreme Court of Canada decision about a Montreal alderman who had a conflict between his public duty and his private interest when he caused the City Police Department to enter into a lease for a building that he had owned and transferred to his daughter.

[66] Counsel for the Returning Officer acknowledges that, while asking the court to cast a big net, and to apply a broad definition to the term "holds office," the express exemption of sitting councillors from obtaining a leave of absence when they seek re-election, is inconsistent with a purposive interpretation of *s.18* that he advocates.

[67] The Applicants submit that serving as citizen members on Grand View Manor Board or the Trails Committee does not disqualify them under *s. 18(1)(d)*. They further argue that Grand View Manor is not a board of the Municipality.

[68] Their counsel submits that to "hold office," both in its ordinary and natural meaning of the term, and in the context of the *Act* as a whole and the purpose of the legislation, does not include volunteer members of municipal committees, even though they receive a nominal honorarium.

[69] Their counsel suggests that to "hold office" connotes that the officeholder holds a position of authority. Counsel submits that the disqualification of the chair of a committee in *Barrington District (Municipality) v Hatfield*, 2009 NSSC 68, was because the candidate was chair of the committee. Counsel argues that the statutory exemption of volunteer firefighters is based on the categorization of firefighters as employees in the service of the municipality, not office holders.

[70] The Applicants submit that the object of *s. 18* is to prevent persons holding office from using their powers and authority as office holders to give them an unfair advantage when running for municipal office. A citizen member of an advisory committee or board is without authority or power to make the kind of promise that would give them an unfair advantage when running for office. They note that sitting councillors are not disqualified from running for re-election without obtaining a leave of absence.

[71] Finally, they submit that, if the legislature intended to disqualify "members" of committees and boards in *s. 18(1)(d),* it easily could have used the word "member" or "members" as it did in *s. 18(1)(a), (b)* and *(c)*.

Analysis

Grand View Manor or Kings County Senior Citizen Home issue

[72] The Applicants' argument that the Grand View Manor Board is not a board of the Municipality is without merit.

[73] The Affidavit of the Municipality's CAO, paras 9 to 15, and Exhibits A, C, D and E, clearly establishes the board as a board of the Municipality.

[74] On June 2, 1969, the Municipal Council by resolution approved the incorporation of Kings County Senior Citizen's Home (colloquially referred to by all parties as the Grand View Manor Board) as a municipal housing corporation under the *Municipal Housing Corporations Act*. The Municipality owns the corporation. The Council appoints its seven-member board. Of those appointed, four are councillors and three are citizen members.

[75] The audited financial statements of the Municipality contain several references to Kings County Senior Citizens Home. The statements show that the Municipality's investment in the corporation as 2.470 million dollars. The financial statements show both non-cash and cash transfers between the Municipality and the corporation. The financial statements show that until paid off in 2010, the Municipality guaranteed the corporation's 2002 expansion debt.

[76] The current list of committees of the Municipality, posted on its website, Exhibit A in the CAO's affidavit, shows Grand View Manor to be a committee of the Municipality.

[77] The Applicants rely upon the Affidavit of Wayne Atwater, a municipal councillor appointed by the Municipality to the Grand View Manor Board, and the current chair of the board. He states, as a "firm opinion", that the facility is not owned or supported by the Municipality. This "firm opinion" is not supported by any document or other fact and is clearly an opinion based on hearsay and misinformation.

The Meaning of "Holds Office" in s.18(1)(d) of the Act in Context

[78] The question of whether Ackland and Winsor are disqualified depends upon whether citizen or volunteer members (non-councillors) appointed to committees "hold office or employment in the service of a board or committee of the municipality." It is not contested that each received an honorarium.

[79] Sullivan writes that interpretation triggers three analyses: (i) the textual analysis of the words in the context of the *Act*; (ii) the legislative intent; and, (iii) how established legal norms affect a proposed interpretation.

[80] The Respondents ask the Court to apply the legal dictionary definition and to "cast a large net."

[81] As Sullivan notes, in chapter 2, finding the ordinary meaning of a term may appear simple but, in reality, is complex. Any term may have multiple meanings in the abstract. Interpretation without context is meaningless and not in accord with the modern principles of statutory interpretation.

[82] A dictionary definition is usually an attempt to describe the full range of senses or meanings that individual words may bear. It does not indicate, or attempt to indicate, a word's meaning within a particular sentence, paragraph, statute or context.

[83] The term "holds office" should not be interpreted as broadly as the broadest dictionary definition, unless, in the context of the sentence, paragraph, statute or general legislative scheme, it should be so interpreted.

[84] The meaning of a word cannot be divorced from the legislative intent discovered through the mischief sought to be remedied.

[85] I conclude that the ordinary meaning of the term "holds office" is not as broad as the large net cast by the Respondents, and does not include a volunteer or citizen member of a municipal committee or board.

[86] I start from the premise that the *Act* does not intend to restrict who may be candidates, except where express restrictions in the *Act* demonstrate a contrary legislative intent.

[87] What purpose is attained, or what mischief remedied, by requiring a volunteer or citizen committee member to obtain a leave of absence before running for the position of councillor? What purpose is attained, or mischief remedied, when councillors, who are members of the same committees and boards, are not required to first obtain a leave of absence from the committee or the council itself before re-offering for election?

[88] Counsel for the Returning Officer acknowledges the incongruity of this matrix. He submits that the purpose of *ss. 17* and *18* is to prevent a conflict between the personal interest of the committee member and his duty to the Municipality. He quotes from paragraph 16 in the *Digby* decision: "The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise."

[89] The decision he references - *Angrignon v Bonnier*, [1935] SCR 38, deals with a different factual matrix than this case. A Montreal city alderman used his position as alderman to cause the City police department to enter into a lease of property that he had owned and transferred to his daughter. The section of the *City Charter* he violated prohibited a person from being nominated or elected if he was directly or indirectly a party to a contract or interested in a contract with the City. The mischief of that legislative provision was a conflict between a private and public interest.

[90] There is no apparent conflict between the private interests and public duty of the citizen member of a municipal committee or board. Certainly it is no greater conflict than of a councillor

who is a member of a municipal committee or board. Both are appointed by the council, presumably, in both instances, based on the absence of any apparent conflict.

[91] The *Digby* decision is not helpful to the Respondents. The court held that the Town's medical health officer was disqualified from being elected a Town councillor by reason of his "holding an office under the Town Council," contrary to *s. 53(1)(b)* of the *Act* as it read in 1947. A second candidate, a firefighter and secretary-treasurer of the Fire Company, was disqualified not because he 'held an office under the Town Council', but because he had "entered into a contract with the Town for the performance of work and labour" pursuant to *s. 53(1)(c)* of that *Act*. The work and labour were as a fire fighter for which he received $40 per year.

[92] Applying the *Digby* decision to this case, it is unlikely that a volunteer or citizen member of a committee would be considered to be "performing work or labour" for the Municipality.

[93] The *Digby* decision does provide historical context for the exemption of volunteer fire fighters from the disqualification under *s. 18(1)(d)*(i) of the *Act*. The *Digby* decision suggests that a volunteer fire fighter performs "work and labour" akin to an employee.

[94] The term used in s. *18(1)(d)* reads: "accepts or holds office or employment in the service of ... the municipality." The same term is found in *s. 17A(1)*. That section provides that a person who accepts or holds office or employment in the service of a municipality is, for the purposes of nomination and applying for a leave of absence, an employee of the municipality.

[95] Using the words "holds office or employment" together, and with the word "employee", suggests that a person who holds an office performs a function akin to, or related to, the role and function of an employee.

[96] Several phrases in *s. 17C* describe the person required by s.18(1)(d) to obtain a leave of absence to run for office. The phrases clearly describe the person as someone in an employment-like relationship.

[97] For example, *Section 17C(3)* reads:

> Where the person withdraws as a candidate and, before the election, notifies the chief administrative officer of the municipality of the person's intention to return to work, the person may return to the position the person held immediately before the leave of absence ... [Underlining is the court's emphasis]

[98] *Section 17C(5)* reads:

> A person on a leave of absence ... to be a candidate in an election and who is an unsuccessful candidate in the election may return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced. [Underlining is the court's emphasis]

[99] *Section 17C(7)* reads:

> Where the person is elected for the second time, the leave of absence ... terminates on the day the person is declared elected for the second time and the person ceases to be an employee of the municipality or to hold office for all purposes, including entitlement to all employee or office-related benefits. [Underlining is the court's emphasis]

[100] *Section 17C(8)* reads:

> Notwithstanding Section 18 of the [*Act*], a person who is not re-elected ... may, when the leave of absence expires ... return to the position in the employment of the municipality that the person held immediately before the leave of absence commenced or, where that position has been filled or eliminated, to an equivalent position. [Underlining is the court's emphasis]

[101] Often the term "holds office," is used in the sense of an "officer." Persons employed by a corporation, institution or government may or may not be officers. Often persons who are not officers are called employees. An officer need not be an employee in the traditional sense, but, nevertheless may be in employment-like relationship with the employer. The role of the medical health officer in the *Digby* case, and the role of most lawyers retained as municipal solicitors by rural municipalities, are examples of persons who hold office in an employment-like (or "work and labour") relationship both as to function and compensation.

[102] I conclude that it is likely that the intent of the legislature, in requiring that a person who "holds office or employment in the service of the municipality" obtain a leave of absence, was to make clear an intent to require all persons in an employment-like relationship with the Municipality to obtain a leave of absence.

[103] The purpose or mischief addressed by requiring employees and officers of the Municipality and of its committees, boards, commissions or utilities, to obtain a leave absence is important. Municipal councils create and eliminate the positions, annually approve departmental budgets and sets tax rates and other policies that directly affect the municipal work force, of which employees and officers are a part, and by which they earn a livelihood. A clear potential exists for a conflict between their private and other economic interests, and the 'interests [they share] in common with the electors generally'.

[104] This purpose or mischief has no logical relevance to a volunteer member of a committee or board, whose relationship with the municipality has no employment-like characteristics. This is especially so for a member of a committee like the Trails Committee, which is advisory and devoid of legislative or executive authority.

[105] The absurdity of describing the object of the legislation, or the mischief intended to be remedied, as requiring only citizen committee members to obtain a leave of absence is evident from the provision in the *Act*, that does not require councillors who sit on these committees to obtain leaves of absence before re-offering for the same office.

[106] Counsel for the Respondents submits that guidance can be obtained from *Barrington District v Hatfield*. In that case, the municipality sought to void the election to the municipal council of the "chair of the long-term steering committee" for which position he was paid. The decision is very brief (22 paragraphs) and dealt mostly with the remedy provisions of the *Act* (*s. 158* and *164*). It is not apparent whether Hatfield was a citizen or a volunteer member of the committee and whether the payment he received was in the form a nominal honorarium or an amount suggestive of an employment-like relationship. There is no analysis of Hatfield's position. It appears that Hatfield was not represented by counsel at the hearing.

[107] The Respondents interpret that decision as supporting their position that membership on a committee disqualifies a candidate. I do not agree. It is not evident from the decision what Mr. Hatfield's role and remuneration were as the chair of the long-term steering committee.

[108] The Applicants distinguish *Barrington* on the basis that Hatfield was described as the chair of that committee, and not simply a member. That is a difference without a distinction.

[109] If I am wrong, and *Barrington* stands for the proposition that a volunteer or citizen member of a municipal committee, who is paid an honorarium, is disqualified from seeking office without first obtaining a leave of absence, I would respectfully disagree for the reasons articulated in this decision.

[110] It is noteworthy that persons who do business with a municipality are not disqualified from being nominated, elected or serving as councillors or members of committees. They are restricted in what they can do, and are obligated to avoid conflicts of interest. In the context of the scheme for dealing with potential conflicts of interest contained in the *Municipal Conflicts of Interest Act*, RSNS 1989, c.299, it makes no sense that volunteer members of a committee are disqualified from being nominated, elected or serving as councillors (without a leave of absence) by reason of a potential conflict of interest.

[111] I agree with the Applicants' submission that, since *s. 18(1)(a), (b)* and *(c)* expressly disqualify "members" of certain bodies from being nominated, elected or serving as councillors, the legislature, if its intent was to disqualify members of municipal committees and boards, would likely have included the word "members" of committees and boards in *s. 18(1)(d)*.

[112] The integrity of the electoral process is not adversely affected by allowing citizen members of committees to seek election as councillors without first obtaining a leave of absence. There is no appearance of unfairness. On the contrary, allowing citizen members of committees to seek election

as councillors enhances public confidence in the commitment and experience of candidates gained by volunteer service on municipal boards and committees.

[113] Counsel for the Respondents argue that the Applicants were clearly disqualified.

[114] It is interesting and noteworthy that Ackland and Winsor, two obviously intelligent persons, one a trained lawyer, would read the *Act* and the *Councillor Nomination Package*, as well as other materials supplied, and come to the conclusion that they did not "hold office or employment in the service of the municipality or a board or committee thereof." Counsel for the Returning Officer acknowledges that their belief was *bona fide*.

[115] It is noteworthy that, even though the Returning Officer was an employee of the Municipality and presumably aware of its public website on which its committees and their membership are listed, and even though Ackland raised with her his membership on the Grand View Manor board before filing his nomination papers, his 'clear disqualification' did not occur to her.

[116] It is not as clear to me, for the same reason as it was not clear to the Applicants, that citizen members of municipal committees and boards, whose relationship with those committees and boards is not in the nature of an employment-like relationship, are disqualified under *s. 18(1)(d)* of the *Act*. There is no logical object or goal to be attained, or mischief to be remedied, by precluding them from seeking office without first obtaining a leave of absence from their committee membership. This differs from persons in an employment-like relationship with the Municipality or any of its utilities, boards, commissions, committees or officials.

Issue Four: Should the Court void the elections?

Legislation

[117] *Section 158(1)* reads:

> Where an election or a vote of the electors for the determination of any matter that the council has directed be put before the electors has not been conducted in accordance with this Act, the Supreme Court may, upon application, declare the election or the vote to be void.

[118] *Section 164* reads:

> 164 No election shall be declared invalid
>
> (a) by reason of any irregularity on the part of the clerk or the Returning Officer or in any of the proceedings preliminary to the poll;

(b) by reason of any want of qualification in the person signing a nomination paper received by the Returning Officer under the provisions of this Act;

(c) by reason of a failure to hold a poll at any place appointed for holding a poll;

(d) by reason of non-compliance with the provisions of this Act or a by-law made pursuant to this Act as to the taking of the poll, as to the counting of the votes or as to limitations of time; or

(e) by reason of any mistake in the use of the prescribed forms,

if it appears to the judge that the election was conducted in accordance with the principles of this Act or a by-law made pursuant to this Act and that the irregularity, failure, non-compliance or mistake did not affect the result of the election. R.S., c. 300, s. 164; 2008, c. 24, s. 4. [Underlining is the court's emphasis]

[119] The Respondents argue that the Returning Officer had the authority to reject the candidacy of disqualified candidates after having accepted their nomination. Premised on their interpretation of *s. 18* and their submission that clearly the candidates were disqualified, they ask the Court to exercise its discretion not to declare the elections void.

[120] In light of this Court's conclusion that:

i) Ackland and Winsor were not disqualified by reason of being citizen or volunteer members of committees or boards of the Municipality, receiving nominal honorariums, but not holding an employment-like position, and

ii) the Returning Officer's revocation of their candidacies was without jurisdiction, and in breach of her duty of procedural fairness to the applicants, and

iii) the election results were likely affected by the Returning Officer's acts,

I declare the 2012 elections for the position of municipal councillor for Districts 8 and 11 of the Municipality of the County of Kings void.

[121] If the parties are unable to agree on costs within one month of the date of this decision, the Court will receive written submissions.

J.