

DATE: 2021-11-12

VARPIO, MATHESON, MONAHAN JJ.

**HEARD at London (by videoconference):**  
October 4, 2021

[1] On October 22, 2018, the Municipality of Lambton Shores (the “Municipality”) conducted its municipal election pursuant to the *Municipal Elections Act* (“MEA”). The mayoral race was decided by approximately 750 votes while a number of counsellor elections were decided by much smaller margins.

- [2] On May 31, 2019, the appellants brought an application under the MEA seeking, *inter alia*, a declaration that the election was invalid. The appellants include four individuals who were both voters and failed candidates. The appellants raised nine issues before the Ontario Superior Court of Justice and on October 2, 2019, Carey J. dismissed their application: *Bonesteel v. Lambton Shores (Municipality)*, [2019] O.J. No. 5179; 2019 ONSC 5691, 92 M.P.L.R. (5<sup>th</sup>) 204, 2019 CarswellOnt 16462.
- [3] An appeal was brought before this court based upon a single ground of appeal: Carey J. “erred in law by failing to apply the correct principles regarding the removal of 1,131 peoples’ names from the voters’ list maintained by the Municipality”. The appellants allege that the presiding justice failed to appreciate that the removal of these voter names constituted an irregularity as defined by the MEA and its judicial interpretation. As such, the election ought to have been declared invalid.
- [4] For the following reasons, the appeal is dismissed.

## FACTS

### The Election

- [5] On October 22, 2018, the Municipality held its municipal election. The clerk of the Municipality (the “Clerk”) was responsible for conducting the election. The Clerk has been a municipal clerk since 2009 and has worked on elections for over 20 years at all three levels of government.
- [6] On July 31, 2018, the Municipal Property Assessment Corporation complied with its duty under the *MEA* and delivered a preliminary list of voters to the Municipality. The Clerk reviewed the preliminary list in order to correct any obvious errors as per Section 22 of the *MEA*. The Clerk deposed that she was attempting to make the voters’ list as accurate as possible by removing the names of deceased persons, duplicate names and individuals who had moved. Her staff assisted with this process. Returned mail was also used to make corrections both before and after the election date. Throughout the corrections process, 479 names were added to the voters’ list, 1,131 names were deleted, 96 people had their locations moved within the Municipality, and 1,594 updates were made. The appellants submit that the 1,131 names removed from the preliminary list constituted approximately 20% of the Municipality’s electorate, a calculation which was not denied by the Municipality. The evidence does not specify whether the changes made to the preliminary list were made before, on or after election day.
- [7] On November 12, 2018, an individual emailed the Clerk asking about the changes to the list. The email string was not filed with this court, but the contents of some of the emails were read into the record during the cross-examination of the Clerk. On November 13, 2018, the Clerk appears to have answered the email inquiry as follows:

...we spent a lot of time cleaning up the voter’s list and the reasons people were added, deleted, and changed varied. It’s all part of the data cleansing process that we completed in order to ensure the voter’s list was as accurate as possible

[sic]. It was all done using photo list management software that identifies conflicts and issues on the voter's list that we investigate. Anyhow the short answer is that I can't break down the numbers in detail but I can give you totals.

- [8] It appears that the appellants undertook no other efforts to determine why certain names were removed during the corrections process.

### The Application

- [9] On May 31, 2019, the application was heard in the Superior Court of Justice. The Clerk filed an affidavit and she was cross-examined upon same. During that cross-examination, she was asked about whether she could identify the reasons that the 1,131 names were removed from the list. She provided the following answer:

Q. Okay and what you said I think in fairness in this email twice is "I can't break down the numbers" you said it right above the numbers and you say right below the numbers for a variety of reasons which I can't break down after [sic]. So I'm thinking, believing that that's still the case today?

A. That is the case.

- [10] Appellants' counsel did not ask for any follow-up in this regard.
- [11] In support of their application, the appellants filed affidavits from two individuals who deposed that their names were erroneously removed from the preliminary list. Both individuals described the process required to have their names restored to the list. Both individuals were subsequently allowed to vote. The appellants adduced no evidence from anyone suggesting that they were unable to vote or were in any other way disenfranchised.
- [12] On May 31, 2019, the presiding justice released his reasons dismissing the application. At paras 15 and 16, he stated that:

The application alleges that 1,131 names were removed from the voters' list arbitrarily contrary to s. 25(1) and (2) of the MEA. The application asserts "attempts to obtain explanations regarding the removal of the 1,131 persons have been made but have been unsuccessful."

This is addressed in the affidavit of the clerk of the municipality who set out how the list can be corrected, and voters added to the list pursuant to s. 22 of the MEA. In cross-examination, she indicated that information was both added, deleted and changed during and after the election. I was not pointed to any evidence as to how many names were deleted from the list before the election or given any evidence as to the reasons why these individuals names were removed [sic]. Here, the onus was on the applicants to show that eligible voters had their names removed from the list and that these eligible voters were not permitted to vote. Not only was there no such evidence but two of the affiants (Kungl and Maurizio) both indicated the simple process that they went through to have their names restored to the list and that they were allowed subsequently

to vote. Ms. Kungl indicated this was the first election where she did not receive a package in the mail about voting. Mr. Maurizio, after explaining how he was put back on the list, indicated his dissatisfaction with the type of voting by internet and/or telephone and that he did not trust this method of voting. He was not a regular computer user. I find the applicants have not satisfied their onus to show an irregularity on this issue. [emphasis added]

## POSITIONS OF THE PARTIES

- [13] The appellants argue only one ground of appeal, that is that the presiding justice erred in law by failing to apply the correct principles when considering the removal of 1,131 names from the preliminary list. The appellants did not specify which principles were misapplied or ignored.
- [14] There is no dispute about the standard of review. For questions of law, the standard of review is one of correctness. To the extent that this appeal deals with a question of mixed fact and law, if there is an extricable question of law it must also be reviewed on a standard of correctness. Otherwise, the appellant must demonstrate that the presiding justice committed a palpable and overriding error of fact or mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.
- [15] The appellants also submit that, given the timing of the next municipal election in October 2022, no remedy ought to be imposed as a result of this appeal other than a declaration that the election was invalid and the provision of directions by this court describing how municipal clerks ought to respond to requests for information regarding voters' lists. The appellants did not specify the court's authority to provide such directions.
- [16] The respondent submits that there has been no error justifying the intervention of this court. As such, there is no basis to suggest that the election was invalid and, as result, the appeal must be dismissed.
- [17] The respondent further submits that this appeal does not raise any issue of law or any question of mixed fact and law with an extricable question of law. Ergo, the standard of review is therefore one of palpable and overriding error.
- [18] As a result, the respondent submits that the appeal must be dismissed.

## THE RELEVANT LAW AND STATUTES

### The Voters' List and the Clerk's Duties

- [19] Sections 11(1), 11(2) and 12 of the *MEA* outline the role of a municipal clerk in a municipal election:

Duties of clerk

11 (1) The clerk of a local municipality is responsible for conducting elections within that municipality, subject to the following exceptions:

...

Same

(2) Responsibility for conducting an election includes responsibility for,

- (a) preparing for the election;
- (b) preparing for and conducting a recount in the election;
- (c) maintaining peace and order in connection with the election; and
- (d) in a regular election, preparing and submitting the report described in subsection 12.1 (2). 1996, c. 32, Sched., s. 11 (2); 2009, c. 33, Sched. 21, s. 8 (7).

Powers of clerk

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

- (a) is not otherwise provided for in an Act or regulation; and
- (b) in the clerk's opinion, is necessary or desirable for conducting the election. 1996, c. 32, Sched., s. 12 (1).

[20] Sections 19(1) and 19(1.1) of the *MEA* describe the preliminary list:

Preliminary list

19 (1) In the year of a regular election, the Municipal Property Assessment Corporation shall prepare a preliminary list for each local municipality and deliver it to the clerk. 2009, c. 33, Sched. 21, s. 8 (9).

Preliminary list

(1) The Chief Electoral Officer shall prepare and maintain a preliminary list for each local municipality and make it available to the clerk. 2020, c. 23, Sched. 4, s. 4 (1).

Deadline

(1.1) The preliminary list must be delivered to the clerk no later than the following date:

1. The date agreed upon by the clerk and the Municipal Property Assessment Corporation, which must be a date earlier than September 1.
2. If no date is agreed upon, the date prescribed by the Minister.
3. If no date is agreed upon or prescribed, July 31. 2009, c. 33, Sched. 21, s. 8 (9).

[21] Sections 22 and 23(1) of the *MEA* deal with corrections to the preliminary list:

Correction of errors

22 (1) The clerk may correct any obvious error in the preliminary list and shall notify the Municipal Property Assessment Corporation of the corrections. 1996, c. 32, Sched., s. 22; 2006, c. 33, Sched. Z.3, s. 18 (3).

Same

(2) For the purposes of subsection (1), the clerk may use any information that is in the local municipality's custody or control. 2009, c. 33, Sched. 21, s. 8 (11).

Same

(3) Information in the local municipality's custody or control that is used by the clerk for the purposes of subsection (1) is deemed to have been collected for the purpose of correcting errors in the preliminary list. 2009, c. 33, Sched. 21, s. 8 (11).

Voters' list

23 (1) The preliminary list, as corrected under section 22, constitutes the voters' list. 1996, c. 32, Sched., s. 23 (1).

[22] Section 24 of the *MEA* describes the process whereby an individual can seek to make a change to the voters' list. Section 25 of the *MEA* provides that deceased persons may be removed from the voters' list and section 26 of the act provides that a municipal clerk's decisions are final as regards section 24 and 25.

**Jurisdiction of the Courts**

[23] An individual may make an application to the Superior Court of Justice per s. 83(1) of the *MEA* which sets out the available remedies:

Application

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

- (a) whether the election is valid;

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

### Irregularities

- [24] Sections 83(6) and 83(7) of the *MEA* limits the ability of the court to invalidate an election:

#### Effect of procedural irregularities

- (6) The court shall not determine an election to be invalid if,
- (a) an irregularity described in subsection (7) occurred at the election but did not affect the result of the election; and
  - (b) the election was conducted in accordance with the principles of this Act. 1996, c. 32, Sched., s. 83 (6).

#### Same

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

1. An irregularity on the part of the clerk or in any of the procedures before voting day.
2. Failure to have a voting place open at the appointed location and time.
3. Non-compliance with a provision of this Act or of a regulation, by-law, resolution or procedure made, passed or established under this Act, dealing with voting, counting of votes or time requirements.
4. A mistake in the use of forms, whether prescribed or not.
5. Repealed: 2020, c. 26, Sched. 2, s. 9.

- [25] The courts have interpreted these sections and others like them. In *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para 24, "irregularities" were defined as "serious

administrative errors that are capable of undermining the electoral process - the type of mistakes that are tied to and have a direct bearing on a person's right to vote."<sup>1</sup>

- [26] In *Cusimano v. Toronto (City)*, 2012 ONCA 907 at paras 22 and 25, the Ontario Court of Appeal stated that sections 83(6) and 83(7) of the *MEA* circumscribe a court's ability to invalidate an election based upon irregularities:

Section 83(1) permits a person who is entitled to vote in an election to contest the validity of that election. The person may make an application to the Superior Court of Justice for a determination of whether an election is valid and, if it is not, whether a by-election should be held. The *MEA* does not provide any specific guidelines indicating when it is appropriate for a judge to invalidate an election. However, by including s. 83(6), the legislature has seen fit to restrict a judge's discretion in cases of procedural irregularities.

...

Together, ss. 83(6) and (7) prevent a court from invalidating an election that was conducted in accordance with the principles of the *MEA*, where the procedural irregularities did not affect the result. In other words, s. 83(6) amounts to a saving provision for elections in which certain specified irregularities occurred when those irregularities did not affect the outcome or integrity of the electoral process.

- [27] At para. 45 of its judgment, the Ontario Court of Appeal in *Cusimano* described the magnitude an irregularity must achieve in order for a court to invalidate an election:

[Dambrot J., sitting as a judge of the Divisional Court, the court from which the appeal in *Cusimano* was heard] then dealt with whether the election could nonetheless be saved under s. 83(6) - whether it could be said that the result had not been affected by the irregularities and that the election had been conducted in accordance with the principles of the *MEA*. Dambrot J.'s description of s. 83(6), at para. 62 of the Divisional Court's reasons, bears repeating here:

... [Section] 83(6) is a very broad saving provision. As I have already noted, it provides a sweeping definition of "irregularity," while narrowly circumscribing the circumstances in which an irregularity will be fatal to an election. It is a recognition that irregularities are inevitable in an election and an affirmation that the democratically expressed will of the electorate should not lightly be overturned. An election will only be set aside where the irregularity either violates a fundamental democratic principle or calls into a question whether the tabulated vote actually reflects the will of the electorate.

## Appeals

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<sup>1</sup> *Opitz* dealt with a federal election under the *Canada Elections Act*. The *Canada Elections Act* contains similar language as the language contained within s. 83 of the *MEA*.



[28] Section 86 of the *MEA* governs appeals:

Appeal

86 (1) An order made under subsection 83 (1) may be appealed to the Divisional Court. 1996, c. 32, Sched., s. 86 (1).

Power of Divisional Court

(2) The Divisional Court may make an order under subsection 83 (1) or, if it is necessary to take evidence, may order a new hearing. 1996, c. 32, Sched., s. 86 (2).

New hearing

- (3) If the Divisional Court orders a new hearing,
- (a) it may order that the hearing be held by the judge who held the original hearing, or by another judge of the General Division; and
  - (b) unless the Divisional Court orders otherwise, the order made on the new hearing may be appealed under subsection (1) as if it had been the first hearing. 1996, c. 32, Sched., s. 86 (3).

## ANALYSIS

[29] The appellants submit that the justice hearing the application erred in law in relation to the removal of the 1,131 names from the preliminary voting list, yet they have put forward no legal argument that the *MEA* was breached. In their submissions, the appellants effectively asked this court to:

- a. infer that the removal of 1,131 names from the preliminary list was an irregularity that violated “a fundamental democratic principle [and/or] called into question whether the tabulated vote actually [reflected] the will of the people”: *Cusimano* at para. 45; and
- b. find that the Clerk’s failure to give reasons to the appellants for the removals also constituted such a violation as per para. 45 of *Cusimano*.

[30] As regards the appellants’ first apparent argument, the removal of approximately 20% of voter names from a preliminary list could cause an observer to take a second look at the corrections process. This concern, however, reflects an isolated view of the evidence. For example, the Clerk added almost 500 names to the preliminary list which is an increase of approximately 10% to said list. The Clerk provided an explanation of the general process that was followed and the appellants neither specified which part of the process was flawed, nor did they adduce any evidence that any voters were disenfranchised by the Clerk’s actions. Instead, the court below received two affidavits from voters who had their names added to the voters’ list. These voters were able to add their names to that list without any apparent difficulty or negative effect.

- [31] The presiding justice found, on the evidence, that the appellants had not satisfied their onus to show an irregularity. On this appeal, the appellants pointed to no error in principle by the presiding justice. Accordingly, the appellants have no basis to suggest that Carey J. committed an error in finding that the elections process contained no irregularities.
- [32] Given that the burden of proof rested upon the appellants, the presiding justice was therefore well within his authority to dispense with an analysis of the other aspects of the test for invalidation as described by the *MEA* and the governing jurisprudence<sup>2</sup> since he found that the evidence did not provide an evidentiary basis to find that an irregularity existed.
- [33] With respect to the appellants' apparent argument that the Clerk's failure to provide particulars for the removal of each of the names constituted an irregularity, the presiding judge considered that submission in weighing the evidence. Again, the appellants have not been able to identify where the presiding justice erred in principle when he weighed said evidence, nor did the appellants identify any palpable and overriding error of fact. This court is not aware of any such misapplication. As a result, the appellants have not demonstrated that the presiding justice erred.
- [34] The appellants' remedial request on this appeal is also flawed. As noted earlier in these reasons, the jurisdiction of the presiding justice (and this court) is limited to the remedies set out in s. 83(1) of the *MEA*. Section 83(1) of the *MEA* makes no reference to the provision of directions. The court, therefore, has no authority to provide such directions.
- [35] In conclusion, the appellants have failed to show that the presiding judge made an error of law or a palpable and overriding error of fact or an error of mixed fact and law.
- [36] The appeal is therefore dismissed.

## **COSTS**

- [37] The parties agree that, should costs be ordered, the appropriate quantum is \$5,500.
- [38] The appellants submit that, because this is public interest litigation, the municipality should pay the appellants' costs or, in the alternative, that an award of "no costs" is appropriate. At paragraphs 140 to 148 of *Cusimano*, the Ontario Court of Appeal made clear that, even where a party is unsuccessful, costs may be considered in light of the public interest associated with the litigation in question. In *Cusimano*, the Court of Appeal determined that the unsuccessful appellant was entitled to costs payable by the municipality in part because the public interest associated with the appeal was pressing and the positions taken by the appellant were reasonable in the circumstances.

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<sup>2</sup> Such as the "magic number test", etc.

- [39] In the case before this court, it cannot be said that the appellants' conduct was reasonable. Simply put, they did not have the needed evidence to support their position at first instance, let alone to suggest that the justice at first instance committed an error.
- [40] A fair election process is a foundational element of democratic society. The electorate must have confidence that elections are fair. Individuals must be able to scrutinize election processes to ensure that democratic results reflect the will of the people.
- [41] The corollary to that principle must be that those individuals who run elections in a principled, solemn, and ethical fashion should not have their efforts needlessly impugned. An award of costs payable by the Municipality or an award of "no costs" would justify the baseless accusations made in this appeal and would encourage others to make similar bald assertions in the future. In these circumstances, an asserted public interest does not justify avoiding a costs order.
- [42] The appellants will pay the respondent \$5,500 (inclusive of HST) within 60 days of today's date.

Digitally signed by Michael Varpio  
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c=Michael Varpio  
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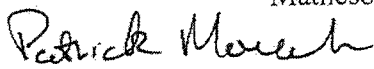
Michael Varpio

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 Varpio J.

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Matheson J.



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Monahan JJ.

**CITATION:** Bonesteel et al. v. Lambton Shores, 2021 ONSC 7441  
**DIVISIONAL COURT FILE NO.:** 525/19  
**DATE:** 2021-11-12

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**MATHESON, MONAHAN AND VARPIO JJ.**

**BETWEEN:**

DOUGLAS F. BONESTEEL; JAMES A. FINLAY;  
GAYLE MACGREGOR; SCOTT MACGREGOR;  
JOHN L. RUSSELL; GEORGE (JORDY) D. SPEAKE

- and -

THE CORPORATION OF THE MUNICIPALITY OF  
LAMBTON SHORES

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**REASONS FOR DECISION**

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**Released: November 12, 2021**