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Challenge to validity of Mayor Chow's election dismissed (*Clarke v. Toronto (City)*)

By Stephen Thiele

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Not every election is necessarily final after the ballots are counted on election night. Sometimes, the margin of victory is extremely close and a judicial recount is required to determine a victor. On very rare occasions, voting or procedural irregularities led to losing candidates contesting an election. In a contested election, an applicant essentially seeks the assistance of the court to overturn an election night result on the grounds that the election was invalid.

In [*Clarke v. Toronto \(City\)*, 2023 ONSC 6495](#), a losing Mayoral candidate brought an application to have the by-election which resulted in the election of Olivia Chow as Toronto's Mayor declared invalid under [section 83\(1\)](#) of the [Municipal Elections Act, 1996](#).

Arguably a provision like [section 83\(1\)](#) provides a necessary failsafe in a democracy to ensure that an election has not been subjected to significant procedural errors or wrongfully hijacked by a winning candidate or others associated with a winning candidate.

However, overturning the results of an election on the grounds that the election is invalid is a difficult feat.

In this case, the applicant contended that the election was invalid because it has been "rigged" by third party pollsters, the media and debate organizers that resulted in only a handful of the over 100 candidates running for Mayor of Toronto to be given media coverage and to be invited to debates.

The applicant argued that the information produced by third party pollster was flawed because the pollsters subjectively selected which candidates would be included in the polls. These polls were used by the debate organizers to determine which candidates should be invited to their debates, which, in turn, allowed those candidates to generate more media coverage to the disadvantage of other candidates.

In the applicant's view, Ms. Chow only defeated the rivals (Ana Bailao, Mark Saunders, Josh Matlow, Brad Bradford

and Mitzie Hunter) who received far more media coverage than the other 96 candidates and that a new election was needed with Ms. Chow running against those 96 candidates because she had yet to defeat them.

The City of Toronto contended that the application was frivolous, vexatious or an abuse of process and that it should be dismissed under [rule 2.1.01\(6\)](#) of the [Rules of Civil Procedure](#).

The court agreed.

[Rule 2.1.01](#) permits a court to stay or dismiss a proceeding if the proceeding on its face is frivolous, vexatious or an abuse of process. Although the threshold that must be met under the rule is extremely high, the rule, as determined in [Gao v. Ontario \(Workplace Safety and Insurance Board\), 2014 ONSC 6497 \(CanLII\)](#), is entitled to be robustly interpreted and rigorously applied.

From a public policy perspective, a rigorous application of the rule permits judicial resources to be freed and advances access to justice.

The court concluded that the application was frivolous and vexatious because even if the court accepted the applicant's complaints about skewed media coverage in favour of only a handful of candidates, the application would inevitably fail.

The purpose of the *Municipal Elections Act, 1996* is to regulate the process and procedures for running an election. The Act was not designed to regulate the conduct of pollsters, the media or debate organizers. Accordingly, the application lacked any sufficient legal basis to determine the validity of the Mayoral election.

The court was persuaded in its conclusion by the fact that the applicant had included in the Notice of Application a photo of Ms. Chow with a fictional quote attributed to her.

Overall, the court concluded that the application had been brought simply to annoy or embarrass Ms. Chow.

The key take-away from this case is that the court has significant powers to dismiss frivolous or vexatious proceedings at a very early stage and that contesting the validity of an election based on the argument that one candidate received more media or poll coverage than other candidates lacks legal merit.

However, there is another important take-away from this case because the issues raised by the applicant point to a potentially larger problem with municipal democracy in Canada's largest city where scores of candidates are able to easily register to run for the position of Mayor or other municipal elected office. This inevitably places Toronto mayoral elections in the hands of third party pollsters and the mainstream media who arguably sift through the candidates on the ballot and subjectively promote only those candidates who they view as being legitimate contenders or who they support before any ballot is cast.

Although the work of the pollsters and media is helpful to the elector, the ballot still contains the names of all of the candidates. A grocery list of candidates on a ballot can be very distracting and lead a voter inadvertently miscast a ballot for a perceived "fringe" candidate rather than a perceived "legitimate" candidate. In a close election, this can be important to the ultimate outcome.

A grocery list of candidates also potential results in voter apathy.

Given Toronto's size and its enormous budget, which makes it one of the largest governments in Canada and North America, it is surprising that the provincial government has not seriously examined legislative reform to permit municipal electoral organizations to freely develop



and contest municipal elections. Doing so would, among other things, allow like-minded candidates to coalesce under a municipal electoral organization's banner, lead to a vetting process for candidates before registration and permit the elector to have a say in who they want to represent them before third party pollsters and the media vet the candidates and guide their choices.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** at 416.865.6651 or by email at sthiele@grllp.com

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