



# KEEPING CURRENT

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## ELECTION VICTORIES UPHELD DESPITE NON-COMPLIANCE WITH FILING REQUIREMENTS: DECISIONS DEMONSTRATE THAT VOTERS SHOULD NOT BE EASILY DISENFRANCHISED

**By Stephen Thiele and  
Dasha Peregoudova**

Gardiner Roberts LLP is available to provide advice on a variety of political and government related issues, including those affecting elections and those involving individual elected officials.

Stephen Thiele represented former Member of Parliament, Borys Wrzesnewskij in the Etobicoke Centre judicial recount and in Mr. Wrzesnewskij's contested election application, along with Gardiner Roberts LLP partner, Gavin Tighe.

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The firm also represented Mayor Rob Ford in his successful defence of a defamation action in *Foulidis v. Ford*.

In 2012, a 4-3 majority of the Supreme Court of Canada in *Opitz v. Wrzesnewskij*<sup>1</sup> rendered a significant decision in a contested federal election application which stands for the proposition that votes cast by electors in an election should not be easily disenfranchised.

In that case, the incumbent Liberal Member of Parliament had lost his seat by 26 votes. He contended, however, that numerous voting irregularities should have resulted in scores of votes cast not being counted. While Justice Lederer at the Ontario Superior Court of Justice agreed with Mr. Wrzesnewskij's procedural approach to the *Canada Elections Act*, the majority of the Supreme Court of Canada applied a substantive approach to declare Mr. Opitz the winner.

The decision in *Opitz v. Wrzesnewskij* has already been referenced dozens of times by other courts, and therefore it is no surprise that in two recent Ontario cases, Justice Woolcombe declared that even though two successful school trustee candidates had their seats deemed vacant as a result of failing to comply with financial filing requirements

under the *Municipal Elections Act, 1995* (the "MEA"), they should be reinstated.

### The Cases

In *Smith v. Toronto District School Board*<sup>2</sup> and *Singh v. Peel District School Board*<sup>3</sup> an elected Toronto District School Board trustee and a Peel Regional School Board trustee, respectively, sought relief from the forfeiture of their elected positions under s. 98 of the *Courts of Justice Act* (the "CJA").

Pursuant to s. 78(1) of the MEA, all candidates running in a municipal election are required to file a financial statement and, depending on contributions received or the amount of expenses incurred during a campaign, an auditor's report by a certain statutorily prescribed period. Pursuant to s. 77(a)(1), the prescribed filing deadline is 2:00 pm the last Friday in March following the election.

The purpose of these provisions is to ensure that the public has an ability to examine the election expenses of a candidate within months of the election. In other words, the requirement to file financial documents after an election acts as a democratic check and balance to ensure that candidates do not

1. 2012 SCC 55 (CanLII)
2. 2015 ONSC 3661 (CanLII)
3. 2015 ONSC 3092 (CanLII)



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exceed statutorily prescribed spending limits and, more basically, that a candidate has contested an election fairly.

A successful candidate who fails to comply with the financial filing requirements under s. 78 forfeits any office to which he or she was elected, the office is declared vacant, and the candidate is ineligible to be elected or appointed to any office to which the MEA applies until the next regular municipal election has taken place.<sup>4</sup>

In the case of Trustee Smith, he had been re-elected by a slim margin. Yet pursuant to the MEA he was required to vacate his seat because he missed the financial document filing deadline by an hour and thirteen minutes.

On his application for relief from forfeiture, Trustee Smith showed that he had first contacted his accountant more than a month before the filing deadline and had attended the accountant's office two-weeks prior to the deadline to provide him with additional materials.

Two days prior to the filing deadline, the accountant advised Trustee Smith that his financial statement and auditor's report were ready for pick-up and for filing with the City of Toronto.

However, Trustee Smith was on a work assignment 1800 km away from Toronto.

In the circumstances, to meet the deadline, Trustee Smith planned to have a personal assistant pick up the financial documents and file them with the City. However, this plan was unsatisfactory because Trustee Smith's original signature was required on the financial documents.

Trustee Smith then attempted to make arrangements to file an application for an

extension of time, as was permitted under the MEA. But this alternative plan was also thwarted because Trustee Smith was unable to contact the necessary Trial Co-ordinator at Toronto's Old City Hall to discuss his predicament.

In a last desperate attempt to meet the filing deadline, Trustee Smith, unable to book a flight to Toronto from Kenora, Ontario, decided to drive to Toronto, overnight.

In *Singh*, Trustee Singh was elected to public office for the first time.<sup>5</sup> He missed the financial documents filing deadline by nearly a week.

In support of his application for relief from forfeiture, Trustee Singh demonstrated that in September 2014 (during his campaign) he had received assurance from an individual about being provided with post-election financial accounting and auditing services.

However by mid-March, 2015, this individual advised another candidate who had run a joint campaign with the Trustee Singh that since he was preparing the financial statements for their respective campaigns, he could not act as the auditor.

In the days prior to the deadline Trustee Singh and his fellow candidate communicated with each other about the need to file their financial documents and were told by someone working for the individual that the filing deadline was March 31 instead of March 27.

Eventually, nearly 4 hours after the filing deadline expired, the individual delivered electronically the necessary financial documents directly to the Brampton election office. Brampton subsequently advised that the documents were unacceptable because they were late and because they needed to be tendered in hard copy.

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4. *Ibid.*, at para. 14

5. This case actually involves an application by two separate candidates. The second candidate, also named Mr. Singh, was an unsuccessful councillor candidate who had run a joint campaign with Trustee Singh.



Trustee Singh then scrambled to execute his financial statement and to secure an accountant, on an emergency basis, to prepare an auditor's report, both of which were then filed.

### **The Decision**

In granting the candidates their requested relief from forfeiture, Justice Woolcombe applied the following test established by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damages caused by the breach...<sup>6</sup>

His Honour found that all of the candidates had proceeded in good faith and had made diligent efforts to either file the required documents on time or tried to immediately remedy their errors.

In each case, Justice Woolcombe concluded that the loss of elected office for Trustees Smith and Singh outweighed the respective error made by them in missing the filing deadline, and that while the financial filing deadline was imposed for an important reason, the damage caused by late filing was negligible.

Although some might debate that the filing deadline and penalties established by the MEA should have been enforced by the Court in these cases and that the discretion granted to the judge under s. 98 of the CJA should not have been exercised, when considered

through lens of the substantive approach established in *Opitz v. Wrzesnewskyj* the judgments rendered by Justice Woolcombe are defensible.

Like *Opitz v. Wrzesnewskyj*, these two cases will further bolster the view that voters should not be easily disenfranchised.

*(This newsletter is provided for educational purposes only and the views expressed herein do not necessarily reflect the views of Gardiner Roberts LLP.)*<sup>7</sup>

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6. [1994] 2 SCR 490

7. Stephen Thiele is a Partner and the Director of Legal Research at Gardiner Roberts LLP. Dasha Peregoudova is a summer student with Gardiner Roberts LLP.

