

In the Matter of an Application for a Compliance Audit of
Giorgio Mammoliti's Election Campaign Finances pursuant
to Section 81 of the *Municipal Elections Act, 1996*, S.O.
1996, c. 32, Sched.

SUBMISSIONS OF THE APPLICANT, DAVID DEPOE

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PART I - INTRODUCTION

1. This is an application by David DePoe ("DePoe") for a compliance audit of the election campaign finances of Giorgio Mammoliti ("Mammoliti").
2. In January 2010, Mammoliti filed his nomination papers to run for mayor of Toronto. In early July 2010, Mammoliti ended his mayoral campaign, and instead commenced a campaign for re-election as a city councillor. Mammoliti was re-elected as a councillor for Ward 7 on October 25, 2010. DePoe now requests a compliance audit of Mammoliti's election campaign finances in relation to his campaign for city councillor.
3. Under s. 81 of the *MEA*, a compliance audit must be ordered where an elector has reasonable grounds to believe that a candidate has contravened a provision of the *MEA* relating to election campaign finances.
4. In the present case, there are three distinct grounds for ordering a compliance audit, each of which is a sufficient basis by itself for ordering a compliance audit.

5. First, Mammoliti was subject to a maximum elections spending limit of \$27,964.65. The receipts included by Mammoliti in his filings indicate that he actually spent considerably in excess of this amount.

6. Second, Mammoliti was required to include the value of all goods and services contributed to his campaign in his election expenses. Although Mammoliti's filings make clear that he had a campaign office at 2958 Islington Avenue, no amount in respect of rent for this space was included.

7. Third, Mammoliti accepted a contribution in excess of the prescribed amount. Moreover, Mammoliti failed to keep proper records of contributions provided to his election campaign.

8. Each of these reasons independently constitutes reasonable grounds for believing that Mammoliti has contravened a provision of the *MEA*. Consequently, the Compliance Audit Committee (the "Committee") should order a compliance audit of Mammoliti's election campaign finances.

PART II - ISSUES AND LAW

9. These submissions will address four issues:

- (a) The standard for ordering a compliance audit;
- (b) Mammoliti having improperly incurred campaign expenses exceeding the prescribed limit;
- (c) Mammoliti's failure to include any amount in respect of rent for a campaign office at 2958 Islington Avenue; and

- (d) Mammoliti's improper acceptance of a contribution in excess of the prescribed maximum contribution, and his failure to keep proper records of contributions received.

A. THE STANDARD FOR ORDERING A COMPLIANCE AUDIT

10. Where an elector believes on reasonable grounds that a candidate has contravened a provision of the *MEA* that relates to election campaign finances, the elector may apply for a compliance audit of the candidate's election finances.

Reference: *MEA*, s. 81(1)

11. The standard for what constitutes "reasonable grounds" for a compliance audit has been described in the same terms as the standard for obtaining a search warrant. Courts have repeatedly adopted the characterization of "reasonable grounds" set out by Justice Hill in *R. v. Sanchez*:

Judicially interpreted, the standard is one of credibly based probability...

Mere suspicion, conjecture, hypothesis or "fishing expeditions" fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude, it must be recognized that reasonable grounds is not to be equated with proof beyond a reasonable doubt or a prima facie case.... The appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common-sense probability as to the existence of the facts and inferences asserted.

Not only must the [appellant] subjectively or personally believe in the accuracy and credibility of the grounds of belief, but... [the standard] also requires that the [appellant] establish that, objectively, reasonable grounds in fact exist. In other words, would a reasonable person, standing in the shoes of the [appellant], have believed that the facts probably existed as asserted and have drawn the inferences therefrom submitted by the [appellant].

Reference: *R. v. Sanchez et al.* (1994), 20 O.R. (3d) 357 (Ont. Ct. (Gen. Div.)) at paras. 30-32, as quoted in *Fuhr v. Perth South (Township)*, 2011 ONCJ 413 at para. 22, Tab C of the Submissions of the Applicant, David DePoe

12. The threshold for ordering a compliance audit is a low one. In *Vaughan (City) v. DeFrancesca et al.*, the Ontario Court of Justice noted as follows:

The test then, is not if council believes there are reasonable grounds the Act has been contravened, but whether the elector had reasonable grounds to believe there had been a contravention. The obligation by council then is to determine if the elector is acting on mere conjecture or suspicion. Is this just a fishing expedition? If the elector is acting on conjecture, suspicion or merely proceeding on a fishing expedition, then that would not constitute reasonable grounds. On the other hand, reasonable grounds is not that high a burden of proof as is proof beyond a reasonable doubt. Thus it is clear that reasonable grounds to believe that the elections finance provisions of the Act have been violated is a low standard.... [emphasis added]

Reference: *Vaughan (City) v. DeFrancesca et al.*, 2008 ONCJ 762 at para. 8, Tab D of the Submissions of the Applicant, David DePoe

13. A low standard for ordering a compliance audit is appropriate, as the decision to order a compliance audit is merely the beginning of an investigative process, rather than a finding of any wrongdoing.

Reference: *Vaughan (City) v. DeFrancesca et al.*, 2008 ONCJ 762 at para. 8, Tab D of the Submissions of the Applicant, David DePoe

14. In determining whether there are reasonable grounds to believe that a provision of the *MEA* has been violated, it is not the responsibility of the Committee to conduct the audit or determine whether a provision of the *MEA* has in fact been breached. As Justice Bellefontaine recently held in *Dickerson v. Compliance Audit Committee of the City of Pickering*, once a complaint discloses reasonable grounds for a compliance audit, it is not the role of the Court (or the Committee) at this initial stage to accept the candidate's statements which would negate the need for a compliance audit.

Reference: *Jackson v. Vaughan (City)* (2009), 59 M.P.L.R. (4th) 55 (Ont. Sup. Ct.) at para. 68, aff'd *Jackson v. Vaughan (City)*, 2010 ONCA 118, Tab E of the Submissions of the Applicant, David DePoe

Dickerson v. Compliance Audit Committee of the City of Pickering, (December 21, 2011, Ont. Ct. J.) at para. 22, Tab F of the Submissions of the Applicant, David DePoe

15. Once the Committee has determined that there are reasonable grounds to believe that a provision of the *MEA* has been contravened, a compliance audit follows. There is little discretion to decide whether a compliance audit should be ordered once reasonable grounds have been found to exist.

Reference: *Fuhr v. Perth South (Township)*, 2011 ONCJ 413 at para. 42, Tab C of the Submissions of the Applicant, David DePoe

Mastroguiseppe v. Vaughan (City), 2008 ONCJ 763 at para. 62, Tab G of the Submissions of the Applicant, David DePoe

B. MAMMOLITI INCURRED EXPENSES OVER HIS CAMPAIGN LIMIT

16. The first basis for ordering a compliance audit is that Mammoliti incurred expenses which exceeded his prescribed spending limit.

17. Section 67(1) of the *MEA* provides that “costs incurred for goods or services by or on behalf of a person wholly or partly for use in his or her election campaign are expenses.”

Reference: *MEA*, s. 67(1)

18. Section 76(1) of the *MEA* specifies that a candidate’s campaign expenses may not exceed a prescribed maximum amount, which is calculated in accordance with a particular formula. The formula varies based on the number of electors entitled to vote for the office for which the candidate is nominated.

Reference: *MEA*, s. 76(1), (4)

19. Certain specified expenses are excluded from the maximum expenditure amount set out in s. 76(1) of the *MEA*. Expenses specifically excluded from the limit are:

- (a) Audit and accounting fees;
- (b) The cost of holding fund-raising functions;
- (c) The cost of holding parties and making other expressions of appreciation;
- (d) Expenses relating to a recount;
- (e) Expenses relating to proceedings involving controverted elections;
- (f) Expenses relating to a compliance audit; and
- (g) Expenses that are incurred by a candidate with a disability, are directly related to the disability, and would not have been incurred but for the election to which the expenses relate.

Reference: *MEA*, s. 76(2)

20. Other than the specified expenses listed above, all expenses incurred on goods or services are subject to the expense limit set out in s. 76(4) of the *MEA*.

Reference: *MEA*, s. 76(5), 67(2)

21. With respect to his campaign for city councillor, Mammoliti was subject to a spending limit of \$27,464.65.

Reference: Financial Statement – Auditor’s Report, Form 4, dated September 29, 2011, Record of the Applicant, Tab 1, p. 13

22. According to Mammoliti’s filed Form 4 Financial Statement, his campaign expenditures that were subject to a spending limit totalled \$25,848.09.

Reference: Financial Statement – Auditor’s Report, Form 4, dated September 29, 2011, Record of the Applicant, Tab 1, p. 13

23. However, the receipts contained in Mammoliti's filings show that Mammoliti spent more than this on expenses that are subject to the spending limit during his campaign for city councillor.

24. In particular, an analysis of Mammoliti's filings, contained at Tab B of these submissions, indicates that he underreported his expenses in a number of categories.

25. For example, although Mammoliti only claimed expenses relating to office expenses and phone and internet totalling \$7,054.38, an analysis of the receipts included with Mammoliti's filings indicates that he spent a total of \$13,216.00 relating to office expenses and phone and internet during his campaign for councillor.

Reference: Financial Statement – Auditor's Report, Form 4, dated September 29, 2011,
Record of the Applicant, Tab 1, p. 14

Analysis of Expenses, Submissions of the Applicant, David Depoe, Tab B

26. Similarly, Mammoliti only claimed expenses relating to advertising and brochures totalling \$5,731.30. However, the receipts contained within Mammoliti's filings show that expenditures with respect to these categories totalled \$8,695.69.

Reference: Financial Statement – Auditor's Report, Form 4, dated September 29, 2011,
Record of the Applicant, Tab 1, p. 14

Analysis of Expenses, Submissions of the Applicant, David Depoe, Tab B

27. Overall, the analysis contained at Tab B indicates that Mammoliti actually spent \$31,638.71 on purchases which were subject to his expense limit. This amount represents approximately \$5,800 more than he reported spending in his filings and approximately \$4,200 over his maximum expenditures. Indeed, these figures are, if anything, conservative, as the analysis at Tab B includes figures that are lower in certain categories subject to the expenditure limit (e.g. signs) than the expenditures reported by Mammoliti.

28. These facts give rise to reasonable grounds to believe that Mammoliti incurred expenses that were in excess of the prescribed spending limit, contrary to the *MEA*.

C. MAMMOLITI FAILED TO ACCOUNT FOR THE FAIR MARKET VALUE OF HIS CAMPAIGN OFFICE RENTAL

29. A second independent basis for ordering a compliance audit is that Mammoliti failed to include the fair market value of rent his campaign office in his election campaign expenses.

30. As noted above, pursuant to s. 67(1) of the *MEA*, “costs incurred for goods or services by or on behalf of a person wholly or partly for use in his or her election campaign are expenses.”

Reference: *MEA*, s. 66(7)

31. Section 67(2) of the *MEA* specifically includes “the value of contributions of goods and services” as an expense within the meaning of the *MEA*. Pursuant to s. 66(1) of the *MEA*, contributions are defined as “money, goods and services given to and accepted by or on behalf of a person for his or her election campaigns”. Consequently, goods and services donated to an election campaign are expenses within the meaning of the *MEA*, subject to certain specified exceptions (such as the value of services provided by voluntary unpaid labour).

Reference: *MEA*, s. 66(1), 67(2)

32. Pursuant to s. 66(3) of the *MEA*, contributions to election campaigns are to be valued at the fair market value of those goods and services. Section 66(3) provides as follows:

66. (3) The value of goods and services provided as a contribution is,

(a) if the contributor is in the business of supplying these goods and services, the lowest amount the contributor charges the general public in the same market area for similar goods and services provided at or about the same time;

(b) if the contributor is not in the business of supplying these goods and services, the lowest amount a business providing similar goods or services charges the general public for them in the same market area at or about the same time.

Reference: *MEA*, s. 66(3)

33. It is clear that office space is a good within the meaning of the *MEA* and that the fair market value of renting office space must be included in a candidate's filings.

34. In *Lyras v. Heaps*, the Ontario Court of Justice considered an appeal from a decision of the Committee not to grant an application for a compliance audit which was based, *inter alia*, on the allegation that a candidate had paid less than fair market value for office space. Although the Court upheld the decision not to order a compliance audit on the basis of the record before it, the Court proceeded on the basis that the fair market value of office expenses must be included in a candidate's expenses.

Reference: *Lyras v. Heaps*, 2008 ONCJ 524 at paras. 41-43, Tab H of the Submissions of the Applicant, David DePoe

35. In the present case, Mammoliti's filings and other evidence disclose reasonable grounds to believe that Mammoliti used the premises located at 2958 Islington Avenue as a campaign office. Specifically:

- (a) Numerous invoices and receipts contained in Mammoliti's filings are addressed to "Giorgio Mammoliti Campaign, 2958 Islington Avenue" or simply "2958 Islington Avenue";

Reference: Receipts Filed by Mammoliti – First Filing, Record of the Applicant, Tab 2, p. 66, 76-79 102-116

- (b) Mammoliti's filings include expenses specifically relating to the use of that office in respect of his campaign, including expenses for gas and business insurance for that location; and

Reference: Receipts Filed by Mammoliti – First Filing, Record of the Applicant, Tab 2, p. 106, 108

- (c) An article from insidetoronto.com dated October 25, 2010, refers to Mammoliti hosting "a spirited victory party at his campaign headquarters at 2958 Islington Ave. between Steeles and Finch avenue".

Reference: Article from insidetoronto.com dated October 25, 2010, Record of the Applicant, Tab 4

36. Although the evidence shows that Mammoliti used the space at 2958 Islington Avenue as a campaign office, Mammoliti's filings do not include any invoices or receipts that either document that rent was paid in respect of that location or that disclose the fair market value of renting that location.

37. Because Mammoliti failed to provide any invoices or receipts relating to the payment of rent for the use of 2958 Islington Avenue, there are reasonable grounds to believe that he contravened a number of provisions of the *MEA*. Specifically, that are reasonable grounds to believe that:

- (a) Mammoliti failed to properly value the contribution of the use of the space as his campaign office, contrary to s. 69(1)(d) of the *MEA*;
- (b) No receipt was issued by Mammoliti in respect of the use of the space as his campaign office, contrary to s. 69(1)(e) of the *MEA*;

- (c) Mammoliti failed to disclose all expenses in his financial filings, contrary to s. 78 of the *MEA*;
- (d) Mammoliti likely received contributions from a single contributor in excess of a total of \$750, contrary to s. 71(1) of the *MEA*; and
- (e) Had Mammoliti properly included the fair market value of renting the office space as required, he would likely have exceeded his maximum expenditure limit, contrary to s. 76(4) of the *MEA*.

Reference: *MEA*, s. 69(1)(d) and (e), 71(1), 76(4), 78

38. Consequently, on the basis of that there are reasonable grounds for believing that Mammoliti violated the *MEA* by failing to properly account for the contribution of the use of his campaign headquarters at 2958 Islington Avenue, the Committee should order a compliance audit.

D. MAMMOLITI IMPROPERLY ACCEPTED ONE DONATION AND FAILED TO KEEP PROPER RECORDS OF OTHERS

39. A third distinct basis for ordering a compliance audit is that Mammoliti improperly accepted certain contributions and failed to keep adequate records of others.

40. Section 71(1) of the *MEA* provides that “[a] contributor shall not make contributions exceeding a total of \$750 to any one candidate in an election.”

Reference: *MEA*, s. 71(1)

41. Mammoliti’s filings indicate that he accepted a contribution in the amount of \$1,250.00. This is a contribution in excess of the prescribed amount set out in s. 71(1) of the *MEA*. Pursuant to s. 69(1)(m), a candidate must ensure “that a contribution of money made or received in

contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention". There is no evidence that such contribution was returned, as it was included in Mammoliti's final filing dated September 29, 2011.

Reference: Financial Statement – Auditor's Report, Form 4, dated September 29, 2011,
Record of the Applicant, Tab 1, p. 19

MEA, s. 71(1)

42. Mammoliti also failed to keep adequate records as required by the *MEA*. Pursuant to s. 69(1)(f) of the *MEA*, a candidate is required to keep records of every contributor's name and address. However, two of the contributions listed in Mammoliti's filings (including the contribution of \$1,250 discussed above) are not associated with any name or address in Mammoliti's filings, and five more are not associated with any address.

Reference: *MEA*, s. 69(1)(f)

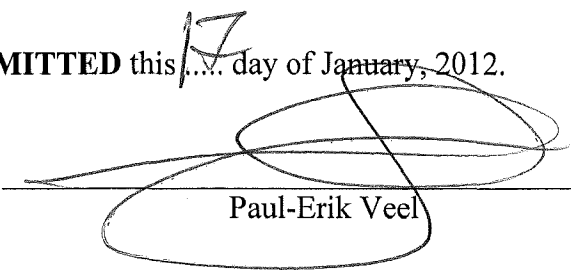
Financial Statement – Auditor's Report, Form 4, dated September 29, 2011,
Record of the Applicant, Tab 1, p. 19

43. These considerations constitute additional independent grounds for reasonably believing that Mammoliti contravened provisions of the *MEA*.

PART III - RELIEF REQUESTED

44. The Applicants respectfully requests that this Committee order a compliance audit of Mammoliti's election campaign finances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17 day of January, 2012.



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TEXT OF STATUTES, REGULATIONS & BY - LAWS

Municipal Elections Act, 1996, S.O. 1996 c. 32, Sched.

66. (1) For the purposes of this Act, money, goods and services given to and accepted by or on behalf of a person for his or her election campaign are contributions.

(2) Without restricting the generality of subsection (1), the following rules apply in determining whether an amount is a contribution:

1. The following amounts are contributions:

- i. an amount charged for admission to a fund-raising function,
- ii. if goods and services are sold at a fund-raising function for more than their market value, the difference between the amount paid and market value,
- iii. if goods and services used in a person's election campaign are purchased for less than their market value, the difference between the amount paid and market value, and
- iv. any unpaid but guaranteed balance in respect of a loan under section 75.

2. The following amounts are not contributions:

- i. the value of services provided by voluntary unpaid labour,
- ii. the value of services provided voluntarily, under the person's direction, by an employee whose compensation from all sources for providing them does not exceed the compensation the employee would normally receive for the period the services are provided,
- iii. an amount of \$10 or less that is donated at a fund-raising function,
- iv. the value of political advertising provided without charge on a broadcasting undertaking as defined in section 2 of the Broadcasting Act (Canada), if,
 - A. it is provided in accordance with that Act and the regulations and guidelines made under it, and
 - B. it is provided equally to all candidates for office on the particular council or local board,
- v. the amount of a loan under section 75.

(3) The value of goods and services provided as a contribution is,

(a) if the contributor is in the business of supplying these goods and services, the lowest amount the contributor charges the general public in the same market area for similar goods and services provided at or about the same time;

(b) if the contributor is not in the business of supplying these goods and services, the lowest amount a business providing similar goods or services charges the general public for them in the same market area at or about the same time.

(4) No employer shall impose any penalty on an employee who refuses to provide services voluntarily as described in subparagraph ii of paragraph 2 of subsection (2).

67. (1) For the purposes of this Act, costs incurred for goods or services by or on behalf of a person wholly or partly for use in his or her election campaign are expenses.

(2) Without restricting the generality of subsection (1), the following amounts are expenses:

1. The replacement value of goods retained by the person from any previous election and used in the current election.

2. The value of contributions of goods and services.

3. Audit and accounting fees.

4. Interest on loans under section 75.

5. The cost of holding fund-raising functions.

6. The cost of holding parties and making other expressions of appreciation after the close of voting.

7. Expenses relating to a recount.

8. Expenses relating to proceedings under section 83 (controverted elections).

- 8.1 Expenses relating to a compliance audit.

- 8.2 Expenses that are incurred by a candidate with a disability, are directly related to the disability, and would not have been incurred but for the election to which the expenses relate.

9. The nomination filing fee referred to in section 33.

(2.1) For greater certainty, the cost of holding fund-raising functions under paragraph 5 of subsection (2) does not include costs related to,

(a) events or activities that are organized for such purposes as promoting public awareness of a candidate and at which the soliciting of contributions is incidental; or

(b) promotional materials in which the soliciting of contributions is incidental.

(3) The expenses described in paragraphs 7, 8 and 8.1 of subsection (2) include expenses relating to recounts and proceedings under section 81 (compliance audit) and section 83 (controverted elections) from a previous election for an office on the same council or local board, if the expenses were incurred after the person's election campaign period for that office in the previous election ended under subparagraph ii of paragraph 4 or subparagraph ii of paragraph 5 of subsection 68 (1).

[...]

69. (1) A candidate shall ensure that,

(a) one or more campaign accounts are opened at a financial institution, exclusively for the purposes of the election campaign and in the name of the candidate's election campaign;

(b) all contributions of money are deposited into the campaign accounts;

(c) all payments for expenses, except for a nomination filing fee, are made from the campaign accounts;

(d) contributions of goods or services are valued;

(e) receipts are issued for every contribution and obtained for every expense;

(f) records are kept of,

(i) the receipts issued for every contribution,

(ii) the value of every contribution,

(iii) whether a contribution is in the form of money, goods or services, and

(iv) the contributor's name and address;

(g) records are kept of every expense including the receipts obtained for each expense;

(h) records are kept of any claim for payment of an expense that the candidate disputes or refuses to pay;

(i) records are kept of the gross income from a fund-raising function and the gross amount of money received at a fund-raising function by donations of \$10 or less;

(j) records are kept of any loan and its terms under section 75;

(j.1) the records described in clauses (f), (g), (h), (i) and (j) are retained by the candidate for the term of office of the members of the council or local board and until their successors are elected and the newly elected council or local board is organized;

(k) financial filings are made in accordance with sections 78 and 79.1;

(l) proper direction is given to the persons who are authorized to incur expenses and accept or solicit contributions on behalf of the candidate;

(m) a contribution of money made or received in contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention;

(n) a contribution not returned to the contributor under clause (m) is paid to the clerk with whom the candidate's nomination was filed; and

(o) an anonymous contribution is paid to the clerk with whom the candidate's nomination was filed.

[...]

71. (1) A contributor shall not make contributions exceeding a total of \$750 to any one candidate in an election.

(2) If a person is a candidate for more than one office, a contributor's total contributions to him or her in respect of all the offices shall not exceed \$750.

(2.1) A contributor shall not make contributions exceeding a total of \$5,000 to two or more candidates for office on the same council or local board.

(3) Subsections (1), (2) and (2.1) do not apply to contributions made to a candidate's own election campaign by the candidate or his or her spouse.

[...]

76. (1) An expense shall not be incurred by or on behalf of a person unless he or she is a candidate.

(2) An expense shall not be incurred by or on behalf of a candidate outside his or her election campaign period.

(3) An expense may only be incurred by a candidate or an individual acting under the candidate's direction.

(4) During the period that begins on the day a candidate is nominated under section 33 and ends on voting day, his or her expenses shall not exceed an amount calculated in accordance with the prescribed formula.

(4.1) The prescribed formula must be written so that the amount calculated under it varies based on the number of electors entitled to vote for the office for which the candidate is nominated.

(5) Subsection (4) does not apply in respect of expenses described in paragraphs 3 and 5 to 8.2 of subsection 67 (2).

(6) For the purpose of subsection (4), the number of electors is the greater of,

(a) the number determined from the voters' list from the previous election, as it existed on nomination day of the previous election, adjusted for applications under sections 24 and 25 that were approved as of that day; and

(b) the number determined from the voters' list for the current election, as it exists on nomination day of the current election, adjusted for applications under sections 24 and 25 that are approved as of that day.

(7) Within 10 days after nomination day, the clerk shall,

(a) calculate the maximum permitted by subsection (4) for each office for which nominations were filed with him or her; and

(b) give a certificate of the applicable maximum to each candidate. 1996, c. 32,

(8) The clerk's calculation is final.

77. For the purposes of documents to be filed under section 78,

(a) the filing date is,

(i) in the case of a regular election, the last Friday in March following the election, and

(ii) in the case of a by-election, 60 days after voting day;

(b) the supplementary filing date is the last Friday in September; and

(c) the supplementary reporting period is,

(i) in the case of a regular election, the six-month period following the year of the election, and

(ii) in the case of a by-election, the six-month period following the 60th day after voting day.

78. (1) On or before 2 p.m. on the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances,

(a) in the case of a regular election, as of December 31 in the year of the election; and

(b) in the case of a by-election, as of the 45th day after voting day.

(2) If the candidate's election campaign period continues during all or part of the supplementary reporting period, he or she shall, before 2 p.m. on the supplementary filing date, file a supplementary financial statement and auditor's report for the supplementary reporting period.

(3) A supplementary financial statement or auditor's report shall include all the information contained in the initial statement or report filed under subsection (1) and in any previous supplementary statement or report under subsection (2), as the case may be, updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period.

[...]

80. (1) A candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act,

(a) if he or she fails to file a document as required under section 78 or 79.1 by the relevant date;

(b) if a document filed under section 78 shows on its face a surplus, as described in section 79, and the candidate fails to pay the amount required by subsection 79 (4) to the clerk by the relevant date;

(c) if a document filed under section 78 shows on its face that the candidate has incurred expenses exceeding what is permitted under section 76; or

(d) if a document filed under section 79.1 shows on its face a surplus and the candidate fails to pay the amount required by subsection 79.1 (7) by the relevant date.

(2) In the case of a default described in subsection (1),

(a) the candidate forfeits any office to which he or she was elected and the office is deemed to be vacant; and

(b) until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which this Act applies

Expenses Reported	Date	Page of Record	Advertising	Bank Charges	Brochures	Meetings	Filing fee	Office	Phone Internet	Signs	Accounting	Fundraising costs	Compliance Audit	Brochures on loan	Voting day party & thank yous	Bank charges
<u>Expenses as Reported by Giorgio Mammoliti in Filings</u>																
Amount Report in First Filing			\$ 4,919.43	\$ 192.71	\$ -	\$ 840.70	\$ 100.00	\$ 5,288.48	\$ 1,349.32	\$ 13,384.48	\$ 2,486.00	\$ 17,196.94				
Amount Reported in Final Filing			\$ 4,919.23	\$ 192.71	\$ 832.07	\$ 840.70	\$ 100.00	\$ 5,705.06	\$ 1,349.32	\$ 11,909.00	\$ 4,181.00	\$ 33,539.62	\$ 10,801.21	\$ 1,710.97	\$ 1,463.47	\$ 28.00
<u>Expenses as Indicated in Receipts Contained in Giorgio Mammoliti's Filings</u>																
<u>Receipts contained in First Filing</u>																
Thing Technologies	30-Jul-10	Tab 2, p. 115						\$ 127.69								
Thing Technologies	9-Aug-10	Tab 2, p. 116						\$ 127.69								
Imperial Hardware	15-Aug-10	Tab 2, p. 77								\$ 1,808.00						
Staples	17-Aug-10	Tab 2, p. 120						\$ 200.70								
Oriental Food Mart	18-Aug-10	Tab 2, p. 118				\$ 26.91										
Rainbow Sign	27-Aug-10	Tab 2, p. 104								\$ 1,769.91	(installment 1/3)					
1 Dacc Trail -Fundraising	31-Aug-10	Tab 2, p. 68										\$ 1,500.00				
In-House Graphics	31-Aug-10	Tab 2, p. 71			\$ 2,803.97											
Rainbow Sign	1-Sep-10	Tab 2, p. 102								\$ 1,000.00	(installment 2/3)					
City of Toronto	1-Sep-10	Tab 2, p. 126						\$ 282.50								
Rainbow Sign	9-Sep-10	Tab 2, p. 103								\$ 3,463.55	(installment 3/3)					
Bagels and Buns	12-Sep-10	Tab 2, p. 117				\$ 90.00										
GV Group	13-Sep-10	Tab 2, p. 72						\$ 8.14								
In-House Graphics	14-Sep-10	Tab 2, p. 70			\$ 615.85											
Rogers	15-Sep-10	Tab 2, p. 65										\$ 114.78				
235 Kelso Cres - Fundraising	15-Sep-10	Tab 2, p. 66										\$ 1,500.00				
1 Dacc Trail -Fundraising	15-Sep-10	Tab 2, p. 67										\$ 1,500.00				
Michaels	17-Sep-10	Tab 2, p. 125						\$ 16.92								
Pizza Nova	21-Sep-10	Tab 2, p. 123-124				\$ 60.13										
Info Design	23-Sep-10	Tab 2, p. 114	\$ 564.89													
In-House Graphics	28-Sep-10	Tab 2, p. 121			\$ 4,710.97											
235 Kelso Cres - Fundraising	30-Sep-10	Tab 2, p. 112										\$ 1,000.00				
1 Dacc Trail -Fundraising	30-Sep-10	Tab 2, p. 112										\$ 1,500.00				
Kealy & Associates	4-Oct-10	Tab 2, p. 76										\$ 6,909.95				
Rogers	11-Oct-10	Tab 2, p. 79							\$ 163.84							
Rogers	12-Oct-10	Tab 2, p. 80							\$ 1,661.14							
1 Dacc Trail -Fundraising	15-Oct-10	Tab 2, p. 109										\$ 1,500.00				
235 Kelso Cres - Fundraising	15-Oct-10	Tab 2, p. 110										\$ 1,000.00				
OJCR Construction	26-Oct-10	Tab 2, p. 78								\$ 1,035.31						
Intact Insurance	1-Nov-10	Tab 2, p. 106						\$ 900.61								
Enbridge	5-Nov-10	Tab 2, p. 108						\$ 151.81								
Best Buy Mobile	8-Nov-10	Tab 2, p. 119										\$ 146.89				
Rogers	18-Nov-10	Tab 2, p.107										-\$ 26.94				
Suncor Energy	30-Nov-10	Tab 2, p. 105						\$ 3,359.18								
Motion Technology Solutions	undated	Tab 2, p. 69						\$ 2,700.65								
Misc expenses	Sept & Oct 2010	Tab 2, p. 73-75						\$ 576.28								

Expenses Reported	Date	Page of Record	Advertising	Bank Charges	Brochures	Meetings	Filing fee	Office	Phone Internet	Signs	Accounting	Fundraising costs	Compliance Audit	Brochures on loan	Voting day party & thank yous	Bank charges
First filing totals			\$ 564.89	\$ 192.71	\$ 8,130.79	\$ 177.04	\$ 100.00	\$ 8,452.17	\$ 1,824.98	\$ 9,076.77	\$ -	\$ 16,644.68	\$ -	\$ -	\$ -	\$ -
Receipts Contained in Final Filing																
Pizza Nova	10-Aug-10	Tab 3, p. 22				\$ 27.22										
Motion Technology Solutions	21-Sep-10	Tab 3, p. 7						\$ 254.25								
Home Depot and Staples	26-Sep-10	Tab 3, p. 24						\$ 121.37								
In-house print	28-Sep-10	Tab 3, p. 6			included above											
Motion Technology Solutions	1-Oct-10	Tab 3, p. 8						\$ 1,508.55								
Signarama	18-Oct-10	Tab 3, p. 21													\$ 28.25	
Miscellaneous	18-Oct-10	Tab 3, p. 31													\$ 134.69	
Mama Mia and Cdn Tire	18-Oct-10	Tab 3, p. 31													\$ 64.60	
Kealey and Associates	8-Nov-10	Tab 3, p. 12										\$ 3,780.00				
Toronto Hydro	24-Nov-10	Tab 3, p. 15						\$ 930.92								
vitoamati photography	30-Nov-10	Tab 3, p. 20													\$ 282.50	
Rogers	12-Dec-10	Tab 3, p. 11										\$ 1,397.47				
MPC	23-Dec-10	Tab 3, p. 10										\$ 115.26				
Suncor	31-Dec-10	Tab 3, p. 17						\$ 57.76								
Clazz Musical Productions	11-Jan-11	Tab 3, p. 9													\$ 762.75	
Rogers	12-Jan-11	Tab 3, p. 11										\$ 669.65				
The Royalton Hospitality	15-Jan-11	Tab 3, p. 35										\$ 12,031.78				
Ontario Court of Justice	19-Jan-11	Tab 3 p. 14						\$ 66.00								
Canada Post	20-Jan-11	Tab 3, p. 30													\$ 81.36	
Bernard Nayman	25-Jan-11	Tab 3, p. 25									\$ 2,486.00					
Posticino Ristorante	14-Apr-11	Tab 3, p. 32										\$ 1,274.64				
Cassels Brock	15-Apr-11	Tab 3, p. 33											\$ 2,476.96			
Bell Canada	25-May-11	Tab 3, p. 34										\$ 404.06				
Bernard Nayman	16-Jun-11	Tab 3, p. 36									\$ 1,695.00					
Rogers	9-Jul-11	Tab 3, p. 37										\$ 205.04				
Miscellaneous	Sept & Oct 2010	Tab 3, p. 23				\$ 153.29										
Final Filing Totals			\$ -	\$ -	\$ -	\$ 180.51	\$ -	\$ 2,938.85	\$ -	\$ -	\$ 4,181.00	\$ 19,877.90	\$ 2,476.96	\$ -	\$ 1,354.15	\$ -
First Filing and Final Filing Totals			\$ 564.89	\$ 192.71	\$ 8,130.79	\$ 357.55	\$ 100.00	\$ 11,391.02	\$ 1,824.98	\$ 9,076.77	\$ 4,181.00	\$ 36,522.58	\$ 2,476.96	\$ -	\$ 1,354.15	\$ -
Mammoliti's Spending Limit			\$ 27,464.65													
Mammoliti's Claimed Final Expenses Subject to Spending Limit			\$ 25,848.09													
Mammoliti's Claimed Final Expenses Not Subject to Spending Limit			\$ 51,724.27													
Mammoliti's Claimed Total Expenses			\$ 77,572.36													
Mammoliti's Final Expenses Subject to Spending Limit (per receipts)			\$ 31,638.71													
Mammoliti's Final Expenses Not Subject to Spending Limit (per receipts)			\$ 44,534.69													
Mammoliti's Final Expenses (receipts)			\$ 76,173.40													

Case Name:
Fuhr v. Perth South (Township)

Between
Roger Fuhr, (Appellant), and
The Corporation of the Township of Perth South,
(Respondent)

[2011] O.J. No. 4251

2011 ONCJ 413

File No. 3211 998 11 301 00

Ontario Court of Justice

K.L. McKerlie J.

Heard: June 27, 2011.
Judgment: August 26, 2011.

(49 paras.)

Municipal law -- Government -- Council members -- Elections -- Campaign financing -- Disclosure -- Appeal by Fuhr from the dismissal of his application for an audit of the campaign finances of the eight other candidates in a municipal election allowed in part -- Fuhr believed that some candidates had not opened separate bank accounts exclusively for campaign purposes -- The financial statements of five candidates revealed no income and no expenses and one candidate did indeed open a bank account exclusively for campaign purposes -- However, two candidates incurred expenses and yet showed no corresponding bank charges on their financial statements -- The Committee's decision with respect to those two candidates was not correct.

Appeal by Fuhr from the dismissal of his application for an audit of the campaign finances of the eight other candidates in a municipal election. Fuhr discovered that several candidates did not declare any bank charges. That led Fuhr to believe that it was doubtful that most of the candidates opened separate bank accounts exclusively for campaign purposes. However, his application for an audit of campaign finances was dismissed by the Compliance Audit Committee on the basis that there were minimal expenses incurred by some candidates and there were signed affidavits of completeness by the candidates.

HELD: Appeal allowed in part. The financial statements of five candidates revealed no income and no expenses. As a result, there were no reasonable grounds to believe that those five candidates contravened the Municipal Elections Act with regards to campaign finances. The Committee's decision was therefore appropriate with respect to those five candidates. Furthermore, there was evidence that one candidate did indeed open a bank account exclusively for campaign purposes. However, two candidates incurred expenses and yet showed no bank charges on their financial statements. It was reasonable to believe that there would have been corresponding bank charges and, accordingly, the Committee's decision with respect to those two candidates was not correct. A compliance audit was ordered with respect to the campaign finances of those two candidates.

Statutes, Regulations and Rules Cited:

Municipal Elections Act, 1996, S.O. 1996, c. 32, ss. 66-68, s. 69(1), ss. 70-80, s. 81, s. 81(6), s. 81.1, s. 82.1, s. 92(5)

Appeal From:

On appeal from the decision of the Township of Perth South Compliance Audit Committee on April 26, 2011, which decision was reaffirmed by the Committee on May 9, 2011.

Counsel:

Appellant, Self-represented.

M. Khami, Harrison Pensa LLP, for the Respondent.

K.L. McKERLIE J.:-

Nature of the Appeal

1 Pursuant to s. 81(6) of the Municipal Elections Act, 1996, S.O. 1996, c. 32, the appellant, Roger Fuhr, appeals the April 26, 2011 decision of the Township of Perth South Compliance Audit Committee in which the Committee rejected Mr. Fuhr's application for an audit of the election campaign finances of the other 8 candidates in the 2010 municipal election in the Township of Perth South.

Legislative Framework

2 The Municipal Elections Act applies to "an election to an office on the council of a local municipality". The requirements respecting "Election Campaign Finances" are specifically delineated in ss. 66 to 82.1 of the Act.

3 Pursuant to s. 69(1), a candidate shall ensure, inter alia, that:

- (a) one or more campaign accounts are opened at a financial institution, exclusively for the purposes of the election campaign and in the name of the candidate's election campaign;
- (b) all contributions of money are deposited into the campaign accounts;

- (c) all payments for expenses, except for a nomination filing fee, are made from the campaign accounts;
- (d) contributions of goods or services are valued;
- (e) receipts are issued for every contribution and obtained for every expense;
- (f) ...

4 This section also delineates a candidate's duty to keep records and to make financial filings under ss. 78 and 79.1.

5 Pursuant to s. 78, a candidate is required to file a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances. An auditor's report is not required "if total contributions received and total expenses incurred in the election campaign up to the end of the relevant period are each equal to or less than \$10,000".

6 The penalties for failing to comply with the filing requirements are set out in ss. 80(2) and 92(5).

7 The "Compliance Audit" provisions of the Municipal Elections Act are set out in ss. 81 and 81.1. The relevant provisions are as follows:

81(1) Application

An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

81(2) Requirements

An application for a compliance audit shall be made to the clerk of the municipality ... and it shall be in writing and shall set out the reasons for the elector's belief.

81(4) Application to be forwarded to committee

Within 10 days after receiving the application, the clerk of the municipality ... shall forward the application to the compliance audit committee established under section 81.1 and provide a copy of the application to the council.

81(5) Decision

Within 30 days after receiving the application, the committee shall consider the application and decide whether it should be granted or rejected.

81(6) Appeal

The decision of the committee may be appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision the committee could have made.

81(7) Appointment of auditor

If the committee decides under subsection (5) to grant the application, it shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

81(9) Duty of auditor

The auditor shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and shall prepare a report outlining any apparent contravention by the candidate.

81(13) Costs

The municipality ... shall pay the auditor's costs of performing the audit.

81(14) Power of committee

The committee shall consider the report within 30 days after receiving it and may,

- (a) if the report concludes that the candidate appears to have contravened a provision of this Act relating to election campaign finances, commence a legal proceeding against the candidate for the apparent contravention;
- (b) if the report concludes that the candidate does not appear to have contravened a provision of this Act relating to election campaign finances, make a finding as to whether there were reasonable ground for the application.

81(15) Recovery of Costs

If the report indicates that there was no apparent contravention and the committee finds that there were no reasonable grounds for the application, the council ... is entitled to recover the auditor's costs from the applicant.

81(17) Saving provision

This section does not prevent a person from laying a charge or taking any other legal action, at any time, with respect to an alleged contravention of a provision of this Act relating to election campaign finances.

8 In his April 5, 2011 Notice of Application for a compliance audit into the election campaign finances of the other 8 candidates in the 2010 municipal election in the Township of Perth South, Roger Fuhr states:

As you are aware, I attended the Township Office on March 30, 2011 and requested that you allow me to peruse the Form 4's from the election. My investigation revealed a significant anomaly that needs to be further reviewed. Specifically, seven of the nine candidates did not declare any bank charges on page 2 of 8 of the Form 4. One candidate showed a bank charge of only 75 cents. This would lead me to believe that it is doubtful that most of these individuals opened a separate account at a financial institution exclusively for campaign purposes in the name of the candidate's election campaign.

...

It is my position that if the named candidates did indeed acquire a bank account according to the rules, then they most surely would have had bank charges to claim on the Form 4. If they in fact had the proper account and simply failed to show the charges, this could likely be fixed. However, I find it rather odd that there is nowhere on the Form 4 to attach such bank statements. If there was a requirement to attach them, then anyone would be aware of whether or not a given candidate did in fact acquire the appropriate account. My recommendation to the committee at this point would be to request that the list of candidates all provide copies of their bank account statements, as it is my opinion that this is the only way to clarify whether or not they complied to the stipulations of the Act.

[Reference: Exhibit "D" of the Affidavit of Tim Ivanyshyn, Chief Administrative Officer of the Township of Perth South, sworn June 3, 2011]

9 On April 26, 2011, the Compliance Audit Committee, comprised of Howard Minett, Jim Brown, Ewart Bancroft and Patricia Taylor, met to consider Mr. Fuhr's April 5, 2011 application. At the meeting, Mr. Fuhr was given an opportunity to make oral submissions. The Committee went into closed session. After considering the Applicant's written and oral submissions, the Committee came out of closed session and provided the following unanimous decision:

That the decision of the Committee is to reject Mr. Fuhr's application and request for audit of the candidates' election financial reports based on the following:

- a) nothing to audit for some of the Candidates' financial reports filed with the Clerk;
- b) minimal expenses incurred by some of the Candidates;
- c) signed affidavits of completeness by the Candidates; and
- d) no penalty befits the nature of the offence.

[Reference: Paragraphs 9-13 and Exhibit "E" to Ivanyshyn Affidavit]

10 On April 29, 2011 Mr. Fuhr made a supplementary application requesting a compliance audit specifically with respect to the election campaign finances of candidate Robert Wilhelm. In his supplementary application, Mr. Fuhr alleged that Mr. Wilhelm has "publically acknowledged" that he contravened the s. 69(1) requirement that a candidate ensure that one or more campaign accounts are opened at a financial institution. [Reference: Paragraph 15 and Exhibit "F" to Ivanyshyn Affidavit]

11 On May 9, 2011, the Compliance Audit Committee met to consider the merits of Mr. Fuhr's April 29, 2011 supplementary application in a public meeting. The Committee determined that the application was "substantially the same" as the April 5, 2011 application and rejected it. [Reference: Paragraphs 15-17 of Ivanyshyn Affidavit]

Standard of Review

12 In *Lyras v. Heaps*, [2008] O.J. No. 4243 (Ont. C.J.), Lane J. succinctly summarized the law respecting the appropriate standard of judicial review and its application to appeals from decisions respecting compliance audits under the Municipal Elections Act:

The Supreme Court of Canada in its recent decision of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, determined that there ought to be only two standards of judicial review, correctness and reasonableness. When applying the correctness standard, a reviewing court will not show deference to the decision makers' reasoning process but will undertake its own analysis of the question, decide whether it agrees with the decision under appeal and, if not, will substitute its own view and provide the correct answer. A court conducting a review for reasonableness will inquire into the qualities that make a decision reasonable, including the existence of justification, transparency and intelligibility in the decision-making process, and whether the decision falls within the range of acceptable outcomes which are defensible on the facts and the law. This deferential standard involves respect for the need for particular expertise and experiences in decision making, and the legislative choice to leave some matters in the hands of administrative decision makers. [paragraph 7]

...

The jurisprudence dealing with the standard of review applicable to appeals from decisions about compliance audits under the MEA is mixed. ... In *Savage* [*Savage v. Niagara Falls (City)*, [2005] O.J. No. 5694], Duncan J. agreed with Culver J. [in *Chapman v. Hamilton (City)*, [2005] O.J. No. 1943] that the MEA grants the appellate court the widest possible power of review on appeal. He also noted that the decision before him was made in camera, with no record and no reasons given. In his view, "it is implicit ... in a deferential or more limited approach, that the reviewing court must have some record of the reasons or the process that brought about the decision. Where that is lacking, there is nothing to show deference to." [paragraph 11]

Sheppard J. in *Sean Harrison v. the Toronto District School Board and Michael Coteau*, unreported decision of the O.C.J. released June 19, 2008, had occasion to

consider a decision not to grant a compliance audit made by the Compliance Audit Committee delegated to perform that function by the Toronto District School Board. He found that the Committee consisted of two chartered accountants and a lawyer in the municipal field, all of whom "have extensive knowledge of the election campaign finance provisions of the Municipal Elections Act, 1996". As "the Committee was appointed by a non expert School Board and the City because of their expertise", he found that far greater deference was owed to their decision than to that of the political bodies in Chapman and Savage.

13 In *Lyras v. Heaps*, Lane J. concluded that "the professional expertise of the specialized Compliance Audit Committee appointed by the Toronto City Council distinguishes this case from those of Chapman and Savage". At paragraph 17, she held that:

Their function is to screen applications for such audits, so that only those which show "reasonable grounds" that a contravention occurred will proceed. This function is a narrow one, the span of their authority is limited to the MEA, and the issues they have to decide are questions of mixed law and facts. Applicants and candidate respondents have full opportunity to present their positions and relevant materials to the Committee in both oral and written submissions, and to answer any questions put by Committee members. Although the Committee does not issue reasons for its vote, the process of considering the application is an open and transparent one. The Committee does not deliberate in private and, like other municipal committees, their decision is made by motion on the record. In these circumstances, I have concluded that considerable deference must be shown to the decision of the Committee.

14 The issue of the appropriate standard of review was not raised on this appeal, nor was it addressed by counsel for the Respondent municipality, who did not provide any case law at all on any issue. Unlike the appeals in Chapman, Savage and Lyras, I do not have much of an evidentiary record before me. The only information I have about the Township of Perth South Compliance Audit Committee consists of the names of its members, the Minutes of its April 26, 2011 meeting and the general information contained in the Ivanyshyn Affidavit, which I have previously summarized.

15 The April 26, 2011 Minutes disclose that the Committee went into "Closed Session" from 1:10 pm to 2:15 pm "for advice that is Solicitor-Client privileged information regarding the application and the process". When the Compliance Audit Committee reconvened at 2:15 pm in order to continue with its deliberations, the following motions were made:

1. That the application by Mr. Roger Fuhr be tabled for consideration.
2. That the Election Financial Reports (Form 4's) of each Candidate named in the application be tabled for consideration.
3. That the Application and the Election Financial Reports (Form 4's) of each Candidate named in the application be considered.
4. That the Committee call upon the Applicant, Mr. Roger Fuhr, to come forward and address the Committee.

16 The Minutes summarize Mr. Fuhr's presentation as follows:

Mr. Fuhr addressed the Committee and outlined the basis for his application. Mr. Fuhr is seeking an audit of the Candidates' financial statements on the basis it appears they have not opened a bank account for election purposes.

17 The unanimous decision of the Compliance Audit Committee as recorded in its Minutes was as follows:

That the decision of the Committee is to reject Mr. Fuhr's application and request for audit of the candidates' election financial reports based on the following:

- e) nothing to audit for some of the Candidates' financial reports filed with the Clerk;
- f) minimal expenses incurred by some of the Candidates;
- g) signed affidavits of completeness by the Candidates; and
- h) no penalty befits the nature of the offence.

18 In this appeal, I have not been provided with any information respecting the specific expertise of the Committee, nor is there any record of the proceedings before the Committee, other than the summary provided in the Minutes. Given that particular context, I apply the "correctness standard" of review.

Issue

19 The issue to be determined on this appeal is whether there were reasonable grounds to believe that the named candidates contravened a provision of the Municipal Elections Act relating to election campaign finances. Specifically, s. 69(1) which requires a candidate to ensure that "one or more campaign accounts are opened at a financial institution, exclusively for the purposes of the election campaign" and "all payments for expenses, except for a nomination fee, are made from the campaign accounts".

Law

20 In *Jackson v. Vaughan (City)*, [2010] O.J. No. 588, the Ontario Court of Appeal considered the constitutionality of s. 81 of the Municipal Elections Act and provided guidance and direction respecting the election campaign finance provisions of the Act. The Court of Appeal affirmed the "thorough, thoughtful reasons" of Lauwers J. in *Jackson v. Vaughan (City)*, [2009] O.J. No. 1057 (Ont. S.C.) and dismissed the appeal. The Court noted that the election campaign finance rules operate on a system of self-reporting and that under s. 78, candidates are required to file a financial statement. The Court held that when an application for a compliance audit is made:

The requirement that the applicant have "reasonable grounds" (s. 81(1)) prevents frivolous and vexatious applications. The council [now compliance audit committee] has little discretion in deciding whether to order a compliance audit once reasonable grounds have been found to exist. However, the applicant can be required to pay the auditor's costs if the compliance audit report indicates that there was "no apparent contravention" and the council "finds that there were no reasonable grounds for the application". [Paragraph 28]

21 At paragraph 32, the Court of Appeal held that phrase "reasonable grounds" is not impermissibly vague and observed that, "the law is replete with provisions using the standard of 'reasonable grounds' and courts have little difficulty in applying the term to specific fact situations"

22 The issue of what the "reasonable grounds" standard means within the context of a request for a compliance audit was specifically addressed in the Chapman and Lyras decisions, both of which adopted the following description provided by Hill J. in *R. v. Sanchez and Sanchez* (1994), 93 C.C.C. (3d) 357 at paragraphs 28-30 (references omitted):

Judicially interpreted, the standard is one of credibly based probability ...

Mere suspicion, conjecture, hypothesis or "fishing expeditions" fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude, it must be recognized that reasonable grounds is not to be equated with proof beyond a reasonable doubt or a prima facie case. ... The appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common-sense probability as to the existence of the facts and inferences asserted.

Not only must the [appellant] subjectively or personally believe in the accuracy and credibility of the grounds of belief, but ... [the standard] also requires that the [appellant] establish that, objectively, reasonable grounds in fact exist. In other words, would a reasonable person, standing in the shoes of the [appellant], have believed that the facts probably existed as asserted and have drawn the inferences therefrom submitted by the [appellant].

23 If reasonable grounds are found to exist, the remedy on appeal is to order a compliance audit pursuant to s. 81 of the Municipal Elections Act. As Lauwers J. held in *Jackson v. Vaughan (City)*, [2009] O.J. No. 1057 (Ont. S.C.) at paragraph 68:

In terms of the statutory structure, the role of the Ontario Court Judge in an appeal under s. 81(3.3) [now 81(6)] of the Act is limited. The judge's responsibility is to deal with the issue of reasonable grounds. It is the responsibility of other actors in the statutory framework, not the Ontario Court Judge at this stage, to conduct the audit, evaluate the results, authorize a prosecution, carry it out and try the case.

24 As to the eventual decision to authorize a prosecution, Lauwers J. noted that there is some discretion in that decision and held that:

A decision based upon concerns about maintaining the confidence of the electorate, the integrity of the election process and the values of public accountability and transparency would be consistent with the statutory purpose ... A decision taking into account the scale of the apparent contraventions would be taking into account relevant considerations ... A decision to prosecute the slightest apparent contravention would run into problems of unreasonableness". [Reference: Paragraphs 98-102]

Factual Background and Analysis

25 At the time of each candidate's registration or shortly thereafter, Tim Ivanyshyn, Chief Administrative Officer for the Township of Perth South, met with each of the candidates for the 2010 Township of Perth South municipal election and provided each candidate with an information package outlining their duties and obligations, including the candidate's responsibility to ensure that one or more campaign accounts were opened at a financial institution, exclusively for the purposes of the election campaign and in the name of the candidate's election campaign. He also provided the candidates with a completed Form 1 (Nomination Paper), which the candidates required to open a bank account for this purpose. Further information respecting their duties and obligations was provided to candidates at a June 24, 2010 information session. Paper copies of the documents presented at the information session, including the "Municipal Elections 2010 Guide", were also forwarded directly to all candidates. A checklist of "Financial Duties" is provided at page 38 of the Guide. It states, in part:

Every candidate must do the following:

- * open a separate account at a financial institution exclusively for campaign purposes in the name of the candidate's election campaign;
- * deposit all contributions intact into the campaign account, including contributions made by the candidate and his or her spouse;
- * pay all campaign related expenditures from the campaign account (an exception to this rule is that the nomination filing fee will not be paid from the account, since the account cannot be used until after being nominated).

[Reference: Paragraphs 2-6 and Exhibits "A" and "B" of the Ivanyshyn Affidavit]

26 Each candidate for the Township of Perth South municipal election filed a Form 4 Financial Statement as required by s. 78 of the Municipal Elections Act. [Reference: Paragraph 8 and Exhibit "C" of the Ivanyshyn Affidavit]

27 In his affidavit sworn June 3, 2011, Mr. Ivanyshyn notes that three of the candidates in the 2010 municipal election were acclaimed and it is typical for candidates in Perth South to spend very little or no money on their campaigns given the small size of each community within the municipality. [Reference: Paragraphs 19 and 20 of Ivanyshyn Affidavit]

28 The relevant information disclosed by the Form 4 Financial Statements filed by the nine candidates is as follows, with the candidates listed in the order in which the Form 4's were attached in Exhibit "C" for ease of reference:

Candidate Stuart Arkett

Spending limit as issued by clerk: \$6,467.95

Total Campaign Period Income (Nomination fee refund): \$100.00

Total Campaign Period Expenses (Nomination filing fee): \$100.00

Excess of Income over Expenses: \$0.00

Candidate Bill Adams

Spending limit as issued by clerk: \$6,577.60

Total Campaign Period Income (Nomination fee refund): \$100.00

Total Campaign Period Expenses (Nomination filing fee): \$100.00

Excess of Income over Expenses: \$0.00

Candidate Catherine Barker

Spending limit as issued by clerk: \$6,577.60

Total Campaign Period Income (Nomination fee refund): \$100.00

Total Campaign Period Expenses (Nomination filing fee): \$100.00

Excess of Income over Expenses: \$0.00

Candidate Charles Armstrong

Spending limit as issued by clerk: \$6,278.40

Total Campaign Period Income: \$0.00

Total Campaign Period Expenses (Signs): \$50.89

(Attached was a receipt for \$50.89 relating to the signs with a notation by the candidate that "this was all I spent other than my nomination fee which has been returned".)

Candidate Donald Henderson

Spending limit as issued by clerk: \$6,278.40

Total Campaign Period Income (\$900.00 contributions from candidate and \$100.00 refund of nomination fee): \$1000.00

Total Campaign Period Expenses (\$293.80 advertising, \$0.75 bank charges, \$326.59 brochures, \$100.00 Nomination filing fee, \$100.00 office expenses; \$160.20 gas): \$981.34

Excess of Income over Expenses: \$18.66

Candidate James Aitcheson

Spending limit as issued by clerk: \$6,519.80

Total Campaign Period Income: \$0.00

Total Campaign Period Expenses: \$0.00

Excess of Income over Expenses: \$0.00

Candidate Elizabeth Armstrong

Spending limit as issued by clerk: \$6,577.60

Total Campaign Period Income: \$0.00

Total Campaign Period Expenses: \$0.00

Excess of Income over Expenses: \$0.00

Candidate Robert Wilhelm

Spending limit as issued by clerk: \$10,345.80

Total Campaign Period Income (contributions from candidate): \$1,807.50

Total Campaign Period Expenses (\$177.00 Advertising, \$1,170.00 signs, \$347.00 gas, \$113.50 Voting day party): \$1,807.50

Excess of Income over Expenses: \$0.00

Candidate Roger Fuhr

Spending limit as issued by clerk: \$10,246.35

Total Campaign Period Income (\$2,299.38 contributions from candidate, \$200.00 Nomination Fee refund): \$2,299.38 is the total shown on the form. However, I note that the total of those two amounts is actually \$2,499.38.

Total Campaign Period Expenses (\$11.70 Bank charges, \$200.00 Nomination filing fee, \$1,466.18 signs, \$423.75 magnets, \$197.75 door hangers): \$2,299.38

Excess of Income over Expenses: \$0.00 (although on the face of the document the mathematical result would be an "excess" of \$200.00)

29 None of the candidates for the Township of Perth South municipal election received contributions or incurred expenses in excess of \$10,000.00. As such, there was no requirement to attach an auditor's report to the Form 4.

30 A review of the Form 4 Financial Statements reveals that five candidates (Stuart Arkett, Bill Adams, Catherine Barker, James Aitcheson, and Elizabeth Armstrong) did not have any "Campaign Period Income" or "Campaign Period Expenses" other than the Nomination filing fee of \$100.00 and the refund of the nomination filing fee in the same amount.

31 Candidates are required to open a campaign bank account exclusively for the purposes of the election campaign and all payments for expenses, except for a nomination filing fee, are to be made from the campaign account.

32 In circumstances where the Form 4 Financial Statements reveal no income and no expenses (except the nomination filing fee and refund), there are no reasonable grounds to believe that those five candidates contravened a provision of the Municipal Elections Act relating to election campaign finances. The Compliance Audit Committee's decision to reject Mr. Fuhr's application for a compliance audit respecting those five candidates was appropriate.

33 I now turn to the Form 4's filed by the four candidates who did incur campaign expenses. Of the remaining four candidates, only three (Donald Henderson, Charles Armstrong and Robert Wilhelm) are the subject of this appeal by Mr. Fuhr as no one applied for a compliance audit of Mr. Fuhr's election campaign finances.

34 Donald Henderson was the only candidate who personally responded to the Notice of Appeal. He filed an affidavit and made a very brief oral submission. In his affidavit sworn June 9, 2011, Mr. Henderson stated that he "did follow the rules of the Municipal Elections Act regarding setting up a bank account for the sole purpose of the 2010 Municipal Election Campaign". Mr. Henderson's Form 4 shows Total Campaign Period Expenses of \$981.34, including a bank charge of \$0.75. He was the sole contributor to his campaign and contributed \$900.00 in addition to the \$100.00 nomination fee.

35 On the basis of all of the information, including the facts alleged in Mr. Fuhr's application, there are no reasonable grounds to believe that Candidate Donald Henderson contravened a provision of the Municipal Elections Act relating to election campaign finances. Specifically, the evidence establishes that Donald Henderson did open a bank account exclusively for campaign purposes. The Compliance Audit Committee's decision to reject Mr. Fuhr's application for a compliance audit respecting Candidate Donald Henderson was appropriate.

36 Charles Armstrong and Robert Wilhelm each had campaign period expenses. Mr. Armstrong listed a very modest \$50.89 for signs he made himself. Mr. Wilhelm listed expenses of \$1,807.50, which consisted of \$177.00 for advertising, \$1,170 for signs, \$347.00 for gas and \$113.50 for the voting day party. Neither candidate listed any expense for bank charges. Mr. Armstrong did not list any campaign period income. Mr. Wilhelm's Form 4 shows that he was the sole contributor to his campaign and his contributions were in the amount of \$1,807.50.

37 Section 69(1) of the Municipal Elections Act clearly and explicitly states that "a candidate shall ensure" that "one or more campaign accounts are opened at a financial institution, exclusively for the purposes of the election campaign and in the name of the candidate's election campaign" and

that "all contributions of money are deposited into the campaign accounts and "all payments for expenses, except for a nomination filing fee, are made from the campaign accounts".

38 The only other candidates who did incur Campaign Period Expenses (Donald Henderson and Roger Fuhr) each listed bank charges on the Form 4 Financial Statement.

39 The question to be asked is whether there are reasonable grounds to believe that Robert Wilhelm and/or Charles Armstrong contravened the requirement to open a campaign bank account given that they each incurred expenses required to be paid from their respective campaign account and yet showed no bank charges on the Form 4 Financial Statement.

40 Given the absence of an entry for bank charges on the Form 4, there would appear to be three possibilities:

1. A campaign account was opened at a financial institution and there were no bank charges incurred.
2. A campaign account was opened at a financial institution and bank charges were incurred, but not listed in the Form 4, perhaps because the amounts were thought to be trifling or insignificant.
3. A campaign account was not opened at a financial institution.

41 The threshold standard for a compliance audit is reasonable grounds, not a prima facie case. Is it reasonable to believe that if a campaign account was opened at a financial institution and expenses were paid from that account, there would be a corresponding bank charge, however modest in its amount? The answer is yes. As noted above, there are other possibilities, but those possibilities do not diminish the reasonable grounds set out in the application by Mr. Fuhr or reduce them to mere suspicion or conjecture.

42 As emphasized in *Jackson v. Vaughan (City)*, [2010] O.J. No. 588 (Ont. C.A.), there is little discretion in deciding whether to order a compliance audit once reasonable grounds have been found to exist.

43 The purpose of the election campaign finance requirements of the Municipal Elections Act is to underscore the core values of public accountability and transparency in the municipal elections. A compliance audit is a straightforward and effective procedure for achieving transparency and accountability.

44 As noted in the April 26, 2011 decision of the Compliance Audit Committee, the campaign period expenses incurred by the candidates were indeed "minimal". I also note that the sole contributors to the campaigns in question were the candidates themselves. However, while the doctrine of *de minimis non curat lex* ("the laws does not concern itself with trifles") may apply to a review of a decision whether to prosecute under s. 81(14), the issue at this stage of the review is simply whether the appellant had reasonable grounds to believe that the candidates contravened a provision of the Act relating to election campaign finances. [Reference: *Jackson v. Vaughan (City)*, [2009] O.J. No. 1057 (Ont. S.C.) at paragraphs 101-102]

45 Despite the modest expenses claimed by Candidates Charles Armstrong and Robert Wilhelm, I am unable to find that the Compliance Audit Committee reached the correct decision in rejecting the request for a compliance audit respecting these two candidates.

Conclusion

46 In summary, the issue on this appeal is whether there were reasonable grounds for the request for a compliance audit. The threshold is "reasonable grounds". The appellant is not required to make a prima facie case. The finding of reasonable grounds at this stage is not determinative of anything other than that the request for a compliance audit should have been granted. The finding of reasonable grounds at this stage does not determine the outcome of the compliance audit and is not to be construed as a finding of any contravention of the provisions of the Municipal Election Act respecting election campaign finances.

47 For the reasons given, I find that the application by Mr. Fuhr discloses reasonable grounds to believe that Robert Wilhelm and/or Charles Armstrong contravened the requirement to open a campaign bank account given that they each incurred expenses required to be paid from their respective campaign account and yet showed no bank charges on the Form 4 Financial Statement.

48 Accordingly, the appeal is allowed respecting Candidates Robert Wilhelm and Charles Armstrong. The appeal is dismissed respecting the other 6 named candidates. Pursuant to s. 81 of the Municipal Elections Act, a compliance audit is ordered respecting the election campaign finances of Robert Wilhelm and Charles Armstrong.

49 This matter is remitted to the Township of Perth South Compliance Audit Committee to appoint an auditor pursuant to ss. 81(7) of the Municipal Elections Act to conduct a compliance audit of the election campaign finances of Candidates Robert Wilhelm and Charles Armstrong and prepare a report pursuant to ss. 81(9) and (10) of the Act.

K.L. McKERLIE J.

cp/s/qllox/qlvxw

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Defrancesca v. Vaughan (City)

Carlo Defrancesca, Richard Lorello and Robert Zuccarini (Appellants) and City of Vaughan (Respondent)

Ontario Court of Justice

H.I. Chisvin J.

Judgment: October 7, 2008
Docket: Newmarket 07-000486

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Counsel: John Lo Faso, Fabio Soccol for Appellants

George Rust-D'Eye for Respondent

Subject: Public; Property; Civil Practice and Procedure

Public law --- Elections — Legislation — Election Finance Acts

Electors voted in municipal election wherein D was elected counsellor — D filed sworn, audited financial statement with respect to election finances, as required by Municipal Elections Act, 1996 — Electors reviewed statement and found, among other things, contributions by what appeared to be related businesses located at B Avenue — Electors' request for compliance audit was denied by municipal council — Electors appealed — Appeal allowed; compliance audit ordered — Court's responsibility on appeal was to examine matter anew — There were reasonable grounds for believing finance provisions of Act had been violated — Test for granting compliance audit was whether elector, and not council, believed there were reasonable grounds to believe Act had been contravened — Reasonable grounds was low standard — Neither elector's belief nor council's decision was determinative of outcome of audit one way or other — Ordering of compliance audit was only first step in investigative process and was not conclusive of any violation of finance provisions of Act — There were reasonable grounds to believe that businesses located at B Avenue were associated companies — Businesses shared same address, had similar officers and directors, and municipal website spoke of president of one company having started some of other companies — It also appeared that one company was not even valid corporation and therefore might not be entitled to make donation — In all, circumstances were such that it would be reasonable for electorate to think there had been violation.

Public law --- Elections — Candidates — Miscellaneous

Campaign finances — Electors voted in municipal election wherein D was elected counsellor — D filed sworn, au-

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dated financial statement with respect to election finances, as required by Municipal Elections Act, 1996 — Electors reviewed statement and found, among other things, contributions by what appeared to be related businesses located at B Avenue — Electors' request for compliance audit was denied by municipal council — Electors appealed — Appeal allowed; compliance audit ordered — Court's responsibility on appeal was to examine matter anew — There were reasonable grounds for believing finance provisions of Act had been violated — Test for granting compliance audit was whether elector, and not council, believed there were reasonable grounds to believe Act had been contravened — Reasonable grounds was low standard — Neither elector's belief nor council's decision was determinative of outcome of audit one way or other — Ordering of compliance audit was only first step in investigative process and was not conclusory of any violation of finance provisions of Act — There were reasonable grounds to believe that businesses located at B Avenue were associated companies — Businesses shared same address, had similar officers and directors, and municipal website spoke of president of one company having started some of other companies — It also appeared that one company was not even valid corporation and therefore might not be entitled to make donation — In all, circumstances were such that it would be reasonable for electorate to think there had been violation.

Public law --- Elections — Practice and procedure on controverted elections — In municipal elections — Appeals

Electors voted in municipal election wherein D was elected counsellor — D filed sworn, audited financial statement with respect to election finances, as required by Municipal Elections Act, 1996 — Electors reviewed statement and found, among other things, contributions by what appeared to be related businesses located at B Avenue — Electors' request for compliance audit was denied by municipal council — Electors appealed — Appeal allowed; compliance audit ordered — Court's responsibility on appeal was to examine matter anew — There were reasonable grounds for believing finance provisions of Act had been violated — Test for granting compliance audit was whether elector, and not council, believed there were reasonable grounds to believe Act had been contravened — Reasonable grounds was low standard — Neither elector's belief nor council's decision was determinative of outcome of audit one way or other — Ordering of compliance audit was only first step in investigative process and was not conclusory of any violation of finance provisions of Act — There were reasonable grounds to believe that businesses located at B Avenue were associated companies — Businesses shared same address, had similar officers and directors, and municipal website spoke of president of one company having started some of other companies — It also appeared that one company was not even valid corporation and therefore might not be entitled to make donation — In all, circumstances were such that it would be reasonable for electorate to think there had been violation.

Cases considered by *H.I. Chisvin J.*:

Chapman v. Hamilton (City) (2005), 2005 ONCJ 158, 2005 CarswellOnt 1914, 10 M.P.L.R. (4th) 120 (Ont. C.J.) — followed

Statutes considered:

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.

Generally — referred to

s. 81 — considered

s. 81(3.3) [en. 2002, c. 17, Sched. D, s. 32(2)] — considered

s. 81(6) — considered

APPEAL by voters in municipal election from council's denial of voters' request for compliance audit.

H.I. Chisvin J.:

1 The applicants are City of Vaughan residents who were entitled to vote in the November 2006, Municipal election. Mr. Bernie DiVona was elected a counsellor of the City of Vaughan in that election. As required by the *Municipal Elections Act*, Mr. DiVona filed a sworn and audited financial statement with respect to his election finances.

2 The applicants, as allowed by the *Act*, reviewed the material filed by Mr. DiVona and subsequently made a request for a compliance audit.

3 A request was filed by the applicants with the Clerk of the City of Vaughan and as required by the *Act*, council considered the matter and denied the applicants' request for a compliance audit. As provided for by section 81(3.3) of the *Municipal Elections Act*, the applicants have appealed to this court, once again, requesting a compliance audit be ordered.

The Nature of This Proceeding

4 Section 81(3.3) of the *Municipal Elections Act* reads:

"The decision of the council or local board under subsection (3) and of a committee under subsection (3) pursuant to a delegation under subsection (3.1) may be appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision the council, local board or committee could have made." 2002, c. 17, Sched. D, s. 32 (2).

5 The nature of an application under this section has been considered by the courts before. I agree with the decision of Justice Culver in *Chapman v. Hamilton (City)*, [2005] O.J. No. 1943 (Ont. C.J.) where, after an extensive review of the law in this area, he held that the appellate court could examine the matter anew.

6 This, in my view, is consistent with the wording of section 81(3.3). The section provides for no limits on the nature of the appeal itself. For example, it does not say that this is an appeal of a question of law alone, nor of mixed law and fact. This section does not limit on its face, the appellate court to reviewing only the decision of the underlying tribunal, in this case council, in considering the reasonableness of that decision. Section 81(3.3) is broad in my view and it is clear that the responsibility of the appellate court is to examine the matter anew.

Test to be Applied

7 Section 81 of the *Act* provides that a compliance audit can be granted if the elector believes on reasonable grounds that a candidate has contravened the provisions of the *Municipal Elections Act* relating to finances. As put by Culver, J. at paragraph 41 of his decision,

In considering whether an application for compliance audit should be granted or rejected, Council must consider whether the elector has reasonable grounds to believe that a candidate has contravened a provision of The Act relating to campaign finances.

8 The test then, is not if council believes there are reasonable grounds the *Act* has been contravened, but whether the elector had reasonable grounds to believe there had been a contravention. The obligation by council then is to determine if the elector is acting on mere conjecture or suspicion. Is this just a fishing expedition? If the elector is acting on conjecture, suspicion or merely proceeding on a fishing expedition, then that would not consti-

tute reasonable grounds. On the other hand, reasonable grounds is not that high a burden of proof as is proof beyond a reasonable doubt. Thus it is clear that reasonable grounds to believe that the elections finance provisions of the *Act* have been violated is a low standard. It is not determinative of the outcome of the audit one way or another, nor is council's decision at this stage determinative. It is only a step to begin the investigative process and nothing more. It is not conclusory of any violation of the finance provisions of the *Act* at all. It is important to remember that this stage of the proceedings is merely to determine if an investigation should be started. It is a pre-investigatory stage. It is not a determination that the candidate has in any way actually violated the statute. Rather, what council must decide is, and what this court must decide is, does the elector have reasonable grounds to believe that the candidate contravened the *Act*. It would then be a function of an auditor to investigate the matter.

9 Section 81(6) requires the auditor to conduct an audit to determine if an individual has complied with the election financing provisions of the *Act*. If the auditor concludes that there has been a violation of the provisions of the *Act*, the auditor is required to submit a report setting out the apparent contraventions.

10 This would then complete the investigative aspect of the proceedings. The matter then goes back to council for consideration under the provisions of section 81 of the *Act*.

11 I note as well, if the electorate is wrong, and the auditor finds no violation, then the electorate is at the risk of having to pay the costs of the auditor. There is, therefore, little or no down side to the municipality to have the matter looked into by an auditor. If there has been a violation then it should be properly investigated. If there has been no violation, then there would be no cost to the municipality as it is the electorates who must bear the cost of the audit.

Are there Reasonable Grounds for the Electorate to Believe a Violation of the Campaign Finance Provisions of the Act have Occurred?

12 In the applicants' factum, seven issues are raised as being violations of the campaign finance provisions of the *Act*. Does any one raise a reasonable ground to believe a violation has occurred?

13 The first issue of these seven issues relates to the contributions by the businesses apparently located at 71 Buttermill Avenue in Concord. Are there reasonable grounds to believe they are related companies on the face of the documents and on other readily available public information?

14 In my view, there are reasonable grounds to believe that they are associated companies. They clearly share the same address and have similar officers and directors. Additionally, the City of Vaughan website speaks of the president of one of the companies having started some of the other companies.

15 It appears that one of these companies is not even a valid corporation and thus may not be entitled to make a donation.

16 Given that the test is, are there reasonable grounds for the electorate to believe there has been a violation of the campaign finance provisions, on the face of it, it would be reasonable for an electorate to think there had been a violation. An investigation by an auditor looking below the surface may, indeed, determine that the appearance is incorrect. But that requires an investigation by a qualified individual. That is not the function of the council, nor the court at this stage of the proceedings. Once again, I want to make it very clear that an investigation of this nature is just that, an investigation and not a finding, or a conclusion of any actual wrong doing. Indeed, a thorough examination may show that there have been no wrong doings. That is a wholly different stage of the proceedings, however,

17 There are six other issues raised by the applicants in this factum with respect to this matter. I do not propose to review them in detail as it is not my function to determine the ultimate veracity of each and every one of these

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matters. As I've said, it is my function, like that of council's, to determine only if there are reasonable grounds for the electorate to believe that there has been a violation of the campaigns finance provisions of the *Act*. In my review, given the seven issues raised, there are reasonable grounds to believe that there has been a violation of the finance provisions of the *Municipal Elections Act* and thus a compliance audit will be ordered.

Appeal allowed.

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2009 CarswellOnt 1490, 59 M.P.L.R. (4th) 55

Jackson v. Vaughan (City)

Linda D. Jackson, Applicant and The Corporation of the City of Vaughan, LECG Canada Ltd., Ken Froese and Timothy Wilkin, Respondents

Ontario Superior Court of Justice

Lauwers J.

Heard: October 2, 2008; January 12, 2009

Judgment: March 11, 2009

Docket: NEW-CV-08-091028

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Counsel: Morris Manning, Q.C., Timothy J. Riddell, for Applicant

Ian J. Lord, for Respondents, Corporation of the City of Vaughan, Timothy Wilkin

Sarah J. Erskine, Robert Rueter, for Respondents, LECG Canada, Ken Froese

Subject: Constitutional; Public; Property; Civil Practice and Procedure

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Miscellaneous

Applicant was elected mayor of city by 90 votes — Two residents of city brought application under Municipal Elections Act, 1996 (MEA) seeking compliance audit of applicant's election campaign finances — City declined, complainants appealed and court directed city to appoint auditor to conduct compliance audit — Audit identified numerous apparent contraventions of election campaign financing rules under MEA and city approved laying of charges against applicant — Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute — Applicant contended that s. 81 of MEA is impermissibly vague and therefore violated s. 7 of Canadian Charter of Rights and Freedoms — Application dismissed — Finding that there are reasonable grounds to believe that candidate had contravened MEA regarding election campaign finances is threshold requirement only — Compliance audit is not restricted to matters referred to in complaint and can be triggered by single contravention — Role of judge in appeal under s. 81(3.3) of MEA is to deal with issue of reasonable grounds and it is responsibility of others in statutory framework, not judge at this stage, to conduct audit, evaluate results, authorize prosecution and try case — There is nothing vague, ambiguous or mysterious in term "compliance audit" and it is not auditor's function to determine whether apparent contravention of MEA is real contravention, as this determination is ultimately for judge

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— Accordingly, there is no delegation of power to auditor to determine whether there has been contravention of MEA — Nor was compliance audit report's interpretation of MEA or use of Municipal Elections 2006 Guide unreasonable on their face or inconsistent with MEA — Fact that matters of detail regarding such things as contributors or contribution limits are not finely defined in legislation does not make it impermissibly vague since these matters can be resolved by reference to principles in legislation — Also, none of expectations delineated in compliance audit report regarding candidates giving campaign manager proper directions as to financial aspects of campaign were unreasonable or inconsistent in principle with expectations in MEA — Nor did retention of prosecutor and provision to him of level of prosecutorial discretion amount to unlawful delegation by city, since city is corporate body and can only act through agents.

Municipal law --- Council members — Removal from office — Practice and procedure — Miscellaneous

Applicant was elected mayor of city by 90 votes — Two residents of city brought application under Municipal Elections Act, 1996 (MEA) seeking compliance audit of applicant's election campaign finances — City declined, complainants appealed and court directed city to appoint auditor to conduct compliance audit — Audit identified numerous apparent contraventions of election campaign financing rules under MEA and city approved laying of charges against applicant — Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute — Applicant contended that nature of audit directed in s. 81(6) of MEA and inspection powers granted to auditor under s. 81(8) breached applicant's right against self-incrimination contrary to s. 7 of Canadian Charter of Rights and Freedoms — Application dismissed — Audit/prosecution process under MEA, which is aimed at securing compliance with rules concerning election campaign finances, is regulatory in nature and not criminal or quasi-criminal — Penalties associated with contraventions are regulatory penalties and administrative penalties and interests affected are not understood by law to constitute protected aspect of "life, liberty and security of the person" — Since audit/prosecution process under MEA does not engage s. 7 of Charter, MEA does not have predominant purpose of determining penal liability — Therefore, disclosure obligations do not violate protection against self-incrimination under s. 7 of Charter, although use of auditor's powers respecting applicant personally after city's decision to prosecute would violate applicant's Charter rights — When city decided to prosecute, adversarial relationship between applicant and city came into being and auditor's mandate in relation to applicant was exhausted and he had no further authority to proceed.

Municipal law --- Attacks on by-laws and resolutions — Grounds — Bad faith

Applicant was elected mayor of city by 90 votes — Two residents of city brought application under Municipal Elections Act, 1996 (MEA) seeking compliance audit of applicant's election campaign finances — City declined and complainants appealed and court directed city to appoint auditor to conduct compliance audit — Audit identified numerous apparent contraventions of election campaign financing rules under MEA and city approved laying of charges against applicant — Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute — Applicant contended that by-laws were passed in bad faith in sense that councillors were using their power for improper purpose in acting unreasonably and arbitrarily without degree of fairness, openness and impartiality required by municipal government — Also, applicant claimed by-laws were pushed through with inordinate speed and proper procedure was not followed — Applicant claimed particularly that city had treated breaches of MEA by another candidate in manner different from her by not prosecuting other candidate and allowing her to be reprimanded and to make amends for breaches by donation to charity — Application dismissed — Regarding allegation of bias, facts and circumstances concerning each campaign were different and differences were fairly reflected in compliance reports — Complaints with regard to other candidate did not lead court to conclude that auditors were biased against applicant or biased in favour of other candidate — Otherwise, it could not be said that proceedings were inequitable, unfair or fraudulent misuse of city council's powers — Meeting at which by-laws were passed occurred with full and complete notice to all involved — Accordingly, evidence did not support applicant's allegations of capricious behaviour, corrupt motivation, bias, bad faith or otherwise unlawful action, response or purpose of city council.

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Public law --- Elections --- Practice and procedure on controverted elections --- In municipal elections --- Irregularities --- Miscellaneous

Applicant was elected mayor of city by 90 votes — Two residents of city brought application under Municipal Elections Act, 1996 (MEA) seeking compliance audit of applicant's election campaign finances — City declined and complainants appealed and court directed city to appoint auditor to conduct compliance audit — Audit identified numerous apparent contraventions of election campaign financing rules under MEA and city approved laying of charges against applicant — Applicant sought order quashing by-laws that authorized and confirmed decision to prosecute — Applicant contended that by-laws were passed in bad faith in sense that councillors were using their power for improper purpose in acting unreasonably and arbitrarily without degree of fairness, openness and impartiality required by municipal government — Also, applicant claimed by-laws were pushed through with inordinate speed and proper procedure was not followed — Applicant claimed particularly that city had treated breaches of MEA by another candidate in manner different from her by not prosecuting other candidate and allowing her to be reprimanded and to make amends for breaches by donation to charity — Application dismissed — Regarding allegation of bias, facts and circumstances concerning each campaign were different and differences were fairly reflected in compliance reports — Complaints with regard to other candidate did not lead court to conclude that auditors were biased against applicant or biased in favour of other candidate — Otherwise, it could not be said that proceedings were inequitable, unfair or fraudulent misuse of city council's powers — Meeting at which by-laws were passed occurred with full and complete notice to all involved — Accordingly, evidence did not support applicant's allegations of capricious behaviour, corrupt motivation, bias, bad faith or otherwise unlawful action, response or purpose of city council.

Municipal law --- Attacks on by-laws and resolutions --- Grounds --- Procedural error --- Miscellaneous

Applicant was elected mayor of city by 90 votes — Two residents of city brought application under Municipal Elections Act, 1996 (MEA) seeking compliance audit of applicant's election campaign finances — City declined and complainants appealed and court directed city to appoint auditor to conduct compliance audit — Audit identified numerous apparent contraventions of election campaign financing rules under MEA and city approved laying of charges against applicant — Applicant sought order quashing, on municipal law grounds, by-laws that authorized and confirmed decision to prosecute — Applicant claimed that city did not enact specific by-laws authorizing compliance audit or authorizing laying of charges against her — Application dismissed — There was no lack of clarity in words of by-laws or in report to which they referred — There was no evidence that city council breached its own procedural by-law, but failure by council to conform to its own rules does not in any event invalidate in any way by-law passed by council — Furthermore, allegation that city council erroneously believed it was obliged to commence legal proceedings against applicant was not proven — In all circumstances, by-laws in question were not illegal on municipal law grounds.

Cases considered by *Lauwers J.*:

Atkinson v. Metropolitan Toronto (Municipality) (1976), 1976 CarswellOnt 836, 69 D.L.R. (3d) 193, 12 O.R. (2d) 401 (Ont. C.A.) — considered

Audziss v. Santa (2003), 167 O.A.C. 226, 2003 CarswellOnt 19, 223 D.L.R. (4th) 257, 33 M.P.L.R. (3d) 163 (Ont. C.A.) — followed

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — followed

Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000

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CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe*) 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe*) 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — followed

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Little v. Ottawa (City) (2004), 2004 CarswellOnt 1846, 49 M.P.L.R. (3d) 115 (Ont. S.C.J.) — considered

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 8 — considered

s. 24(1) — pursuant to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

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Generally — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — pursuant to

s. 52(1) — pursuant to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 238 — considered

s. 239 — considered

Municipal Act, 2001, S.O. 2001, c. 25

s. 5 — considered

s. 23.1 [en. 2006, c. 32, Sched. A, s. 15] — considered

s. 272 — referred to

s. 273 — considered

Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50

Generally — referred to

s. 5 — referred to

s. 12 — referred to

s. 15 — referred to

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.

Generally — referred to

s. 66 — considered

ss. 66-79 — referred to

s. 67 — considered

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s. 68 — considered

s. 68(1) ¶ 5 — referred to

s. 69 — considered

s. 69(1)(l) — considered

s. 69(1)(m) — referred to

s. 69(1)(m)-69(1)(o) — referred to

s. 70 — considered

s. 70(3) — considered

s. 70(6) — considered

s. 70(7) — considered

s. 70(8) — referred to

s. 71 — considered

s. 71(1) — referred to

s. 72 — considered

s. 73 — considered

ss. 73-79 — referred to

s. 74(1) — considered

s. 75 — considered

s. 76(4) — referred to

s. 77 — considered

s. 78 — considered

s. 79 — considered

s. 79(2) — considered

s. 80 — considered

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- s. 80(1) — considered
- s. 80(2) — considered
- s. 81 — considered
- s. 81(1) — considered
- s. 81(2) — considered
- s. 81(3) — considered
- s. 81(3.3) [en. 2002, c. 17, Sched. D, s. 32(2)] — considered
- s. 81(4) — considered
- s. 81(5) — considered
- s. 81(6) — considered
- s. 81(8) — considered
- s. 81(8)(b) — considered
- s. 81(10) — considered
- s. 81(11) — considered
- ss. 89-91 — referred to
- s. 90 — considered
- s. 90(2) — considered
- s. 91 — considered
- s. 92 — referred to
- s. 92(5) — referred to
- s. 92(6) — considered

Public Inquiries Act, R.S.O. 1990, c. P.41

Generally — referred to

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Pt. II — referred to

s. 7 — considered

s. 9 — referred to

APPLICATION by successful mayoral candidate for order quashing by-laws authorizing and confirming taking of proceedings against her for breach of election campaign finance rules under *Municipal Elections Act, 1996*.

Lauwers J.:

I. Overview

1 The Applicant, Linda D. Jackson, was elected as the Mayor of the City of Vaughan on November 13, 2006. She won by 90 votes.[FN1]

2 Two residents of the City of Vaughan, Quintino Mastroguiseppe (Mastroguiseppe) and Gino Ruffolo (Ruffolo), brought an application under ss. 81 (1) and (2) of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, as amended (the "MEA" or the "Act"), seeking a compliance audit of the Applicant's election campaign finances. "When the City declined, the complainants appealed under s. 81 (3.3) of the *Act*. On February 19, 2008, Justice L. Favret (Ontario Court of Justice) directed the City to appoint an auditor "to conduct a compliance audit for the period in the Statement and Report ... following which the auditor will report as required pursuant to s.81(7) of the *Act*". (para. 73)

3 The audit identified numerous "apparent contraventions" of the election campaign financing rules under the *Act*.

4 On June 24, 2008, the Council of the City of Vaughan approved the laying of charges against Ms. Jackson for "numerous apparent contraventions" of the *Act* and retained Timothy J. Wilkin as prosecutor.

5 Ms. Jackson asks this Court to quash both the authorizing By-law 205-2008 and confirming By-law 228-2008 under s. 273 of the *Municipal Act, 2001*, S.O. 2001, c. 25, calling in aid s. 24(1) and s. 52 of the *Canadian Charter of Rights and Freedoms*. She thereby seeks to avoid the prosecution.[FN2]

6 For the reasons set out below, I decline to quash the By-laws. The Ontario Court of Justice judge who hears the ultimate charges will have the task of hearing the evidence, considering the proof offered by the prosecutor, and any defences Ms. Jackson may choose to raise. It is not my task to determine matters of guilt or innocence, only whether there is a legal impediment to the prosecution rooted in the numerous grounds raised by Ms. Jackson including the *Canadian Charter of Rights and Freedoms*. I have concluded that there is no such impediment at this time.

7 Mr. Manning, on behalf of Ms. Jackson, made submissions on four main issues.

Issue One: Section 81 of the MEA offends the Rule of Law and s. 7 of the *Canadian Charter of Rights and Freedoms* in that it is impermissibly vague and does not limit enforcement discretion.

I find that s. 81 of the MEA and its other relevant provisions are not impermissibly vague. The statutory terms, the structure of the compliance audit and the prosecution, the ordinary principles of administrative law that apply to municipalities and the terms of the City's by-laws properly limit enforcement discretion. This argument has no merit.

Issue two: The nature of the audit in s. 81 (6) directed toward apparent contraventions of the MEA and the requirement and inspection powers granted to an auditor under s. 81 (8) of the MEA breached the Applicant's right against self-incrimination contrary to s. 7 of the *Charter*.

I find that the audit/prosecution process under s. 81 of the MEA does not engage the protections in s. 7 of the *Charter*. The interests affected are not understood by the law to constitute a protected aspect of "life, liberty and security of the person." The audit/prosecution process does not have the predominant purpose of determining penal liability, and that the disclosure obligations do not violate the protection against self-incrimination under s. 7 of the *Charter*. I also find, however, that the use of the auditor's powers respecting the Applicant personally after the City's decision to prosecute would violate the Applicant's *Charter* rights.

Issue three: The acts of the Council of the City of Vaughan were so markedly inconsistent with the relevant legislative context that they amounted to bad faith.

This amounted to an invitation to find that City Council was biased against Ms. Jackson. I decline the invitation. While there are differences between the compliance audit report about Ms. Jackson and the report about Councillor Joyce Frustaglio, neither the differences nor the complaints are significant. They do not lead me to conclude that the auditors were biased against Ms. Jackson or biased in favour of Ms. Frustaglio. The facts and circumstances concerning each campaign were different and the differences are fairly reflected in the compliance audit reports. Ms. Jackson has not proven the existence of bias on the part of City Council, so it cannot form a support for her argument that it acted in bad faith. I also find that the evidence does not support the Applicant's allegations of capricious behaviour, corrupt motivation, bias, bad faith or otherwise unlawful action, response or purpose on the part of City Council.

Issue four: By-Law 205-2008, which authorized the prosecution, and confirming By-law 228-2008 are illegal and ultra vires the Council on municipal law grounds.

I find that the by-laws are not illegal on municipal law grounds. In particular, I find that the allegation that Council erroneously believed it was obligated to commence legal proceedings against Ms. Jackson is not proven.

8 Virtually all of the complaints made by Ms. Jackson about the MEA, its interpretation and the acceptability of the process followed by City Council could have been raised in the defence of the prosecution at trial; they can be reasserted in the defence, except for those foreclosed by this decision.^[FN3]

9 Each of these grounds and the plethora of subsidiary grounds advanced by Ms. Jackson will be addressed in detail below after the facts and the statutory context are described. In his arguments on behalf of Ms. Jackson, Mr. Manning took a scattershot approach; addressing these arguments systematically makes these reasons regrettably lengthy.

1. The Relief Sought — Details

10 In the amended Notice of Application, under which the argument proceeded on consent, Ms. Jackson seeks an order:

- a) Quashing By-Law 205-2008;
- b) Declaring the appointment of Ken Froese and LECG Canada Ltd. [to conduct the Compliance Audit] to be null and void;

- c) Prohibiting Ken Froese and LECG Canada Ltd. from continuing their alleged investigation concerning alleged contraventions by the Applicant of the *Municipal Elections Act, 1996*;
- d) Declaring the appointment of Timothy J. Wilkin [as prosecutor] null and void;
- e) Prohibiting Timothy J. Wilkin from acting pursuant to By-Law 205-2008 passed by the Council of the City of Vaughan and in particular from laying any charges against Linda D. Jackson in relation to any alleged contraventions against the *Municipal Elections Act 1996*;
- f) Declaring s. 81 of the *Municipal Elections Act, 1996*, to be in breach of:
 - i) section 7 of the *Canadian Charter of Rights and Freedoms*,
 - ii) the rule of law as protected by the preamble to the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1867*, and therefore
 - iii) of no force or effect pursuant to s. 52 (1) of the *Constitution Act, 1982*;
- g) Quashing By-Law 228-2008 passed by the Council of Vaughan on September 8, 2008.

II. The Facts

11 The following facts, taken largely from the Affidavits of the Applicant, appear to be either agreed upon among the parties or not disputed:

- a) the Applicant was elected to the office of Mayor of the City of Vaughan on November 13, 2006;
- b) on May 14, 2007, two residents of the City of Vaughan, Quintino Mastroguiseppe (Mastroguiseppe) and Gino Ruffolo (Ruffolo), brought an application to John Leach, City Clerk, pursuant to ss. 81 (1) and (2) of the *Act*, seeking a compliance audit of the Applicant's election campaign finances for the election. That application claimed that there were reasonable grounds to believe the Applicant had contravened a provision of that *Act* relating to election campaign finances. That application was based on the Applicant's financial statement and auditor's report dated April 2, 2007, for the period ending December 31, 2006;
- c) on May 22, 2007, the Council of the City of Vaughan deferred consideration of the application;
- d) on June 6, 2007, Mastroguiseppe and Ruffolo appealed under s. 81 (3.3) of the *Act* to the Ontario Court of Justice on the basis that the Council had no jurisdiction to defer the hearing of the application;
- e) Council argued that the application for the compliance audit was premature since Ms. Jackson had, by notice under s. 68 (1)(5) of the *Act*, extended her campaign period, which allowed the supplementary reporting period ending December 31, 2007, to come into effect;
- f) on February 19, 2008, Justice Favret allowed the appeal and ordered a compliance audit pursuant to s. 81 of the *Act* for the period in the financial statement and audit report, being April 6, 2006, to December 31, 2006;
- g) on March 28, 2008, the City Clerk's Department received a second application by Mastroguiseppe and Ruf-

folo for a compliance audit of the Applicant's election campaign finances respecting campaign finances within the initial reporting period as well as finances during the supplementary reporting period.

h) on March 31, 2008, Council confirmed the appointment of Ken Froese and Glen R. Davison, C.A., of LECG Canada Ltd., to conduct the first compliance audit of the campaign expenses for the 2006 municipal election for the period of April 6, 2006, to December 31, 2006, and directed that a second compliance audit for the period from April 6, 2006, to December 31, 2007, be combined with the earlier audit process ordered by Justice Favret;

i) on June 18, 2008, Council received the compliance audit report regarding the campaign finances of the Applicant for both periods;

j) at its regularly scheduled meeting on June 23, 2008, Council moved to schedule a special meeting for June 24, 2008, for the purpose of dealing with the compliance audit report, that the requirements for forty-eight hours notice be waived and that Timothy Wilkin be retained to provide legal advice to Council regarding the report;

k) on June 24, 2008, Council resolved into Committee of the Whole (Closed Session) for the purpose of receiving legal advice from Mr. Wilkin. After reconvening into a public session, Council passed By-law No. 205-2008 retaining Mr. Wilkin as prosecutor and instructing him to prosecute Ms. Jackson for breaches of the Municipal Elections Act.

l) on September 8, 2008, after this application had been served and filed, City Council passed By-Law Number 228-2008, which "adopted, confirmed and ratified ... as having been duly made by the Council, including, without limiting the generality of the foregoing, the decisions made at the meetings of the Council," up to that point related to the matter.

m) on September 12, 2008, the auditor served a Summons on Blair McCreadie, counsel for the Applicant, and Mario Campese, the Applicant's campaign manager, pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41, purportedly in connection with the compliance audit, which were returnable September 29 and September 30, 2008. They were placed in abeyance pending the outcome of this application.

1. The Compliance Audit Report

12 The compliance audit report was comprehensive in detailing the apparent contraventions. It was neutrally framed and factual. It listed a range of contraventions from relatively significant apparent contraventions such as excess campaign spending to relatively insignificant ones such as missing postal codes on the addresses of some contributors contrary to the requirements for the financial statements set out in the prescribed form. As listed in the executive summary:

- Ms. Jackson had a campaign spending limit of \$120,419.00 under s. 76 (4) of the *Act*, but spent \$12,356.00 more than the limit;
- There were a number of apparent contraventions of the *Act* in relation to contributions including the receipt of cash in excess of the \$25.00 limit set out in s. 70 (8) of the *Act*; instances of contributors contributing more than \$750.00 contrary to s. 71 (1) of the *Act*; a number of instances of contributions in excess of \$750.00 from companies or associated groups of companies that were not returned to contributors contrary to s. 69 (1)(m) of the *Act*; a number of instances of contributions being returned months after the filing of the 2006 financial statement and not as soon as possible after the candidate became aware of the contravention, contrary to s. 69 (1)(m) of the *Act*; and a number of instances of contributions being recorded in the name of partnerships and not in the names of individual contributors;

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- In the area of expenses, the report set out thirteen apparent contraventions in which the cost of certain items was omitted or possibly understated;
- In the area of financial reporting, seven apparent contraventions were identified.

III. The Statutory Context

13 The rules regarding elections are set out in the MEA. The determination of the issues in this matter requires that the *Act* be construed. I am guided in that task by the decision of the Ontario Court of Appeal in *Kerr v. Danier Leather Inc.* (2005), 77 O.R. (3d) 321 (Ont. C.A.), aff'd [2007] 2 S.C.R. 331 (S.C.C.). At paras. 82-85, the court held:

Section 130 [of the *Securities Act*] should be interpreted by applying Professor Driedger's "modern approach" to statutory interpretation, the approach consistently preferred by the Supreme Court of Canada:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 ("Driedger"), approved in, for example, ... [Internal citations omitted]

This modern approach has two aspects. One aspect is that context matters. The court must interpret s. 130, not as a stand-alone provision, but in its total context. In *Bell ExpressVu* at para. 27, Iacobucci J. stressed the importance of context in interpreting the words of a statute:

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1 at p. 6, "words, like people, take their colour from their surroundings."

The context for interpreting s. 130 includes its purpose, the purpose of the OSA as a whole, an issuer's express disclosure obligations in Part XV of the statute, and related provisions of the OSA dealing with disclosure of material facts and material changes.

The second aspect of this modern approach imports the sound advice of Professor Ruth Sullivan, who has edited the third and fourth editions of Driedger. In interpreting a statutory provision, the court should take account of all relevant and admissible indicators of legislative meaning. After taking these indicators into account, the court should adopt an interpretation that complies with the legislative text, promotes the legislative purpose, and produces a reasonable and sensible meaning.... [Internal citations omitted]

14 The court is directed by these principles to take a purposive approach and to consider s. 81 of the MEA not in a vacuum, but in the context of the statute as a whole, especially in view of s. 81 (6), which points expressly to "the provisions of this Act relating to election campaign finances." The court may also consider ancillary material such as the regulations under the *Act*, prescribed reporting forms and the related publication of the Ministry of Municipal Affairs and Housing available on the website, entitled the "Municipal Elections 2006 Guide". The latter is a plain language guide for candidates and voters. It does not have the force of law: *Rayside v. Toronto (City) Commission on Election Finances* (1992), 10 O.R. (3d) 287 (Ont. Div. Ct.).

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15 Courts and commentators have discussed the purposes of election campaign funding rules. J. Patrick Boyer commented in *Local Elections in Canada: The Law Governing Elections of Municipal Councils, School Boards and Other Local Authorities* (Toronto: Butterworths, 1988) at 18:

Campaign costs have been mounting in recent years, and electors and elected people alike have become concerned that campaign financing be as open, fair, and as broadly based as possible. This represents nothing more than a recognition of the importance and pervasiveness of modern government and the attendant need to ensure that the campaigns of candidates reflect general rather than specific interests in society.

16 In *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 (S.C.C.), the Supreme Court noted at para. 72 that: "Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime be preserved."

17 In *Libman c. Québec (Procureur général)*, [1997] 3 S.C.R. 569 (S.C.C.), the Court held at para. 47:

To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard.

18 In *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (S.C.C.), the Court held at para. 103:

Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective.

19 These principles apply with necessary modifications to municipal campaign funding.

1. The Municipal Elections Act

20 It is important to note that the MEA creates two classes or categories of contraventions. The more serious contraventions are called "corrupt practices" and the less serious relate to election campaign finances. Ms. Jackson is now facing possible charges only in respect of the latter.

(a) Corrupt Practices

21 Corrupt practices, which are not the subject of this application, are described in ss. 89-91 of the *Act*. Depending on the nature of the offence, s. 90 imposes fines and imprisonment at various levels. The offence of bribery to secure a vote, for example, exposes the person who is convicted of the offence to "a fine of not more than \$5,000, or to imprisonment for not more than 6 months, or to both, and is disqualified from voting at an election until the fourth anniversary of voting day," under s. 90(2). The conviction of a candidate carries the additional penalty of forfeiture of office, and, unless the presiding judge finds that the candidate lacked "any intent of causing or contributing to a false outcome of the election," conviction disqualifies the candidate from running again for six years, under s. 91.

(b) Contraventions of Election Campaign Finance Rules

22 The quasi-criminal treatment of corrupt practices can be usefully contrasted with the treatment of contraventions of the election campaign finance rules that are set out in ss. 66-79. Section 80 imposes specific penalties on the candidate which may include loss of pay, forfeiture of office, and ineligibility for election until the next regular election has taken place:

80. (1) A candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act, if,

- a) he or she fails to file a document as required under section 78 by the relevant date;
- b) a document filed under section 78 shows on its face a surplus, as described in section 79, and the candidate fails to pay the amount required by section 79 to the clerk by the relevant date; or
- c) a document filed under section 78 shows on its face that the candidate has incurred expenses exceeding what is permitted under section 76.

(2) The following penalties apply:

- a. In the case of the defaults described in clauses (1) (b) and (c),
 - i. the candidate forfeits any office to which he or she was elected and the office shall be deemed to be vacant,
 - ii. until the next regular election has taken place, the candidate is ineligible to be elected or appointed to any office to which this Act applies.
- b. In the case of the defaults described in clause (1) (a), the candidate is suspended without pay from any office to which he or she was elected until the document is filed and subparagraphs 1 i and ii apply if the candidate has not filed the document within 91 days after the last day the document was required to be filed under section 78.

23 A candidate may be subject to the penalties referred to in s. 80 (2), but s. 92 (6) has a saving provision:

92 (6) However, if the presiding judge finds that the candidate, acting in good faith, committed the offence inadvertently or because of an error in judgment, the penalties described in paragraph 1 of subsection 80 (2) do not apply.

24 In addition, under s. 92 certain contraventions of ss. 69, 70, or 73-79 can be prosecuted as provincial offences, which exposes an individual to a fine of not more than \$5,000.

25 The important distinction for the purposes of the constitutional analysis is that, in contrast to corrupt practices, election campaign finance offences do not attract imprisonment as a possible penalty.

(c) The Election Campaign Finance Rules

26 The rules on election campaign finances rely heavily on the candidate's competence and honesty. The system works on self-reporting. Section 78 of the MEA requires a candidate to file a financial statement accompanied by an

auditor's report, each in the prescribed form, and to file a supplementary financial statement where necessary. It is worth noting that in each municipal and school board election in Ontario literally hundreds of candidates are obliged to complete and submit these documents and appear to do so without difficulty.

27 Section 69 (1) (m)-(o) obliges a candidate to return a non-compliant campaign contribution to the contributor "as soon as possible after the candidate becomes aware of the contravention" or to the clerk. Under s. 79, a candidate is obliged to pay a surplus to the clerk. Under s. 80, the clerk is obliged to monitor compliance and to send a notice of default to the candidate where the defaults are plain in the financial reports or where the reports have not been filed as required under the *Act*.

(d) Overview of the Statutory Audit Compliance/ Prosecution Process

28 There are five stages or "checks" in the legislative scheme. First, under s. 81 (3) of the *Act*, Council is obliged to "consider the application" of an elector for a compliance audit under s. 81 (1) of the *Act*. As the cases note, this is a control mechanism intended to prevent frivolous and vexatious applications. There must be "reasonable grounds". The application is received by municipal council as a public document and placed on the agenda. Subsection 81 (11) discourages frivolous applications by exposing the Applicant to being required to pay the auditor's costs if the compliance audit report notes that there was "no apparent contravention" and council "finds that there were no reasonable grounds for the application".

29 The second stage or "check" is that an applicant whose application is refused by Council can appeal to a judge of the OCJ under s. 81 (3.3). In this case when Vaughan Council deferred the application, the complainants appealed and Justice Favret ordered the compliance audit.

30 The third stage or "check" is in the form of the independent audit required under s. 81 (4). This is to be conducted by an independent auditor licensed under the *Public Accounting Act, 2004* (s. 81 (5)) and the directions to the auditor are clear and distinct under s. 81 (6). The auditor's powers are set out under the MEA in s. 81 (8).

31 The fourth stage or "check" is Council's consideration of the compliance audit report under s. 81 (10) and its decision to commence a legal proceeding for "any apparent contravention". The decision of Council must be made in accordance with the ordinary principles of administrative law and is amenable to some form of judicial review.

32 The fifth stage or "check" is the prosecution itself, in which the candidate has full natural justice protections and *Charter* rights.^[FN4]

(e) The Audit Function

33 Section 81 of the MEA is part of the enforcement mechanism, and exposes the candidate to the possibility of an audit:

81. (1) An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

(2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80 (6), if any; it shall be in writing and shall set out the reasons for the elector's belief.

(3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.

...

(3.3) The decision of the council or local board under subsection (3) ... may be appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision the council, local board or committee could have made.

(4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

(5) Only an auditor who is licensed under the *Public Accountancy Act, 2004* may be appointed under subsection (4).

(6) An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate.

(7) The auditor shall submit the report to,

- (a) the candidate;
- (b) the Council or local board;
- (c) the clerk with whom the candidate filed his or her nomination; and
- (d) the applicant.

(8) For the purpose of the audit, the auditor,

- (a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate and of the municipality or local board; and
- (b) has the power of a commission under Part II of the *Public Inquiries Act*, which Part applies to the audit as if it were an inquiry under that Act.

(9) The municipality or local board shall pay the auditor's costs of performing the audit.

(10) The council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances.

(11) If the report indicates that there was no apparent contravention and the council or local board finds that there were no reasonable grounds for the application, the council or local board is entitled to recover the auditor's costs from the applicant...

(f) The Prosecution

34 In *Audziss v. Santa* (2003), 223 D.L.R. (4th) 257 (Ont. C.A.), the Court of Appeal concluded that s. 81 of the MEA constitutes a "complete code of procedure that vested exclusive authority in the council to commence proceedings in respect of any alleged contravention of the provisions concerning election campaign finances." (paras. 26, 28) At issue in that case was whether an elector, faced with a decision of council not to order a compliance audit, is nonetheless free to bring an application for forfeiture of the councillor's seat or to commence a private prosecution (which is not an issue in this case). After describing the statutory scheme, the Court of Appeal went on to explain the inherent tensions in the following words at para. 28:

Having regard to: a candidate's obligations under the MEA in relation to election campaign finances; the automatic sanctions that apply upon the clerk serving notice of default; the elector's right to apply for a compliance audit to ensure compliance with these provisions; the council's obligation to consider that application and its power to appoint an auditor; the council's obligation to consider any report resulting from a compliance audit and its power to commence a legal proceeding against the candidate for any apparent contravention of a provision relating to election campaign finances; and finally an elector's right to seek judicial review in respect of the council's decision; it is my view that the Legislature did not intend that an elector could simply by-pass the whole process and lay a private information. This interpretation is also one which, in my view, achieves a proper balance between an elector's right to challenge an elected official in regard to his or her statutory obligations and the need to limit, and to ensure the legitimacy of, attacks on elected officials.

35 The legislative history of the *Act* shows that the right of appeal to the OCJ in s. 81 (3.3) used in this case was inserted after the Court of Appeal's decision in *Audziss*, when the only ability to challenge a refusal of council to appoint an auditor was to seek judicial review.

36 The "balance" referred to by the Court of Appeal is between the policy goals of public accountability and transparency that compliance with the MEA campaign finance provisions are designed to accomplish on the one hand, with a certain degree of protection for candidates from legal challenges that do not comply with the standards in s. 81 (1) of the MEA on the other hand. Trafford J. referred to the latter aspect in his decision in *Hall v. Jakobek* (2003), 42 M.P.L.R. (3d) 55 (Ont. S.C.J.) at para. 21:

Given the Legislative intention, that is, to ensure the legitimacy of attacks on elected officials and, I infer, other candidates, by electors, it is my view that s. 81 of the Act is, in its purpose and effect, a provision to screen allegations by electors of election campaign finance wrongdoing by candidates and elected officials, especially where the allegations are determined by an auditor and/or a Council to be frivolous, vexatious or otherwise devoid of merit.

IV. The Constitutional Complaints

37 Section 7 of the *Canadian Charter of Rights and Freedoms* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

38 Ms. Jackson has two basic s. 7 complaints. First, she argues that s. 81 of the MEA is impermissibly vague; it contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and offends against the "rule of law" referred to in the preamble of the *Charter*, it is therefore of no force and effect under s. 52 (1) of the *Constitution Act, 1982*.

39 Second, she argues that "the nature of the audit directed in Section 81(6) toward apparent contraventions of the MEA and the requirement and inspection powers granted to an auditor under 81(8) of the MEA breach the Ap-

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plicant's right against self-incrimination contrary to section 7 of the *Charter*." Each of these complaints is addressed in turn.

1. Whether Section 81 of the MEA is Impermissibly Vague and Therefore Unconstitutional

40 It is a principle of fundamental justice under s. 7 of the *Charter* that laws may not be too vague.

41 In approaching this issue, I am guided by the words of the Supreme Court of Canada in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), where it held at para. 28 that "[t]he 'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion."

42 Justice Gonthier added, at paras. 60-63:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective....

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion; Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

Ms. Jackson draws particular comfort from the following words at paras. 69-71:

What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an impermissibly [sic] vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion...

Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the State. In my opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

43 In *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 (Ont. C.A.), the Court of Appeal considered the constitutionality of the legislation banning "pit bull" terriers and, more particularly, whether it provided an intelligible definition of the term "pit bull". Sharpe J.A. held at paras. 39 and 44:

It is sufficient for the law to delineate an area of risk. It is only "where a court has embarked upon the interpretative process, but has concluded that interpretation is not possible" that a law will be declared unconstitutionally vague: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 ... at para. 79.

These cases [on vagueness] demonstrate that a law will not be struck down as being vague simply because reasonable people might disagree as to its application to particular facts. No doubt individuals, even experts, may disagree about what is in the "best interests of the child", whether a particular contract would "unduly" lessen competition, whether a specific political issue is "particularly associated" with a given political party, or whether a dominant characteristic of a publication is the "undue exploitation of sex". Yet each one of those phrases has been held to have sufficient precision to survive s. 7 scrutiny. In these and other areas of social or regulatory policy, the fact that identification and classification does not lend itself to linguistic certainty will not defeat laws which provide a degree of clarity capable of supporting intelligible debate. In my view, given the nature of the subject matter and the importance of the objective, the Attorney General's submission that the impugned provision gives sufficient guidance is well supported by the authorities cited.

44 Professor Peter W. Hogg criticizes the test of whether the law provides an adequate basis for legal debate, "because almost any provision, no matter how vague, could provide a basis for legal debate": *Constitutional Law of Canada*, 5th ed., loose-leaf (Toronto: Carswell, 2007), at s. 47.18(b). A careful reading of Justice Gonthier's words in para. 63 of *Pharmaceutical Society (Nova Scotia)*, *supra*, shows, however, that the test is qualified: "A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria." [Emphasis added.]

45 Professor Hogg goes on to say:

What is perhaps most useful in giving some content to the rule against vagueness is to refer back to the two values that the rule protects, namely, fair notice to citizens and limitation of enforcement discretion. A law is unconstitutionally vague if it fails to give fair notice of what conduct is prohibited by the law, and if it fails to impose real limitations on the discretion of those charged with enforcement of the law.

46 To summarize, a statutory provision is intelligible, sufficiently certain, and therefore not impermissibly vague, if it gives fair notice to citizens setting out the boundaries of permissible and impermissible conduct that delineate a zone or area of risk. It must be possible in specific cases to reach a conclusion as to the meaning and application of the statute through reasoned analysis applying legal criteria.

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47 In addition, a provision must not give unfettered discretion to a decision maker because doing so will deprive the judiciary of the means of controlling the exercise of the discretion. The enactment should therefore give a sufficient indication as to how decisions must be reached and the determinative factors or elements to be considered.

48 Clarification is in order, however, concerning discretion. The Oxford Shorter Dictionary defines "discretion" as "freedom to decide or act as one thinks fit, absolutely or within limits; having one's own judgment as sole arbiter". In other words, within a certain ambit one is free to choose among different outcomes. This is the sense of the word evoked in *Baker v. Canada (Minister of Citizenship & Immigration)*, *supra*, at para. 52: "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries."

49 There is, however, a real debate about the meaning of "discretion" in concrete settings. For example, consider the Supreme Court's words in *Baker*, *supra*, at para 54:

It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.

50 In my view, and I say this with diffidence, the interpretation of legislation is not an example of true discretion. In "Another View of *Baker*" (1999), 7 R.A.L. 163 at 164, James L.H. Sprague observed, and I agree:

Filling in legislative gaps and making choices among various options is not true discretion. That is trying to discern what the legislator meant to say. The legislator never said, or intended to say, that where there is a gap, the law is to be whatever a decision-maker may decide it should be. No, where the decision-maker has to fill in gaps or otherwise interpret law he or she is not exercising discretion. He or she is simply doing his or her best to ascertain what the law is — he or she is not a law-maker (or at any rate is not supposed to be).

51 In the context of the MEA, there is minimal discretion in the council's decision on whether to appoint an auditor under ss. 81 (1) and (4). If the application shows reasonable grounds, that is the end of the matter and council must appoint an auditor. The section requires the exercise of judgment on which council may be right or wrong and will be subject to judicial oversight through an appeal under s. 81 (3.3).

52 In *Chapman v. Hamilton (City)*, [2005] O.J. No. 1943 (Ont. C.J.), Culver J. noted that "councillors were reluctant to exercise their jurisdiction, to consider the request for Compliance Audit on its merits, because they did not want to be seen as 'standing in judgment' of their colleagues." (para. 13) He held at paras. 36 and 37:

... I find that the issue to be determined, namely whether or not the elector has reasonable grounds to believe that a candidate has contravened a provision of The Act relating to campaign finances, is a question of mixed fact and law. Political considerations, in their highest sense, the creation of public policy as the political will of the citizens of the City, or in the lowest sense, political opportunism fed by ambition, have no place to play in such an analysis. The order for Compliance Audit is not dispositive. It may be that political considerations are appropriate when considering the laying of charges, should the audit determine misfeasance, but not at this stage.

... I note that Council in its debate, did not consider the merits of the application as it relates to the provisions of The Act, but, applied a political consideration, namely the unwillingness to judge their peers, and therefore dis-

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missed the application with the desire to have the court make the ultimate decision. This debate, I find, amounts to a failure or refusal to meaningfully exercise jurisdiction....

53 There may be some minimal discretion when it comes to minor breaches. The failure to insert a contributor's postal code in the prescribed form is a technical violation. It may be, for example, that the only violation for a candidate is a few missing postal codes. Perhaps a municipal council could justify refusing appointing an auditor in such circumstances. That is not the situation here.

54 In carrying out the audit the auditor is not exercising true discretion. He or she will need to interpret the *Act*, and might be wrong or right in the interpretation, but is also subject eventually to judicial oversight such as when, for example, an OCJ judge rejects the auditor's understanding of what constitutes a "fund-raising event" and dismisses a charge laid under s. 81 (10).

55 There is some discretion in a council's decision to prosecute under s. 81 (10), which provides that council: "may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances." The extent of the discretion will be discussed below, but the general administrative law principles, which govern municipalities and other such bodies, make it clear that there is no such thing as an "unfettered discretion."

56 With these principles in mind, I now turn to consider the Applicant's specific arguments on vagueness.

(a) The Applicant's Arguments on Vagueness

57 Mr. Manning raised various issues under the rubric of vagueness.

(i) The Standards Applicable to Council's Decision to Order an Audit

58 I reproduce here the provisions in s. 81 that give rise to the audit:

81. (1) An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

(2) The application ... shall be in writing and shall set out the reasons for the elector's belief.

(3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected....

59 The Applicant complains:

The factors which Council may take into consideration in deciding whether to grant or refuse an application for a compliance audit, including financial issues, matters of proportionality and other issues, are not enumerated under section 81(3). Therefore, it is unclear whether a compliance audit must be conducted merely if the applicant has reasonable grounds to believe a section of the MEA has been contravened or whether council may refuse an applicant who has "reasonable grounds" to believe that multiple sections MEA have been contravened. Moreover, the standard "reasonable grounds" is not defined in the legislation. It is unclear what will constitute "reasonable grounds" and how council must evaluate whether the applicant has satisfied the onus, under section 81(1) of showing that her or his belief in a candidate's contravention of the MEA is on "reasonable grounds."

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60 As noted earlier, there is little discretion for a municipal council in deciding whether to order a compliance audit once reasonable grounds are found to exist. The law is replete with provisions using the standard of "reasonable grounds" and courts and public bodies have had little difficulty in applying it to concrete facts. To some extent, however, in the context of this application this inquiry is redundant, since the main audit was ordered as the result of Justice Favret's decision on the appeal of Vaughan Council's initial refusal to order the audit. She had no trouble finding reasonable grounds.

(ii) The Scope of the Compliance Audit

61 The Applicant raised an issue about the scope of the compliance audit both as an independent ground of complaint and as an example of impermissible vagueness. As the history of the matter noted, the Council initially declined to appoint an auditor to carry out a compliance audit. The complainants appealed under s. 81 (3.3), and Justice Favret issued a decision compelling the Council to appoint an auditor. Justice Favret found, at para. 70, that:

there are reasonable grounds to conclude some, not all, of the corporations listed are associated and that pursuant to s.72 of the Act, they would be deemed a single corporation for the purpose of who is an eligible contributor. As such I agree that there are reasonable grounds to conclude there was a contravention of the Act as there is no indication over contributions were returned.

62 Justice Favret went on, however, to reject the complaint that there was a contravention of the *Act* by the candidate in relation to fundraising events as lacking "sufficient particularity to support such a conclusion [that there was a contravention]", although she found that the material "supports a conclusion that the Candidate failed to issue a receipt for one of the events on one occasion contrary to s. 69(1) of the Act." (para. 71)

63 The Applicant complains that the Act does not clearly answer the following question:

[I]f an applicant demonstrates reasonable grounds that there has been one contravention of the MEA but fails to demonstrate reasonable grounds as to another contravention alleged, is the auditor conducting a compliance audit solely into the one contravention for which the applicant's belief is based on reasonable grounds? ... Having made a determination on the merits that the applicant does not have reasonable grounds to believe that there had been a contravention in respect of some but not all of the contraventions alleged, is the auditor appointed precluded from examining these allegations?

64 The Applicant argued that the compliance audit must relate only to the matters in the complaint that are found by the judge hearing the s. 81 (3.3) appeal to have reasonable grounds.

65 I disagree. I find that s. 81 (1) is a threshold requirement only. Once it is plain to a municipal council that there are reasonable grounds for the belief "that a candidate has contravened a provision of this Act relating to election campaign finances" under s. 81(1), then the result is "a compliance audit of the candidate's election campaign finances"; in other words, the audit is comprehensive and is not restricted to the matters referred to in the complaint. The trigger can be a single contravention, although in this case the applications for a compliance audit identified numerous possible contraventions.

66 It is noteworthy that the cases that have considered the audit function have not limited the audit to the grounds of the original complaint: See *Savage v. Niagara Falls (City)* (Ont. C.J.) (B.W. Duncan); *Chapman, supra*. In *Mastrogriuseppe v. Vaughan (City)*, February 19, 2008, Doc. Newmarket 49119990790000352-01-02 [2008 CarswellOnt 9087 (Ont. C.J.)], Justice Favret did not review fully all of the alleged grounds of contravention by Ms. Jackson, leaving out, for example, the allegations relating to cash donations. She ordered a "compliance audit for the period in the Statement and Report" without restricting it to the particular grounds that she found were reasonable in reviewing the application.

67 Similarly, in *DeFrancesca v. Vaughan (City)* (October 7, 2008), Doc. Newmarket 07-000486 (Ont. C.J.), Justice H.I. Chisvin reviewed an application in which seven issues were raised concerning the campaign finances of Bernie DiVona, an elected councillor of the City of Vaughan. City Council denied the applicants' request for a compliance audit. Chisvin J. asked himself the following question: "Does any one raise a reasonable ground to believe that a violation has occurred?" (para 12) He looked at only one of the issues, concerning contributions by businesses apparently located at a single address and having similar officers and directors. He found that there were reasonable grounds to believe that there had been a violation of the finance provisions of the MEA. He concluded at para. 17:

There are six other issues raised by the applicants in this factum with respect to this matter. I do not propose to review them in detail as it is not my function to determine the ultimate veracity of each and every one of these matters. As I've said, it is my function, like that of council's, to determine only if there are reasonable grounds for the electorate to believe that there has been a violation of the campaigns finance provisions of the *Act*....

68 I find that there are good reasons for this approach. In terms of the statutory structure, the role of the Ontario Court judge in an appeal under s. 81(3.3) of the *Act* is limited. The judge's responsibility is to deal with the issue of reasonable grounds. It is the responsibility of other actors in the statutory framework, not the Ontario Court judge at this stage, to conduct the audit, evaluate the results, authorize a prosecution, carry it out and try the case. Further, the MEA's provisions are interrelated, and the identification of a problem may suggest that there might be more awaiting discovery. For example, the failure to issue a campaign receipt may be related to an unauthorized expenditure; this is grist for the auditor's mill and is well beyond the purview of an Ontario Court judge on an appeal under s. 81 (3.3).

(iii) What is a Compliance Audit?

69 The Applicant argues that it not clear what a "compliance audit" is under ss. 81 (1) and 81 (4) of the MEA, noting that it seems to be something different than an audit, but precisely what is not clear, since: "there is no definition of what a compliance audit consists. An auditor's duty, under s. 81(6), is to prepare a report outlining any 'apparent contraventions' by the candidate but what constitutes an 'apparent contravention' is not defined." On behalf of the Applicant, Mr. Manning asks: "Is an 'apparent contravention' a real contravention?"

70 Taken contextually, in my view the nature of a compliance audit readily emerges from the MEA. Subsection 81 (6) provides:

(6) An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate.

71 Section 81 relates back to the provisions of the MEA concerning election campaign finances, which are set out in ss. 66-79. These are detailed provisions that give content to the concepts of contributions (s. 66), expenses (s. 67), the election campaign period (s. 68), the duties of a candidate (s. 69), when a candidate may accept contributions (s. 70), maximum limits on contributions (s. 71), restrictions on fund-raising functions (s. 73), borrowing by a candidate (s. 75), filing dates in relation to financial statements (s. 77) and an auditor's report (s. 78) and the treatment of surpluses and deficits (s. 79).

72 The term "compliance audit" in s. 81(1) obviously refers to compliance with "a provision of this Act relating to election campaign finances," set out in the Act and referenced in the prescribed forms for the financial statement and auditor's report required to be filed under s. 78 of the MEA. The term is nothing more than a convenient contraction for drafting purposes. It does not denote or connote anything more than an audit leading to a report to municipal council that, like any auditor's report, identifies "apparent contraventions" as required by s. 81(6) of the Act.

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I find that there is nothing vague, ambiguous or mysterious in the term "compliance audit". I find that it is not the auditor's function to determine whether an apparent contravention is a real contravention. That is a determination which is ultimately for the judge of the Ontario Court of Justice to make in a prosecution under s. 81 (10), after being filtered through municipal council and a prosecutor.

(iv) Impermissible Delegation to the Auditor

73 The Applicant argues that: "Section 81 of the MEA effectively delegates an ill-defined power to an auditor to determine whether there has been a contravention of the MEA. This power, to determine whether there has been an 'apparent contravention' of the MEA cannot be validly delegated to an auditor." She takes the position that:

A statutory term which grants discretion but which fails to give direction as to how that discretion should be exercised, so that this exercise may be controlled, will be impermissibly vague. Laws that do not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements, will be impermissibly vague. In giving unfettered discretion, it will deprive the judiciary of means of controlling the exercise of this discretion.

74 The legal principles the Applicant cites are valid, but do not apply to the compliance audit specified by the MEA. There is no "delegation" of the "power to determine whether there has been a contravention of the MEA" by the municipal council to the auditor. The respective roles are statutorily determined. As noted above, it is not the auditor's role "to determine whether there has been a contravention of the MEA" (which is the function of the OCJ on a prosecution), only to identify "apparent contraventions." The compliance requirements of the *Act* are clear and simple. There will always be matters of detail that come up in concrete situations and that require interpretation by the auditor. But these can usually be resolved by reference to the principles in the legislation and are subject to judicial oversight.

(v) Fund-raising Functions

75 The Applicant complains that there is no definition of "fund-raising event" in the MEA. The undefined term "fund-raising functions" is found in s. 79 (2) and s. 73, among other places. The concept, however, is quite simple to understand and, in my view, does not require further definition.

76 The Applicant refers to the paras. 1.30-1.32 in the compliance audit report:

1.5 What the Act Says About Fundraising Events

1.30 Paragraph 5 of subsection 67(2) of the Act includes "*the cost of holding fund-raising Junctions*" as a campaign expense, and subsections 76(4) and 76(5) provide that these costs are not subject to limitation.

1.31 Although the Act does not define a fundraising event, the Municipal Elections 2006 Guide included the following guidance:

"Fund-raising functions are events intended to raise money for a person's election campaign. Such activities include dinners, dances, garden parties, etc. for which there is an admission charge, as well as auctions, button sales, etc. for which there may not be an admission charge."

[Underlining added]

1.32 The candidates were required to file financial statements that included a schedule addressing each fund-

raising activity (Schedule 2). The schedule includes a description of the fund-raising activity, the amount of the admission charge, the number of tickets sold, and ticket revenue. The form includes the notation "*if admission charge per person is not consistent, provide complete breakdown of all ticket sales*".

[Emphasis in original; Footnote omitted]

77 The Applicant particularly criticized the auditor's reliance on the Municipal Elections 2006 Guide ("the Guide") published by the Ontario government. The excerpt quoted above from the Guide gives common sense advice to candidates and those assisting them in election campaigns. I see no inconsistency between these elements of the Guide and the *Act*.

(vi) Contributions

78 The MEA lists those who may be contributors and contribution limits:

70. (3) Only the following may make contributions:

1. An individual who is normally resident in Ontario.
2. A corporation that carries on business in Ontario.
3. A trade union that holds bargaining rights for employees in Ontario.
4. Subject to subsection (5), the candidate and his or her spouse.

70. (6) A contribution may be accepted only by a candidate or an individual acting under the candidate's direction.

70. (7) A contribution may be accepted only from a person or entity that is entitled to make a contribution.

71. (1) A contributor shall not make contributions exceeding a total of \$750 to any one candidate in an election.

71. (2) if a person is a candidate for more than one office, a contributor's total contributions to him or her in respect of all the offices shall not exceed \$750.

71. (3) Subsections (1) and (2) do not apply to contributions made to a candidate's own election campaign by the candidate or his or her spouse.

72. For the purposes of sections 66 to 82, corporations that are associated with one another under section 256 of the *Income Tax Act* (Canada) shall be deemed to be a single corporation.

74. (1) A contributor shall not make a contribution of money that does not belong to the contributor.

79 The auditor focused particularly on these provisions. The Applicant takes issue with the highlighted words in following discussion in the compliance audit report concerning contributions, and submits that they are signs of "uncertainty" that exemplify the *Act's* impermissible vagueness:

1.25 The Act states that contributions may only be made from money that belongs to the contributor (Subsection 74(1)). It does not address whether one cheque may be issued on behalf of two or more individuals or entities. We have interpreted the Act to permit contributions on another's behalf where there is supporting documentation, such as a letter, advising the candidate that the funds are being contributed on the other party's behalf, using the other party's funds. For example, where a candidate is advised that a contribution is being made on behalf of a number of individuals, each of whom is reimbursing the entity, or where the funds are being charged to their shareholder loan account, or a similar situation. The Municipal Elections 2006 Guide suggests the following:

Before issuing a receipt for a contribution received by cheque, the candidate should ensure that the cheque is honoured at the bank and, if the contribution is:

- *from an individual, ensure the contributor meets the requirement of being a resident in Ontario;*
- *from a sole proprietorship, determine the name of the owner and issue a receipt in the owner's name, not the name of the business, as a good practice;*
- *from a corporation, ensure that it meets the requirement of carrying on business in Ontario; ...*

Helpful Hints

- *... If a cheque for a contribution is drawn from a joint personal bank account, the receipt must be issued only to the person who signed the cheque. Where two people have signed a cheque drawn from the joint personal account, the candidate must determine who made the contribution and issue the receipt to that person.*
- *Unincorporated groups, such as a law partnership, may contribute to a candidate's campaign, however the candidate should:*
 - *Request a list of the names and addresses of the individual contributors that shared in the contribution and the amount contributed by each individual;*
 - *Issue receipts to the individual contributors, not the unincorporated group. The individual's proportion of the group's contribution counts towards that individual's campaign contribution limit of \$750; and*
 - *Report these contributions on the candidate's financial disclosure in the same manner as contributions.*

[Underlined emphasis added; Italics emphasis in original; Footnote omitted]

80 The compliance audit report's interpretation of the Act and its use of the Guide are not unreasonable on their face and are likewise not inconsistent with the MEA. The fact that these matters of detail are not finely defined in the legislation does not make it impermissibly vague. Again, there will always be matters of detail that come up in concrete situations, which can be resolved by reference to the principles in the legislation.

81 The Applicant also complains about the underlined words in the following excerpt from the compliance audit report:

1.27 The Act by identifying only corporations, apparently does not permit contributions from an incorporated income trusts, limited and general partnerships, unincorporated co-tenancies, and other legal but non-corporate entities through which business is conducted in Ontario.

[Emphasis added]

82 It is to be noted that the compliance audit report's statement about the other entities appears to be correct but the reference to partnerships is not accurate, as the report seems to acknowledge later in referring to the need, in respect of a partnership, to list "the name of the person on whose behalf the contribution was made," consistent with the Guide.

(vii) Providing Proper Direction

83 Section 69 (1)(l) provides:

69. (1) A candidate shall ensure that,

(1) proper direction is given to the persons who are authorized to incur expenses and accept or solicit contributions on behalf of the candidate;

84 The related audit finding in the report provides:

1.8 What are Reasonable Expectations from a Candidate?

1.37 Paragraph 69(1) (1) of the Act requires that candidates provide "*proper direction...to the persons who are authorized to incur expenses and accept or solicit contributions on behalf of the candidate.*" The proper direction presumably includes ensuring that the authorized persons understand the candidate's responsibilities under the Act in relation to accepting contributions, incurring expenses, using bank accounts, retaining proper financial records, and preparing financial statements.

[Emphasis added by the Applicant]

85 The Applicant takes the position that the word "presumably" illustrates an impermissible vagueness in the statute. I disagree. As noted, there will always be matters of detail that come up in concrete situations. These can easily be resolved by reference to the principles in the legislation.

86 One of the findings in the report with which the Applicant takes issue is the following:...

2.7 (11) ... Linda Jackson informed us that she did not provide any direction to Mario Campese in relation to delegation of the financial aspects of the campaign. In our opinion the failure to provide direction to the Campaign Manager is an apparent contravention of paragraph 69(1) (1) of the Act (Section 4:7 of our Report);

87 Later in the report it was stated:

4.62 ... Linda Jackson informed us that she did not provide any direction to Mario Campese in relation to delegation of the financial aspects of the campaign. She advised us that Mario Campese had fulfilled the Campaign Manager role in prior municipal elections and thus that she believed that he did not require further direction. In our opinion the failure to provide direction to the Campaign Manager is an apparent contravention of paragraph 69(1) (1) of the Act.

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[Emphasis added]

88 Whether the underlined words provide a defence to Ms. Jackson would be a matter for subsequent proceedings. I note that in her August 28, 2008, affidavit, Ms. Jackson asserted:

This statement is false. I never informed Ken Froese, or anyone else for that matter, that I did not provide direction to Mario Campese. In fact, Campese was provided with a copy of the Act, the City of Vaughan election guide and he possessed experience from 2 prior elections.

89 The compliance audit report also states:

1.38 When a contribution is received, a candidate may reasonable be expected to identify contributions that exceed the \$750 contribution limit or are clearly from inappropriate sources, such as contributions from out-of-Province businesses, charities, federal or provincial political parties, or similar sources. Where accepting contributions is delegated to others, a candidate's instructions should include appropriate procedures to identify clearly inappropriate contributions.

...

1.40 Prior to finalizing a financial statement, a candidate may reasonably be expected to identify potential multiple contributions that result in an over-contribution, contributions from different individuals or corporations sharing a common address, or other commonalities that suggest a possible association resulting in an over-contribution. The candidate's responsibility is to then promptly refund over-contributions. However, in our view the candidate cannot reasonably be expected to do more than enquire of the contributors as to whether they are associated or are otherwise not permitted to contribute to the candidate's municipal election campaign.

1.41 A candidate may also be reasonably expected to monitor the level of expenses subject to limitation during the course of the campaign to ensure that the campaign does not exceed the limitation. As well, the candidate may reasonably be expected to provide direction to persons delegated financial responsibilities to ensure processes are in place to ensure expense limitations are not exceeded.

1.42 Our compliance audit considered that it is a reasonable expectation of a candidate who has delegated financial authority to others that the candidate will review expenses, by category, and consider the reasonableness of overall financial reporting.

1.43 Our compliance audit also considered that it is a reasonable expectation that a candidate consider whether there is inventory to report at the end of the campaign period (reusable signs, furniture, or other equipment or supplies), whether the amount loaned to the campaign agrees with the candidate's own financial records, whether the price of tickets and the number of attendees at fund-raising events is consistent with the candidate's recollection, and whether the total of expenses for fundraising are consistent with the cost of fundraising.

[Emphasis by the Applicant]

90 None of the expectations delineated in this part of the compliance audit report, which the Applicant challenges, are unreasonable or inconsistent in principle with the expectations of the MBA that refer to a candidate giving "proper direction".

(b) *The Frustaglio Compliance Audit Report*

91 In support of the arguments on vagueness and partiality, on January 12, 2009, the Applicant brought a motion for the admission of fresh evidence concerning the compliance audit report related to councilor Joyce Frustaglio dated October 17, 2008. I heard argument and issued a decision on January 14, 2009. I agreed to admit the Frustaglio compliance audit report as fresh evidence and invited argument on it. I said at para. 21:

I am alive to the concerns raised by Messrs. Rueter and Lord. At the same time, however, the common law is rightly suspicious of abstract questions. The expression "pure law" may be an oxymoron, since the law always needs a context within which it is to be considered. Experience in working with statutory provisions in the context of a real issue can reveal ambiguities that an abstract review would perhaps miss. The Jackson Compliance Audit Report assists in setting the context within which the vagueness argument can be assessed, and the Frustaglio Report may add usefully to that context.

92 Careful reading of the Frustaglio compliance audit report, in comparison with the Jackson compliance audit report, shows that they are substantially the same in terms of format, methodology and the description of the interpretation taken by the auditor of obligations under the MEA. It is not surprising that Mr. Manning therefore launches the same complaints about the Frustaglio report as he did about the Jackson report. He asserts that: "In the Frustaglio report, LECG [the audit firm] reached its conclusions by interpreting the Act in a manner different from its interpretation of the Jackson audit and this is the very essence of arbitrariness." I reject this assertion; it is not true that the Frustaglio report interpreted the Act "in a manner different from its interpretation of the Jackson audit".

93 Other aspects of the Frustaglio report will be addressed elsewhere in these reasons.

(c) The Standards Applicable to Council's Decision to Commence a Prosecution

94 Section 81 (10) of the MEA provides:

(10) The Council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances.

95 The Applicant notes:

After council has received a report outlining apparent contraventions, there is no articulation of the factors that council may take into consideration in determining, under section 81(10), whether to commence a legal proceeding. It is unclear whether even a single contravention is sufficient for the commencement of legal proceedings, or to whom council should delegate the commencement of legal proceedings.

96 As noted above, the trigger can be a single contravention, although in this case the applications for a compliance audit identified numerous possible contraventions.

97 In *Chapman, supra*, at para. 36, Culver J. stated that: "It may be that political considerations are appropriate when considering the laying of charges, should the audit determine misfeasance, but not at this stage [of considering an application for an audit]." By this he meant: "Political considerations, in their highest sense, the creation of public policy as the political will of the citizens of the City, or in the lowest sense, political opportunism fed by ambition." (para. 36) Mr. Manning, on behalf of Ms. Jackson, pronounced himself as "horrified" that political considerations would have any bearing on the decision of Council to prosecute.

98 As noted above, there is some discretion in a municipal council's decision to prosecute under s. 81 (10), since

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council: "may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances." There is, however, no such thing as an "unfettered discretion" in a municipal body.

99 The overriding principles are expressed in *Baker, supra*, at para. 53:

... [D]iscretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute ... [D]iscretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law ..., in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*....

100 Among the relevant administrative law principles are that: power must be exercised for the purpose for which it was granted and not for another purpose; the decision maker cannot decline to decide an issue remitted to it; the decision must be made on the basis of relevant considerations and must not take into account irrelevant considerations; decision-making power may not be improperly delegated; there must be some evidence to justify decisions of fact; statutory preconditions to the exercise of power must be met; there should not be errors in the interpretation of legislation; and the decision must not be grossly unreasonable.

101 Without being exhaustive, it is easy to see how these principles would apply to a decision on whether to prosecute under s. 81 (10) of the MEA. Possible examples abound. A decision based on concerns about maintaining the confidence of the electorate, the integrity of the election process and the values of public accountability and transparency would be consistent with the statutory purpose and would also be political considerations in the highest sense. On the other hand, a decision made to advance political ambition by ousting a rival would be for an improper purpose. A decision taking into account the scale of the apparent contraventions would be taking into account relevant considerations, but one based on personal animosity or bias would be improper. A decision to prosecute the slightest apparent contravention would run into problems of unreasonableness.

102 As a relevant example, the auditor's report indicates that Ms. Jackson neglected to provide postal codes for some of the contributors to her campaign, as required in the form prescribed by the *Act*. In respect of this contravention, the doctrine of *de minimis non curat lex* might be a defence (a matter I leave for the trial judge). It essentially means that "the law does not concern itself with trifles": *R. v. Hinchey*, [1996] 3 S.C.R. 1128 (S.C.C.) at para. 69. The origins of this doctrine were outlined by the Ontario Court of Appeal in *R. v. Kubassek* (2004), 188 C.C.C. (3d) 307 (Ont. C.A.) at para. 19, quoting from "*Reward*" (*The*) (1818), 2 Dods. 265, 165 E.R. 1482 (Eng. Adm. Ct.), where Sir Walter Scott (later Lord Stowell) said, at 269-270 Dods., 1484 E.R.:

The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, *de minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

And see *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 (S.C.C.), where this defence was discussed in Justice Arbour's dissent at paras. 203-205.

(d) *Improper Delegation to the Prosecutor*

103 By-law 205-2008 led to the retainer of the Respondent, Timothy J. Wilkin, in order to prosecute the Applicant. The resolution adopted by Council on June 24, 2008, and confirmed by By-law 205-2008 provided:

WHEREAS...

AND WHEREAS it is important for all concerned to avoid any perception of bias as legal proceedings move forward.

NOW THEREFORE THE COUNCIL OF THE CITY OF VAUGHAN RESOLVES AS FOLLOWS:

1. That the City of Vaughan institute the laying of charges against Linda D. Jackson under The Municipal Elections Act, 1996; and
2. That Mr. Timothy J. Wilkin of Cunningham, Swan, Carty, Little & Bonham LLP, be retained to conduct the prosecutions and to proceed in a timely manner; and
3. That the charges to be laid shall be those for which reasonable and probable grounds exist for believing that an offence has been committed, as may be determined in the legal opinion of Timothy J. Wilkin; and
4. That the retainer includes instructions that Timothy J. Wilkin have the authority, in his sole discretion:
 - i. to withdraw any charge, or charges, against Linda D. Jackson if, in his opinion, the available evidence in respect of a charge or charges does not provide a reasonable likelihood of obtaining a conviction; and
 - ii. to conduct any pre-trial or trial proceedings necessary, and to summon such witnesses as may be required including, if necessary, the retaining of experts to appear as witnesses; and
 - iii. to enter into negotiations with respect to the charges for the purposes of establishing an agreed statement of facts, a plea bargain and/or a joint submission to the Court in respect of penalty; and
 - iv. to enter into a binding plea bargain agreement; and
 - v. to establish what penalty to seek from the Court upon a conviction; and
 - vi. to provide regular status reports to the City Solicitor for her information.

104 The Applicant argues that the retention of Mr. Wilkin and the provision to him of a level of prosecutorial discretion amounts to an unlawful delegation:

Nowhere does the MEA authorize a council to delegate the substance of its authority to make decisions under section 81(10) to commence a legal proceeding to anyone, let alone an unelected member of the public. Paragraphs 2, 3 and 4 of the resolution of June 24, 2008 ... reveal that the council delegated to Mr. Wilkin a power it thought it had - to institute the laying of charges against the Applicant. By-law 205-2008, purporting to adopt, ratify and confirm this resolution constitutes a purported grant to Wilkin of an unbridled and uncontrollable discretion with respect to the entirety of the prosecution, thereby leaving the Applicant at the mercy of Wilkin, who is entitled to impose whatever conditions he sees fit. This is an unlawful delegation of statutory authority.

105 In oral argument, Mr. Manning added a submission that s. 81(10) of the MEA did not actually authorize the laying of a charge, but it is quite clear from *Audziss v. Santa, supra*, that this submission is wrong.

106 Mr. Lord points to the authority of a municipality to delegate under s. 23.1 of the *Municipal Act, 2001*, S.O.

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2001 c. 25. As a corporate body, a municipal council can only act through agents, so the appointment of a prosecutor is the only way that Council's statutory responsibility under s. 81 (10) can be exercised.

107 The City, according to Mr. Lord, expects that in furtherance of the prosecution an information will be sworn by an employee of the City; that will form the basis of the prosecution, it being quite plain that a corporation cannot swear an information. Mr. Wilkin will act as the prosecutor. In essence, Mr. Lord argues that the kind of prosecutorial discretion that is normally exercised by the Crown in relation to criminal or quasi-criminal offences, or by municipal officials in prosecuting municipal by-law infractions, would be exercised by Mr. Wilkin: *Little v. Ottawa (City)* (2004), 49 M.P.L.R. (3d) 115 (Ont. S.C.J.) per J. Mackinnon J. at para. 12; *Toronto (City) v. Polai* (1969), [1970] 1 O.R. 483 (Ont. C.A.); affirmed (1972), [1973] S.C.R. 38 (S.C.C.). He disputes that Mr. Wilkin is without instructions in view of the detailed nature of paragraph four of the resolution. I agree with Mr. Lord's submissions.

108 In response to a question from the bench, Mr. Manning conceded that if Council had obliged Mr. Wilkin to report back to it with his recommendations on these discretionary elements, requesting instructions from Council, then his objection would lose force. In my view, such a reference back would be permissible but is unnecessary since the criteria which Mr. Wilkin must apply in his decisions are set out in the resolution.

(e) Conclusion on Issue One: Whether Section 81 of the MEA is Impermissibly Vague and Therefore Unconstitutional

109 For the reasons set out above, I find that there is no merit to the Applicant's arguments on this issue.

2. Ms. Jackson's Right Against Self-incrimination Under s.7 of the Charter

110 I repeat here for convenience, s.7 of the *Canadian Charter of Rights and Freedoms*:

8. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

111 There are three sub-issues: First, does the audit/prosecution process under s. 81 of the MEA engage s. 7 of the *Charter*? The Applicant argues that: "In the case at bar, there exists a real or imminent deprivation of life, liberty or security of the person, and this deprivation is not in accordance with the principles of fundamental justice contrary to s. 7 of the *Charter*." Mr. Manning asserts that the possibility that Ms. Jackson "may be subject to prosecution and, under s. 80 (2) of the MEA, may forfeit the office to which she was elected and be deemed ineligible to be elected or appointed to any office until the next regular election is taking place," fully engages s. 7. The City and the auditor argue that s. 7 is not engaged because the penalties under the MEA are relatively minor and do not involve imprisonment.^[FN5]

112 Second, based on the reasoning of the Supreme Court in *R. v. Jarvis*, [2002] 3 S.C.R. 757 (S.C.C.), does the audit/prosecution process under s. 81 of the MEA breach s. 7 of the *Charter* because the predominant purpose of the compliance audit under the MEA in the case at bar is the investigation of an alleged contravention? The Applicant argues that: "the auditor is not conducting a compliance audit but rather an investigation into the liability to prosecution and is so doing with inspection and requirements powers under which the Applicant is statutorily compelled to give information," thereby breaching the Applicant's s. 7 *Charter* rights against self-incrimination. The auditor argues that the "the purpose of the compliance audit is to determine whether Ms. Jackson had complied with the provisions of the *Act* with respect to her campaign finances. The predominant purpose of the compliance audit is not to determine any penal liability."

113 Third, based on the reasoning of the Supreme Court in *R. v. Jarvis*, is the auditor prevented from continuing

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the audit after City Council decided to prosecute Ms. Jackson under s. 81 (10) of the MEA on June 24, 2008? The Applicant argues that this is the result in *R. v. Jarvis*, which applies to her. The auditor argues that: "the fact that Council has resolved to commence proceeding against Ms. Jackson for apparent contraventions of the *Act* does not render the compliance auditor *functus officio*. The predominant purpose test does not prevent compliance audits and investigations into penal liability under the *Act* from being conducted simultaneously."

(a) *First sub-issue: Does the audit/prosecution process under section 81 of the MEA engage section 7 of the Charter?*

114 The weight of the authority is that s. 7 is engaged only where the right to liberty of the subject is at stake owing to the threat of imprisonment, unless some other interest concerning the right to life or security of the person can be established (neither of which is present here).

115 In *R. v. Jarvis*, the taxpayer was audited under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("ITA"). The taxpayer was then charged with tax evasion. The Supreme Court held that while the material gathered by the auditor before the commencement of an investigation into penal liability was validly gathered and could be used in the prosecution, information obtained by the auditor after the investigation was under way should be excluded because it violated the taxpayer's s. 7 *Charter* rights.

116 In relation to s. 7, the Court held at paras. 66 and 67:

... A court conducting an analysis under s. 7 must first determine whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination thereof. Next, the court must identify the relevant principle or principles of fundamental justice and, finally, determine whether the deprivation is in accordance with this principle or principles.

It is beyond doubt that the appellant's s. 7 liberty interest is engaged by the introduction of statutorily compelled information at his trial for the s. 239 offences, owing to the threat of imprisonment on conviction: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 515, per Lamer J. (as he then was); *Reference re ss. 193 and 195.1(1) (c) of the Criminal Code (Man)*, [1990] 1 S.C.R. 1123. The relevant principle of fundamental justice in the present case is the principle against self-incrimination, an elemental canon of the Canadian criminal justice system, standing for the notion that individuals should not be conscripted by the state to promote a self-defeating purpose: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at para. 81, per Iacobucci J. This Court has clearly established that the principle against self-incrimination finds residual expression under s. 7: *Thomson Newspapers*, *supra*; *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577, per Lamer C.J.; *R. v. Jones*, [1994] 2 S.C.R. 229, at p. 256, per Lamer C.J.; *S. (R.J.)*, *supra*; *Branch*, *supra*; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. White*, [1999] 2 S.C.R. 417.

[Emphasis added]

117 By contrast, the Applicant relies on the decision of Lamer J. (as he then was) in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at 515-516 to argue that a penalty less than imprisonment might attract s. 7 protection:

I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependent upon the content given to the words "security of the person". That issue was and is a live one. Indeed, though the question as framed focuses on absolute liability (s. 94(2)) in relation to the whole Charter, including the right to security of the person in s. 7, because of the presence of mandatory imprisonment in s. 94(1) only deprivation of liberty was considered....

118 While I detect, from a reading of this passage in isolation, a faint glimmer of the Applicant's argument that s. 7 may apply where there is, as in this application, no imprisonment for a contravention, the Court's use of Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) in R. v. Jarvis tends to rebut that. Indeed, the Court in R. v. Jarvis also cited Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada), [1990] 1 S.C.R. 1123 (S.C.C.), where Dickson C.J.C. held at 1140:

There are two components of s. 7 that must be satisfied before finding a violation. First, there must be a breach of one of the s. 7 interests of the individual — life, liberty or security of the person. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice. With respect to the first component, there is a clear infringement of liberty in this case given the possibility of imprisonment contemplated by the impugned provisions.

[Emphasis added]

119 The City and the auditor take particular comfort from Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada), which appears to limit s. 7 protected interests. They say that at best Ms. Jackson's interest is an economic one (that is her income from the position of mayor), and the right to exercise a chosen profession is not protected by s. 7. I find that such a narrow characterization seriously understates the impact of a prosecution and conviction on a municipal politician.

120 While I am sympathetic to the Applicant's submission that the vocation of a politician is more than a mere economic interest, in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307 (S.C.C.), the Supreme Court found that, in the case of a disgraced politician arguing that delay caused him harm, the impugned state action "must have had a serious and profound effect on the respondent's psychological integrity" to breach s. 7. (para. 81)

121 The Court in Jarvis held, at para. 64, that: "For present purposes, where ss. 7 and 8 of the *Charter* are at issue, it is instructive to note both that the requirements of fundamental justice relevant to the former section 'are not immutable; rather, they vary according to the context in which they are invoked.'" Even so, the cases about s. 7 evoke an "on/off switch" metaphor.[FN6] This approach to s. 7 echoes throughout the careful distinction the Court makes in Jarvis between "regulatory penalties" and "administrative penalties," on the one hand, which do not attract s. 7 protection, and "penal liability," on the other hand, which does. This distinction emerges at the outset in para. 2:

Ultimately, we conclude that compliance audits and tax evasion investigations must be treated differently. While taxpayers are statutorily bound to co-operate with CCRA auditors for tax assessment purposes (which may result in the application of regulatory penalties), there is an adversarial relationship that crystallizes between the taxpayer and the tax officials when the predominant purpose of an official's inquiry is the determination of penal liability. When the officials exercise this authority, constitutional protections against self-incrimination prohibit CCRA officials who are investigating ITA offences from having recourse to the powerful inspection and requirement tools in ss. 231.1(1) and 231.2(1). Rather, CCRA officials who exercise the authority to conduct such investigations must seek search warrants in furtherance of their investigation.

And see also para. 89.

122 This logic underpins the Jarvis decision. The Court repeats an earlier finding that the ITA is "essentially a regulatory statute" (para. 48). At paras. 50 and 55, the Court explains that penalties are part of the regulatory scheme, as is an audit system:

While voluntary compliance and self-assessment comprise the essence of the ITA's regulatory structure, the tax

system is equipped with "persuasive inducements to encourage taxpayers to disclose their income": Krishna, *supra*, at p. 767. In this connection, Krishna writes at p. 772, the "system is 'voluntary' only in the sense that a taxpayer must file income tax returns without being called upon to do so by the Minister". For example, in promotion of the scheme's self-reporting aspect, s. 162 of the ITA creates monetary penalties for persons who fail to file their income returns. Likewise, to encourage care and accuracy in the self-assessment task, s. 163 of the Act sets up penalties of the same sort for persons who repeatedly fail to report required amounts, or who are complicit or grossly negligent in the making of false statements or omissions

...

To be effective, self-enforcing regulatory schemes require not only resort to adequate investigation, but also the existence of effective penalties.... To this end, s. 238(1) sets out a summary conviction offence that is triggered by non-compliance with the filing requirements or with other of the Act's provisions — including ss. 231.1(1) and 231.2(1), and the documentary retention rules imposed by s. 230(1). Section 238's purpose is inherently pragmatic or instrumental: the offence exists "not to penalize criminal conduct but to enforce compliance with the Act". [Internal citations omitted]

123 It is instructive to note that while the Court in *Jarvis* treats s. 238 of the ITA as part of the regulatory regime, the section does contain a penalty of imprisonment for failure to cooperate with an audit.

124 The Court's focus in *Jarvis*, however, is on s. 239 of the ITA, which creates the more serious offences that "carry rather significant penalties" (para. 56) and which "are no trifling matter as this provision bears at least the formal hallmarks of criminal legislation, namely, prohibitions coupled with penalties. They may be prosecuted upon indictment, and conviction can carry up to five years' incarceration. It is because of these factors that the penal sanctions in s. 239 are, in certain contexts, referred to as 'criminal'." (para. 59)

125 Taking the same approach to the MEA, it seems plain that the audit/prosecution process, which is aimed at securing compliance with the rules concerning election campaign finances, is regulatory in nature and the penalties associated with contraventions are "regulatory penalties" or "administrative penalties" within the rubric of *Jarvis*. By contrast, prosecution under the MEA for "corrupt practices" would be the provincial quasi-criminal analogue of a prosecution under s. 239 of the ITA. On this logic s. 7 of the *Charter* is not engaged by the prosecution of Ms. Jackson for contraventions of the election campaign finance rules under s. 81 (10) of the *Act* since imprisonment is not involved.

126 Accordingly, on the first sub-issue I find that the audit/prosecution process under s. 81 of the MEA does not engage the protections in s. 7 of the *Charter*. The prosecution is not criminal or quasi-criminal but regulatory, and the interests affected are not understood by the law to constitute a protected aspect of "life, liberty and security of the person."

(b) Second Sub-issue; Based on the reasoning in Jarvis, does the audit/prosecution process under section 81 of the MEA breach section 7 of the Charter because the predominant purpose under the MEA is the investigation of an alleged contravention?

127 Despite my ruling on the first sub-issue, I turn now to consider the second sub-issue.

128 The Applicant argues that "clearly by the reference to 'apparent contravention' but also substantively, the predominant purpose of the compliance audit under the MEA in the case at bar is the investigation of an alleged contravention." The Applicant cites *Nelles v. Grange* (1984), 46 O.R. (2d) 210 (Ont. C.A.) for the proposition that a "public inquiry is not the means by which investigations are carried out with respect to the commission of particular crimes." (page 216) She urges me to apply these words with necessary modifications to the actions of the auditor.

129 The Applicant argues that the scheme in s. 81 of the MEA effectively merges the audit and investigative functions. The means that the entire compliance audit/prosecution process under the MEA is unconstitutional. The Applicant draws particular support from paras. 88 and 98 of the *R. v. Jarvis* decision:

In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.

...

In summary, wherever the predominant purpose of an inquiry or question is the determination of penal liability, criminal investigatory techniques must be used. As a corollary, all *Charter* protections that are relevant in the criminal context must apply.

This means (para. 96):

...with respect to s. 7 of the *Charter*, when the predominant purpose of a question or inquiry is the determination of penal liability, the "full panoply" of *Charter* rights are engaged for the taxpayer's protection. There are a number of consequences that flow from this. First, no further statements may be compelled from the taxpayer by way of s. 231.1(1) (d) for the purpose of advancing the criminal investigation. Likewise, no written documents may be inspected or examined, except by way of judicial warrant under s. 231.3 of the ITA or s. 487 of the *Criminal Code*, and no documents may be required, from the taxpayer or any third party for the purpose of advancing the criminal investigation. CCRA officials conducting inquiries, the predominant purpose of which is the determination of penal liability, do not have the benefit of the ss. 231.1(1) and 231.2(1) requirement powers.

130 In *Jarvis*, the Supreme Court, at para. 94, set out a list of factors that the Applicant submits apply with necessary modifications to the audit/prosecution process under the MEA:

In this connection, the trial judge will look at all factors, including but not limited to such questions as:

- (a) Did the authorities have reasonable grounds to lay charges? Does it appear from the record that a decision to proceed with a criminal investigation could have been made?
- (b) Was the general conduct of the authorities such that it was consistent with the pursuit of a criminal investigation?
- (c) Had the auditor transferred his or her files and materials to the investigators?
- (d) Was the conduct of the auditor such that he or she was effectively acting as an agent for the investigators?
- (e) Does it appear that the investigators intended to use the auditor as their agent in the collection of evidence?
- (f) Is the evidence sought relevant to taxpayer liability generally? Or, as is the case with evidence as to the

taxpayer's *mens rea*, is the evidence relevant only to the taxpayer's penal liability?

(g) Are there any other circumstances or factors that can lead the trial judge to the conclusion that the compliance audit had in reality become a criminal investigation?

It should also be noted that in this case we are dealing with the CCRA. However, there may well be other provincial or federal governmental departments or agencies that have different organizational settings which in turn may mean that the above factors, as well as others, will have to be applied in those particular contexts.

[Emphasis added]

131 It seems to me that the Applicant's logic proceeds on a false premise. The purpose of the compliance audit is to determine whether a candidate has complied with the requirements of the MEA. The process is part of the regulatory structure, particularly the enforcement mechanism. If there is a contravention, however, a prosecution is not automatic. That must be assessed by municipal council in accordance with the principles of administrative law discussed earlier. In short, the predominant purpose of the compliance audit is not to determine any penal liability, assuming that the penalties under the MEA are penal and not regulatory.

132 The Applicant also argues, based largely on the reasoning of the Supreme Court in *R. v. Jarvis*, that if prosecution is the only available remedy when a compliance audit reveals an apparent contravention of the *Act*, then: "the auditor is not conducting a compliance audit but rather an investigation into the liability to prosecution and is so doing with inspection and requirements powers under which the Applicant is statutorily compelled to give information." This is said to breach the Applicant's s. 7 *Charter* rights against self-incrimination.

133 On the interpretation of the *Charter* generally and s. 7 specifically, the Court has adopted a contextual approach, holding in *Jarvis* that: "[t]he scope of a particular *Charter* right or freedom may vary according to the circumstances" (para. 63). The Court also held, at para. 64, that: "context will determine the expectation of privacy that one can reasonably expect the latter section [s. 8] to protect."

134 It is important to recall that under the MEA there are precise disclosure requirements placed on candidates that are set out in the *Act* and collected in the prescribed forms for both the campaign financial statement (form 4) and the candidate's auditor's report (form 5). These are public documents, and contain detailed information about the candidate's spending limits, contributions and contributors, expenses subject to the spending limit and those not so subject, surplus or deficit, and the inventories of campaign goods and materials contributed and those left over at the end of the campaign. The compliance audit under the MEA is largely aimed at assessing the accuracy and veracity of the public reports. By s. 81 (8)(b) of the MEA the auditor is given the inspection and requirement powers under Part II of the *Public Inquiries Act*, R.S.O. 1990, c. P.41. Section 7 of that Act gives the auditor the power to summon witnesses to give evidence under oath or to produce relevant documents, while s. 9 gives protection against self-incrimination.

135 As the compliance audit report explained:

1.19 Our compliance audit procedures included the following general procedures, addressing both the issues raised by the applicants and other issues identified by the candidate or through our audit procedures:

(1) Contributions: An analysis of the lists of contributors in order to identify possible apparent contraventions and communications with selected contributors in relation to possible ineligible contributions;

(2) Financial Statements: A review of the Financial Statements and related supporting documents and evaluation of the appropriateness of financial reporting, including the allocation of expenses between those

subject to, and not subject to, limitations; and

(3) Expenses: A detailed review of certain expenses, including obtaining information from third parties for selected expense items and reviewing completeness of expenses in order to determine the likelihood of unreported contributions in kind.

136 It is fair to say that no one who participates in a municipal election campaign has any reasonable expectation of confidentiality concerning any of the matters required to be reported by the MEA.

137 I consider here the factors referred to in *Jarvis*. First, the audit was triggered by a complaint and not by any sense on the part of the "authorities" that there had been a contravention of the municipal election campaign finance rules. Second, the general conduct of the process was not "consistent with the pursuit of a criminal investigation". It was, rather, an investigation into whether there had been an "apparent contraventions" of the election campaign finance rules. Third, since the prosecution had not been initiated at the time of the audit, the conduct of the auditor was not as agent for the prosecutor, although ultimately the information obtained by the auditor would be transferred to the prosecutor. Fourth, the auditor was not after information that addressed the Applicant's *mens rea*, but only apparent compliance with the campaign finance rules. Fifth, since the entire audit process was regulatory in nature, there is no basis for concluding that the compliance audit had become a criminal investigation.

138 In *Jarvis* the Court considered the "principle against self-incrimination" in the context of "statutorily compelled" information at para. 68:

In giving expression to this principle, however, s. 7 does not envelop an abstract and absolute rule that would prevent the use of information in all contexts in which it is statutorily compelled. A court must begin "on the ground", with a concrete and contextual analysis of all the circumstances, in order to determine whether or not the principle against self-incrimination is actually engaged. This analysis necessarily involves a balancing of principles. One must, in assessing the limits on compellability demanded by the principle against self-incrimination, consider the opposing principle of fundamental justice suggesting that relevant evidence should be available to the trier of fact in a search for truth. These competing interests will often be brought to the foreground in regulatory contexts, where the procedures being challenged have generally been designed (and are employed) as part of an administrative scheme in the public interest. As the Court stated in *White*, at para. 48:

In some contexts, the factors that favour the importance of the search for truth will outweigh the factors that favour protecting the individual against undue compulsion by the state. This was the case, for example, in *Fitzpatrick supra*, where the Court emphasized the relative absence of true state coercion, and the necessity of acquiring statements in order to maintain the integrity of an entire regulatory regime. In other contexts, a reverse situation will arise, as was the case, for example, in *Thomson Newspapers, supra*, *S. (R.J.), supra*, and *Branch, supra*. In every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant's statement. [Some internal citations omitted]

139 The case of *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 (S.C.C.) is most instructive. The appellant was the captain of a vessel licensed for the regulated commercial groundfish fishery in British Columbia. He was charged with overfishing. The Crown sought to admit into evidence the fishing logs and hail report made by the appellant, which all fishermen are required to maintain and provide. The trial judge excluded the documents on the grounds that they were self-incriminatory.

140 Justice La Forest used a contextual analysis to find that the right against self-incrimination was not violated. He found two factors to be critical: "First, the information provided in this case was not provided 'in a proceeding in which the individual and the state are adversaries'. Instead, it was provided in response to a reasonable regulatory

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requirement relating to fishery management." (para. 34) He added: "In my view, the lack of adversarial relationship between the individual and the state at the time the hail reports and fishing logs are statutorily compelled is an important basis upon which to conclude that the principle against self-incrimination is not engaged in this case." (para. 36)

141 La Forest J. held: "Second, the 'coercion' imposed on the appellant is at best indirect, for it arose only after he had made a conscious choice to participate in a regulated area, with its attendant obligations." (para 34) He added: "Surely it defies common sense to argue that the state, in seeking to regulate the commercial fishery by attaching certain conditions to a fishing licence, is coercing an individual to furnish information against himself." (para 42)

142 La Forest J. concluded that neither of the fundamental purposes for the principle against self-incrimination were engaged, being the need to protect against unreliable confessions, and the need to guard against the abuse of power by the state. Concerning the latter he said: "I cannot see how it can be said to be abusive for the state to prosecute overfishing on the basis of the true returns it requires fishers to fill out as a condition of their voluntary participation in the commercial fishery." (para 46)

143 Finally, La Forest J. brought in aid of his approach by analogy the Court's jurisprudence under s. 8 of the *Charter* concerning unreasonable search and seizure, noting that: "a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business ... The documents should not be equated to involuntary confessions to investigators, reflecting as they do instead the voluntary compliance by commercial fishers with the statutory requirements of the regulated fishing regime." (para. 49)

144 The Court's logic in *Fitzpatrick* applies, with necessary modifications, to the MEA. The public interest in the regulation of municipal elections is well explained in the cases referred to earlier in these reasons. Ms. Jackson's familiarity with the rules of campaign finance, as a third time candidate, is manifest, and she made a voluntary and informed decision to participate. Her knowledge of the statutory scheme for a compliance audit and possible prosecution of contraventions may safely be assumed, if not expected. The documents required by the MEA are meant to be public, much more so than the income tax receipts in *Jarvis* or the fishing records in *Fitzpatrick*. There is no expectation of privacy, an element that I find to be relevant to the s. 7 analysis. One cannot assert a right against self-incrimination - the distribution of information against one's interest — when that person has already effectively consented to its release by participation in the regulatory process that demands that the information be available to the public. It is only where the predominant purpose changes to assembling a case for conviction and imprisonment that the interests shift.

145 Assuming that a prosecution under the MEA is covered by s. 7 of the *Charter*, I find therefore that the auditor's access to documents and witnesses in a compliance audit does not violate Ms. Jackson's freedom from self-incrimination, as understood by the cases.

146 Accordingly, on the second sub-issue, I find that the audit/prosecution process does not have the predominant purpose of determining any penal liability, and that the disclosure obligations would not, in any event, violate the protection against self-incrimination. Consequently, s. 7 is not breached on these grounds.

(d) Third sub-issue: Based on the reasoning in Jarvis, is the auditor prevented from continuing the audit after City Council decided to prosecute on June 24, 2008?

147 In relation to the third sub-issue, The Applicant argues that once the City decided to prosecute under s. 81 (10) of the MEA, any further investigation by the auditor was foreclosed, since the Rubicon had been crossed and the auditor was constitutionally prevented from continuing with the audit.

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148 In this respect, particular issue was taken with a reservation in the compliance audit report:

1.4 As part of the compliance audit we requested documentation from third parties, including certain contributors, the Bank of Montreal, the Toronto Star, CHIN Radio, NAM, Flags Unlimited, and the Venetian banquet and Hospitality Centre. Not all of the requested information has been provided as of the date of this Report. Accordingly, *we reserve the right to issue a supplementary report should we obtain additional information from third parties concerning possible apparent contraventions of the Act.*

[Emphasis in original]

149 I point out that there was no compulsion on the auditor to file the report in an incomplete form. The auditor could have waited until the report was complete before issuing it. The City, however, was obliged by s. 81 (10) to consider the report, once received, within thirty days. The filing of the report by the auditor, even though it was incomplete, was the trigger.

150 In reliance on the reservation in the report, the auditor issued summonses to two individuals after the submission of the report to Council. These summonses have been placed in abeyance while this matter is being litigated. The Applicant takes the position that it is inappropriate for the auditor to continue work in these circumstances.

151 Ms. Erskine, for the auditor, argues that the auditor is never an investigator in the sense contemplated by *Jarvis*. The auditor's report is a neutral document that ought to be completed. It stands on its own as a public record. Ms. Erskine submits that the auditor is never in an adversarial position. There is no objection, according to *Jarvis* at paragraph 97, to parallel processes. She submits that it is not the auditor's function to address the "mental element" or "*mens rea*"; this is specifically addressed in s. 92 (5) and (6) of the MEA and is to be assessed by the prosecutor in framing the prosecution and ultimately by the Court hearing the case.

152 In *Jarvis* the Supreme Court noted that the requirements of fundamental justice "are not immutable; rather, they vary according to the context in which they are invoked" (para. 63), but I noted that there was little sign of this variability in the jurisprudence. In *Blencoe, supra*, the Supreme Court held that: "Section 7 can extend beyond the sphere of criminal law, at least where there is 'state action which directly engages the justice system and its administration.'" (para. 46) In *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.) at para. 77 the Supreme Court said: "the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those 'that occur as a result of an individual's interaction with the justice system and its administration.'"

153 It is plain that once a prosecution under the MEA has commenced, in the words of *Jarvis*, "the inquiry in question engages the adversarial relationship." (para. 88) In *Jarvis* at para. 94, the Supreme Court listed factors assessing whether the predominant purpose of an audit is prosecutorial; these factors apply, with necessary modifications, to the MEA. In the same paragraph, *Jarvis* also makes it clear that its logic applies to regulatory enactments including those of the province. See, for example, *R. v. Inco Ltd.* (2001), 54 O.R. (3d) 495 (Ont. C.A.).

154 Consistent with the underlying purpose of s. 7 of the *Charter* and giving due recognition to its variable nature, I therefore agree with the Applicant that once the City decided to proceed with the prosecution, relying on the compliance audit report, the Rubicon was crossed, and the adversarial relationship between the Applicant and the municipality came into being. While at one level the auditor is a neutral and independent third party, at another level the auditor is an investigator being paid by the City. Under the *Jarvis* principles, the use of the auditor's powers respecting the Applicant personally after the City's decision to prosecute would violate the Applicant's *Charter* rights. Once the City decided to pursue prosecution of the Applicant, and notwithstanding the reservation in the compliance audit report, the auditor's mandate in relation to the Applicant was exhausted and he had no further authority to pro-

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ceed.

Conclusion on Issue Two: Ms. Jackson's Right Against Self-incrimination Under s.7 of the Charter

155 The audit/prosecution process under the MEA does not engage s. 7 of the *Charter*. It does not have the predominant purpose of determining penal liability. The disclosure obligations do not violate the protection against self-incrimination under s. 7 of the *Charter*. I find however, that the use of the auditor's powers respecting the Applicant personally after the City's decision to prosecute would violate the Applicant's *Charter* rights.

3. Precipitous Actions and Bad Faith on City Council's Part

156 The Applicant argues that the By-laws passed by the City leading to the decision to prosecute in By-law 205-2008 and the subsequent By-law 228-2008 confirming previous Council actions were all passed in bad faith and therefore are subject to being quashed under ss. 272 and 273 of the *Municipal Act, 2001*.

157 In oral argument, Mr. Manning was at pains to say that his bad faith complaint was about non-compliance with the relevant elements of the statutory context. He was not, he advised, impugning the integrity of the Councillors, but was instead saying that they were using their power for an improper purpose, one for which it had not been designed, citing *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) and *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Ont. Div. Ct.). In his factum he stated:

A finding of bad faith does not require any wrongdoing on the part of any council members, but only that council acted unreasonably and arbitrarily in the circumstances without the degree of fairness, openness and impartiality required of a municipal government. Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct by the municipality, usually marked by unfairness, partiality, secretiveness, unreasonableness, improper motives, oppression, fraud or the absence of procedural fairness.

These last sentences do raise issues about the integrity of the Councillors, especially the references to unfairness and impartiality.

(a) Impartiality and Bias

158 I note that Mr. Manning did not use the term "bias" in his main factum, his supplementary factum, his factum seeking to admit the Frustaglio compliance audit report as fresh evidence or in the further submissions that he filed relating the effect of the Frustaglio report on the vagueness issue. Nor did Ms. Jackson use the term in either of her affidavits. His diffidence signals his awareness that an allegation of bias is extremely serious on the one hand, and his concern that the facts in this case do not support such an allegation or finding, on the other hand. But I do not know how else to characterize his argument about partiality.

159 In his factum, Mr. Manning made two assertions about partiality in noting that "Council treated the Applicant differently from Councillor Alan Shefman who was excused for late filing, as he was allowed to retain his seat even though he would have faced losing his seat under the provisions of the MEA", and "Council denied requests for compliance audits on Regional Councillor Rosati and Councillor Carella based solely on corporate searches, even though these did not prove or disprove corporate association". He did not pursue these references in oral argument. Differential treatment does not necessarily imply bias or discrimination.

160 In his factum on the fresh evidence motion, Mr. Manning asserted:

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Notwithstanding the finding in the Frustaglio report that Councillor Frustaglio breached the provisions of the MEA, Council for the City of Vaughan treated the breaches by her in a manner different from that of the moving party. While the City of Vaughan decided to prosecute the moving party, the City relied on the manner of interpretation and application of the MEA by LECG to allow Councillor Frustaglio to be reprimanded and to make amends for her breaches by a donation to charity.

161 I decline Mr. Manning's implicit invitation to find that City Council was biased against Ms. Jackson, or that it favoured the other Councillors referred to. The Applicant has not proven the existence of bias on the part of City Council, so it cannot form a support for his argument that City Council acted in bad faith.

162 There are some differences between the Jackson compliance audit report and the Frustaglio compliance audit report. I set out below some excerpts from the Frustaglio report:

2.1 The candidate and her campaign team cooperated with the compliance audit and provided us with all requested information....

2.4 The financial statements for Joyce Frustaglio's election campaign did not properly disclose complete addresses for 2006 contributors and did not disclose the correct contributor names for many of the 2006 contributors. We accept the candidate's explanation that this occurred as a result of unintentional mistakes in finalizing the financial statements, with the external accountants printing incorrect columns in an electronic spreadsheet containing contributor details and including the inaccurate listing in the financial statements.

163 Concerning this last comment, Mr. Manning noted in his factum: "Notwithstanding a limited statutory mandate requiring only an 'outlining' of 'any apparent contravention by the candidate' the auditors have arrogated to themselves power to either accept or reject a candidate's explanation for the actual contravention of the Act and, if they determined it was the result of an unintentional mistake, to excuse that contravention." I reject this complaint. It seems to me to be common sense that the auditor should identify those matters that appear to be simple calculation or other mistakes rather than outright "apparent contraventions". It is up to the Council and the prosecutor to determine how a particular matter will be addressed in terms of a prosecution under s. 81 (10) of the MEA.

164 The expectation is that a candidate will cooperate with the audit. In this case, the compliance audit report noted that Ms. Jackson and her campaign manager, Mario Campese, initially cooperated but then stopped:

6.2 Although we received cooperation from Linda Jackson and Mario Campese throughout the course of our compliance audit, part way through our June 7, 2008 interview of Mr. Campese he refused to answer further specific questions. He advised us to issue our report without obtaining responses to our questions. Had we received responses to our questions, and questions we had yet to ask, we may have been provided additional information relevant to this Report.

165 It is not known whether a completed review of the facts and circumstances behind the Jackson report would have disclosed inadvertent errors. Whether some of the apparent contraventions would have been re-characterized as errors after further discussion between the auditors and the Jackson campaign team is in the range of speculation given that cooperation was discontinued.

166 The Frustaglio report states:

3.30 In our opinion the contributions from the two corporations are not apparent contraventions of the Act. However, based on the information provided by Phillip and Angelo Locilento and the information on the cheques, the two payments should have been recorded as personal contributions in the Financial Statements. In our opinion, this is an apparent financial reporting contravention of paragraph 69(1) (f) of the Act, which re-

quires that the candidate obtain a contributor's name and address, and Section 78 of the Act, which requires that the Financial Statement "*be in the prescribed form*".

[Emphasis in original]

167 Concerning this discussion, the Applicant complains that: "The auditors were of the opinion that contributions from two corporations 'are not apparent contraventions of the *Act*', but then found that there was 'an apparent financial accounting contravention' of the *Act*."

168 Taking the disputed paragraph as a whole, it is clear why the auditors took the position that they did; the failure was not in detecting the relationship between the corporations, but in how the contribution was documented in the Financial Statements. This was not an objectionable conclusion.

169 A similar analysis can be made of the other complaints raised by the Applicant about the Frustaglio report. I find that the complaints taken individually or cumulatively are not significant. Moreover, they do not lead me to conclude that the auditors were biased against Ms. Jackson or biased in favour of Ms. Frustaglio. Facts and circumstances concerning each campaign were different and the differences are fairly reflected in the compliance audit reports.

(b) The Other Elements of Bad Faith

170 The elements of bad faith alleged by the Applicant in her factum include: "[t]he by-law being pushed through with inordinate speed," and other specifics set out in the succeeding paragraphs.

171 Mr. Manning alleges that bad faith is shown by the Council in the case at bar in commencing legal proceedings in an arbitrary manner without proper considerations. This is a restatement of the complaints dismissed elsewhere in these reasons for decision.

172 The Applicant asserts that Ken Froese was appointed under s. 81 (5) of the MEA along with Glen R. Davison C.A. of LECG Canada Limited, but was not licensed when he prepared the compliance audit report as required by s. 81 (6) of the MEA, because the professional credentialing of auditors had changed in the meantime. The evidence was, however, that Mr. Froese and Mr. Davison both signed the compliance audit report. Mr. Davison was at all material times duly licensed under the *Public Accounting Act, 2004*, in accordance with the requirements of s. 81 (5) of the *Act*. I am satisfied that the auditors and the report met the qualifications requirements of the MEA.

173 The Applicant alleges that the appointment of Ken Froese was contrary to the procedural by-law of the City regarding Requests for Proposal. I rejected this complaint earlier.

174 The Applicant alleges that Ken Froese exceeded the terms of the audit ordered by Justice Favret, including resting his report on affidavit evidence that Justice Favret rejected. I ruled earlier that the auditor was not limited to the grounds found reasonable by an Ontario Court judge on an appeal under s. 81 (3.3).

175 The Applicant alleges that there is no authority for the joining of an audit ordered by Justice Favret with a second audit requested by Quintino Mastrogiuseppe, including no reasonable grounds for belief in contravention or by law to confirm the requested compliance audit. The introduction to the compliance audit report notes that it relates to two financial statements, being the financial statements for the period of April 6, 2006, to December 31, 2006, which was ordered to be audited by Justice Favret, and the financial statement for the period of April 6, 2006, to December 31, 2007, which City Council determined should be audited upon application by Mastrogiuseppe and Ruffolo. There is nothing in the MEA that prevents Council from joining the audits and, since there would inevitably be considerable overlap, there was efficiency in doing so. The application for the second audit was exhaustively

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reviewed in the report of the Commissioner of Legal and Administrative Services and the City Solicitor dated March 31, 2008. The grounds are substantially similar to those upheld by Justice Favret. Accordingly, this objection has no validity.

176 The Applicant alleges that the final report based alleged contraventions of the Act on criteria not found in statute or the guide and on personal opinion and conjecture. This is a restatement of the complaints dismissed under Issue One.

177 The Applicant alleges that Council ordered the laying of charges against the Applicant, naming Timothy Wilkin as the independent prosecutor, based on a preliminary and incomplete audit report and, in so doing, set aside the usual municipality practices and procedures. I reject this complaint; Council was obliged by s. 81 (10) of the MEA to deal with the compliance audit report in the form in which it was filed.

178 The Applicant alleges that Council passed the by-law having received and considered the legal advice of Timothy J. Wilkin on June 24, 2008, which advice was illegally received at a meeting that was held in the absence of any "emergency".

179 As noted, at its regularly scheduled meeting on June 23, 2008, Council moved to schedule a special meeting for June 24, 2008, for the purpose of dealing with the compliance audit report, and that the requirements for forty-eight hours notice be waived. Although section 4.2 of the City's procedure by-law permits a meeting to be held on less than forty-eight hours notice in circumstances of emergency, Mr. Lord advised that this extension occurred under section 2.2, which provides that the "rules and regulations contained herein may be suspended by a two-thirds vote of the Members of Council ... present at the meeting...." He advised that this was customary when Council could not complete all of its business at the regular meeting, and conceded that this was not an emergency situation.

180 Mr. Lord relies on the decision of the Ontario Court of Appeal in *Howard v. Toronto (City)*, [1928] 1 D.L.R. 952 (Ont. C.A.), at 965:

Procedure is a matter of internal regulation of business, and in the absence of statutory obligation, the council is at liberty to alter or suspend the ordinary procedure.... It is well-settled that failure to conform with the rules of procedure of municipal council does not invalidate a by-law passed by it.... The Court cannot prescribe a procedure to be adopted by the council, and cannot quash a by-law for error in procedure, except in cases where there has been a failure to observe the formalities (by way of notice or otherwise) prescribed by the statute as a condition precedent to the exercise of its powers or unless the proceedings are so inequitable and unfair as to evidence of fraudulent misuse by the council of its powers.

181 I am unable to say in the circumstances that the proceedings were inequitable, unfair, or a fraudulent misuse of Council's powers. A meeting on June 24, 2008, occurred with full and complete notice to all involved.

(c) Conclusion on Issue Three; Precipitous Actions and Bad Faith on City Council's Part

182 In all of the circumstances I find that the evidence does not support the Applicant's allegations of capricious behaviour, corrupt motivation, bias, bad faith or otherwise unlawful action, response or purpose by the Council.

4. Are the By-laws Illegal on Municipal Law Grounds?

183 Ms. Jackson asks this court to quash By-law 205-2008 and confirming By-law 228-2008, as being illegal and ultra vires on municipal law grounds. The complaint is that "Council did not enact specific confirming By-laws authorizing the conduct of a compliance audit into alleged contraventions of the MEA, ... [and] never passed specific conferring By-laws authorizing... the laying of charges in relation to the apparent contraventions." This is said to be

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contrary to s. 5 of the *Municipal Act, 2001*, which results in "there being no valid corporate act."

184 Ms. Jackson's affidavit takes a similar approach to the issues it raises under this rubric, so for convenience I will quote and address only one reference, by way of example:

At no time did Council pass a specific Bylaw authorizing the Acting Head of Council and the proper officers of the City to do all things necessary to give effect to the issuance of a request for proposal for an auditor to conduct a compliance audit in relation to my campaign finances. The only confirming Bylaw passed by the Council on February 25, 2008, was one signed by myself and Sybil Fernandes, Deputy City Clerk confirming the proceedings of Council in relation to matters that I did not have an interest in.

I am informed by my counsel Morris Manning, Q.C., and verily believe that as a result of the failure of the Council to pass a specific Bylaw authorizing the issuance of a request for proposal for an auditor to conduct a compliance audit in relation to my campaign finances the appointment of the auditors Ken Froese of LECG Canada Ltd. and Glen R. Davison was made illegally.

185 Considering the substance of the paragraphs from Ms. Jackson's affidavit quoted above, it is necessary to look at the standard language of the confirming by-laws. By-law 55-2008 deals with the issuance of a request for proposal for an auditor to conduct the compliance audit. It states:

A By-law to confirm the proceedings of Council at its meeting on February 25, 2008.

The Council of The Corporation of the City of Vaughan ENACTS AS FOLLOWS:

1. THAT the actions of the Council at its meeting held on February 25, 2008 with respect to each recommendation contained in the Meeting Agenda of that date and in respect to each motion, resolution and other action taken by the Council at the said meeting, subject to all approvals required by law, are hereby adopted, ratified and confirmed.

2. THAT the Head of the Council or the Acting Head of the Council and the proper officers of the Municipality are hereby authorized and directed to do all things necessary to give effect to the said motions, resolutions and other actions and to obtain approvals where required, and, except where otherwise provided, the Head or Acting Head of the Council the Clerk and/or Treasurer are hereby authorized to execute all documents necessary in that behalf, and the said Clerk is hereby authorized and directed to affix the corporate seal of the Municipality to all such documents.

186 The Minutes to which the By-law refers contain the following:

Item 23, Report No. 9, of the Committee of the Whole, which was adopted, as amended, by the Council of the City of Vaughan on February 25, 2008, as follows:

By approving the confidential recommendations of the Committee of the Whole (Closed Session) meeting of February 25, 2008;

By approving the following contained in the additional report of the Commissioner of Legal and Administrative Services and City Solicitor, dated February 25, 2008:

The Commissioner of Legal and Administrative Services and City Solicitor in consultation with the City Manager and Deputy City Manager and Commissioner of Finance and Corporate Services rec-

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ommend that Council direct that a Request for Proposal be issued for an auditor to conduct a compliance audit pursuant to section 81(6) of the Municipal Elections Act, 1996 in regard to the 2006 Municipal Election Campaign finances of Mayor Linda D. Jackson.

[Emphasis in original]

187 A similar pattern is found in the other by-laws and reports.

188 I find there to be no lack of clarity in the words of the By-law and the report to which it refers. I agree with Mr. Lord's submission, stated with some asperity, that: "[t]here is no basis in law, that every decision, even administrative decisions, made by a municipal council, involving actions such as instructing staff in the performance of their duties and receiving legal advice, requires the enactment of a by-law by the Council."

189 Section 5 of the *Municipal Act, 2001* provides:

5. (1) The powers of a municipality shall be exercised by its council.

(2) Anything begun by one council may be continued and completed by a succeeding council.

(3) A municipal power, including a municipality's capacity, rights, powers and privileges under section 9, shall be exercised by bylaw unless the municipality is specifically authorized to do otherwise.

(4) Subsections (1) to (3) apply to all municipal powers, whether conferred by this Act or otherwise.

190 On behalf of the City, Mr. Lord submits that each decision of the City Council questioned in these proceedings was duly ratified, confirmed and assumed by the City in each successive decision, up to and including the decision by the Council to respond to these proceedings. The evidence shows that Council made all of the decisions in question by resolution, and in fact did confirm each decision by a confirmatory by-law duly enacted by vote by a quorum of the members representing all of the members of Council qualified to vote on the original matter; this includes By-law 205-2008 authorizing the prosecution and confirming Bylaw 228-2008.

191 Single, specific, confirming by-laws are lawful: *Atkinson v. Metropolitan Toronto (Municipality)* (1976), 12 O.R. (2d) 401 (Ont. C.A.), at 409. A municipality has the power to ratify, by by-law, any previous decision lawfully made and without a time limit where, as here, there is no deprivation of a previous private right such as to litigate damages: *Mackay v. Toronto (City)* (1917), 39 O.L.R. 34 (Ont. H.C.), per Middleton J., at 46; *Walker v. Ontario (Minister of Housing)* (1982), 37 O.R. (2d) 325 (Ont. Div. Ct.), page 330.

192 I have found no evidence that City Council breached its own procedural by-law, but failure by a council to conform with its own rules does not in any event invalidate in any way a by-law passed by the Council: *Howard v. Toronto (City)*, *supra*. This ground of complaint has no merit.

193 I pause to address one lurking issue. The standard line that, by her signature, Ms. Jackson was only "confirming the proceedings of Council in relation to matters that [she] did not have an interest in" appears throughout the affidavit. This qualification was undoubtedly added to address the possibility that by signing, Ms. Jackson was contravening s. 5 of the *Municipal Conflict of Interest Act*. This section forbids the involvement of a member of Council in the decision-making process on a matter in which she has an interest, which Ms. Jackson undoubtedly had in the matter in issue. That qualification is not expressed in the confirming by-laws, and for good reasons. First, in signing the by-laws Ms. Jackson was performing only a clerical task by virtue of her office as Mayor, so no danger of contravening the *Municipal Conflict of Interest Act* existed. Second, her action was quite consistent with the

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practice, which is set out in section 3.11 of the City's Procedural By-law No. 400-2002:

No Member after having declared an interest on any matter may move, second or vote on the "adoption of items not requiring separate discussion", if the matter having declared an interest is contained therein. The Member after having declared an interest may move, second and vote on the Confirming By-law.

194 There is no doubt that whether or not Ms. Jackson voted on any of the decisions, or any of the by-laws in question; whether or not she had a pecuniary interest in any such decision or a by-law; and whether or not she acted at any time in contravention of the *Municipal Conflict of Interest Act* does not affect the fact or validity of the Council's decision or by-law, pursuant to s. 12 of that Act.

195 The Applicant refers to improper delegation by Council under this issue. It has been dealt with elsewhere in these reasons. Section 23.1 of the *Municipal Act, 2001*, as amended gives Council the power to delegate. To the extent that it delegated its powers in respect of the activities referred to in this application, Council did not delegate legislative powers to anyone. This ground of complaint has no merit.

196 The Applicant takes special aim at By-law 205-2008 with respect to the retention of Mr. Wilkin to conduct the prosecution, which he says is *ultra vires* for a number of reasons. First, she submits that:

The preamble to the resolution regarding the institution of the laying of charges against the Applicant under the *Municipal Election Act, 1996* reveals that the Council mistakenly thought it had an "obligation to commence legal proceedings ... rather than, as the statute provides, a discretion to exercise after considering whether the Report's identification of "numerous apparent contraventions" was correct and warranted legal proceedings. Council misinterpreted the statutory provision of section 81(10) which requires the council to exercise its own discretion and not blindly follow the audit report.

197 The resolution adopted by Council on June 24, 2008, and confirmed by By-law 205-2008 provided:

WHEREAS Council has received, reviewed, and considered the Report of Ken Froese and Glen R. Davison dated June 18, 2008, being the Compliance Audit Report regarding the 2006 municipal election campaign finances of Linda D. Jackson;

AND WHEREAS the Compliance Audit Report has identified numerous apparent contraventions of the Municipal Elections Act, regarding the election campaign finances of Linda D. Jackson;

AND WHEREAS Council has received and considered the legal advice of Timothy J. Wilkin on June 24, 2008;

AND WHEREAS the obligation to commence legal proceedings in respect of such contraventions under the Municipal Election Act falls to Council;

AND WHEREAS it is important for all concerned to avoid any perception of bias as legal proceedings move forward.

NOW THEREFORE THE COUNCIL OF THE CITY OF VAUGHAN RESOLVES AS FOLLOWS:....

[Emphasis added]

198 The underlined portion of the Preamble is the only support for the proposition that "Council misinterpreted the statutory provision of section 81(10) which requires the council to exercise its own discretion and not blindly

follow the audit report." There is no other evidence to support the allegation that Council thought it was obligated to commence legal proceedings. It is quite plain that the authority to commence proceedings under s. 81 (10) of the MEA rests solely with Council. It is also clear from the minutes of the meeting that, quite apart from its in-house lawyer to whom Council would have access, that Council was legally advised by Mr. Wilkin. The substance of his advice is not before this court, but I have trouble making a dispositive assumption that he did not give Council the advice that they had discretion in the matter to be exercised in accordance with the ordinary principles of administrative law cited earlier.

199 Council's deliberations around the Frustaglio compliance audit report show the proper pattern, and also contain the text of the legal opinion. The preamble to the resolution of Council dated November 10, 2008, provides:

WHEREAS Council has been mindful of the overall public interest by giving due consideration to whether the candidate fulfilled the duties of a candidate under the Municipal Elections Act; and

WHEREAS Council has been mindful of the overall public interest by giving due consideration to the need for general deterrence with respect to campaign finance issues and the need for this candidate to be deterred from possible future contraventions of the Municipal Elections Act, with consideration given to whether this candidate deliberately violated the Act, or whether any contraventions were through inadvertence only; and

WHEREAS Council has considered the overall public interest by giving due consideration to whether the contraventions reported by the Compliance Auditor are substantive or technical in nature; and

WHEREAS Council has considered all of the above matters and assessed whether the overall public interest has been served in relationship to achieving final compliance with the Act and whether the overall public interest aspect of the compliance audit process has been met; and

WHEREAS Council has determined that both the public interest and compliance aspects required by the legislation have been achieved.

200 The City Solicitor's opinion canvassed fully the options open to Council and the applicable legal and policy principles, and added as a concluding factor for Council to consider: "[w]hether, in Council's opinion, having regard to all of the circumstances with respect to the matter, it is in the public interest to commence legal proceedings against the candidate or take no further action." Council had the advice of qualified personnel and there is no reason for me to assume that the advice given in respect of Ms. Jackson's case was any different regarding the options open to Council. I therefore find that the allegation that Council erroneously believed it was obligated to commence legal proceedings against Ms. Jackson is not proven.

201 Second, the Applicant challenges By-law 228-2008 on the basis that s. 81 (10) of the MEA, in giving discretion to a council to "commence a legal proceeding" does not give power to "institute the laying of charges against" the Applicant under the MEA, as Vaughan Council resolved to do. As set out above, the cases hold otherwise.

202 Third, the Applicant submits that:

Nowhere does the MEA authorize a council to delegate the substance of its authority to make decisions under section 81(10) to commence a legal proceeding to anyone, let alone an unelected member of the public. Paragraphs 2, 3 and 4 of the resolution of June 24, 2008 ... reveal that the council delegated to Mr. Wilkin a power it thought it had — to institute the laying of charges against the Applicant. By-law 205-2008, purporting to adopt, ratify and confirm this resolution constitutes a purported grant to Wilkin of an unbridled and uncontrollable discretion with respect to the entirety of the prosecution, thereby leaving the Applicant at the mercy of Wilkin,

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who is entitled to impose whatever conditions he sees fit. This is an unlawful delegation of statutory authority;

203 Fourth, the Applicant submits that Council failed to give any, let alone specific, guidance and directions to Mr. Wilkin nor did it state with clarity the standards to be enforced. This repeats an argument that I rejected earlier.

204 The Applicant also takes special aim at confirming By-law 228-2008 and submits:

By-law 228-2008 purports to confirm the illegal actions of Council identified by the Applicant in Court File No. CV-0809028. The law has as its sole purpose the (sic) seeking to deny the Applicant access to the court in the application. Absent specific statutory authority, Council was acting without authority and in bad faith in passing By-Law 228-2008.

205 I accept the City's submission that in response to these proceedings, and without prejudice to its position that the by-laws in question were valid and accomplished the purposes intended (including the confirmation of all of the Council decisions raised in these proceedings), the Council of the City of Vaughan, at its meeting held on September 8, 2008, enacted By-law 228-2008 to further confirm all of the decisions in question in these proceedings, should such be required, and out of an abundance of caution. This intent is amply borne out in the language of By-law 228-2008 and in the minutes of the Council meeting of September 8, 2008, to which it refers.

Conclusion on Issue Four; Are the By-laws Illegal on Municipal Law Grounds?

206 I conclude that the by-laws are not illegal on municipal law grounds.

Ruling:

207 For the reasons set out above, I dismiss this application with costs. I will accept written submissions on a 7-day respective turnaround from the successful parties, the moving party, and then reply. Cost submissions should specifically address whether the auditor is entitled to costs from the moving party.

Application dismissed.

FN1 As determined on judicial recount: *Di Biase v. Vaughan (City)* (2007), 34 M.P.L.R. (4th) 219 (Ont. S.C.J.); (2007), 39 M.P.L.R. (4th) 112 (Ont. Div. Ct.); (2007), 43 M.P.L.R. (4th) 287 (Ont. Div. Ct.) per Howden J.

FN2 The parties did not dispute the court's jurisdiction to deal with the application.

FN3 There is support for the proposition that I should exercise my discretion against hearing this application, since the arguments could have been made in the prosecution. Regrettably the parties did not cite the authorities referred to by I. MacDonnell J. in *R. v. Khan*, [2009] O.J. No. 111 (Ont. S.C.J.), which came to my attention after these reasons had been drafted.

FN4 As an aside, in response to a question from the bench, Mr. Lord asserted that a candidate could appear before a municipal council as a delegation to respond to allegations of fact in an application for a compliance audit, and to address the matters raised in the compliance audit report when council is deliberating a prosecution, as part of municipal compliance with fairness requirements. (This aside assumes, without deciding, that the factors in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at para. 21 *et seq.* mandate fairness in these circumstances without qualification by the reasoning in *New Brunswick (Board of Management) v. Dums-muir*, 2008 SCC 9 (S.C.C.)) Ms. Jackson did not seek to address Vaughan Council and has not complained about any inability to do so. My reading of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, however, suggests

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that s. 5 and s. 15 prevent a successful, but not an unsuccessful, candidate from addressing a municipal council on the subject of an audit or a prosecution under the MEA. This is an incongruous result.

FN5 The City did not engage in the constitutional analysis beyond this assertion, taking the position that the issue was one for the Crown. The provincial and federal Crowns declined to intervene. The Applicant did not challenge the auditor's standing to address the constitutional issues.

FN6 Arguably a "sliding scale" metaphor might be better suited to the concept of variability, for example analogizing to the factors for determining the degree of procedural protection offered in administrative law under *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para 21 *et seq.*

END OF DOCUMENT

DATE: December 21, 2011

B E T W E E N:

Jody E. Johnson, Counsel for the Respondent

E. Marshall Green, counsel for the Appellant

HEARD: November 8, 2011

BELLEFONTAINE, J:

[1] This is my decision on the appeal brought on behalf of Mr. Doug Dickerson from a decision of the Compliance Audit Committee of the City of Pickering dated the 18th day of May 2011. In their decision, the committee granted the applications brought by three electors David Steele, Ian Cummings and Jolanta Duszak requesting a compliance audit of Mr. Dickerson's election campaign finances, pursuant to the *Municipal Elections Act* ("Act").

[2] The grounds submitted by the applicants in support of their request for a compliance audit included:

1. That Mr. Dickerson's Form 4 Financial Statement-Auditors Report, filed by him and declared by him to be correct, shows spending of \$33,331, well above the spending limit of \$19,154 issued by the city clerk.
2. The Form "4" Report did not disclose as required any inventory of campaign goods and materials, specifically signs from a previous campaign which was inconsistent with the large number of signs used by Mr. Dickerson during the campaign.
3. Post-election day expenses for honorariums and voting day party of \$16,094 were excessive and questionable.

[3] Mr. Dickerson submits no reasonable ground existed to support the committee's decision to order an audit. On the basis of supplemental information provided to the committee and before me by way of sworn affidavit, Mr. Dickerson submits the totality of the evidence establishes:

1. The expense overage is a result of an incorrect interpretation by his accountant of the categorization of post-voting day expenses, totaling \$15,050 for post voting clean up and data entry, not subject to the spending limit as pre-voting day expenses that are covered by the spending limit.
2. Given that his actual pre-election day expenses were well under the spending limit, the oversight in not including \$800.00 worth of signs

would not establish non-compliance with the *Act* as he would still be below the allowable spending limit.

3. As post- voting day expenses are not limited, no reasonable grounds could exist that a breach has occurred by virtue of these expenses.

[4] Fundamental to Mr. Dickerson's position, is that the *Act* as recently amended has resulted in ambiguous wording and that as it is a "penal" statute, he is entitled to the interpretation most favourable to him which he submits would support his argument that no reasonable grounds exist. While the committee did not provide reasons for its decision, it has been submitted that during the course of the proceedings the committee members felt there was an ambiguity in the *Act*, but that the ambiguity was an issue that should be resolved at the compliance audit stage, rather than by themselves. The appellant submits that the committee was in error in doing so and that in order to determine whether reasonable grounds existed to find that the *Act* had been contravened they had to come to a determination of how the *Act* should be interpreted.

[5] The legislative framework governing this appeal has been outlined by Justice McKerlie in *Fuhr v. Perth South (Township)* 2011 O.J. No. 4251 para 2-7:

Legislative Framework

2 The Municipal Elections Act applies to "an election to an office on the council of a local municipality". The requirements respecting "Election Campaign Finances" are specifically delineated in ss. 66 to 82.1 of the Act.

3 Pursuant to s. 69(1), a candidate shall ensure, inter alia, that:

- (a) One or more campaign accounts are opened at a financial institution, exclusively for the purposes of the election campaign and in the name of the candidate's election campaign;
- (b) All contributions of money are deposited into the campaign accounts;
- (c) All payments for expenses, except for a nomination filing fee, are made from the campaign accounts;
- (d) Contributions of goods or services are valued;
- (e) Receipts are issued for every contribution and obtained for every expense;

4 This section also delineates a candidate's duty to keep records and to make financial filings under ss. 78 and 79.1.

5 Pursuant to s. 78, a candidate is required to file a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances. An auditor's report is not required "if total contributions received and total expenses incurred in the election campaign up to the end of the relevant period are each equal to or less than \$10,000".

6 The penalties for failing to comply with the filing requirements are set out in ss. 80(2) and 92(5).

7 The "Compliance Audit" provisions of the Municipal Elections Act are set out in ss. 81 and 81.1. The relevant provisions are as follows:

81(1)

Application

An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

81(2)

Requirements

- An application for a compliance audit shall be made to the clerk of the municipality... and it shall be in writing and shall set out the reasons for the elector's belief.

- 81(4)

Application to be forwarded to committee

- Within 10 days after receiving the application, the clerk of the municipality ... shall forward the application to the compliance audit committee established under section 81.1 and provide a copy of the application to the council.

- 81(5)

Decision

- Within 30 days after receiving the application, the committee shall consider the application and decide whether it should be granted or rejected.

- 81(6)

Appeal

- The decision of the committee may be appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision the committee could have made.

- 81(7)

Appointment of auditor

- If the committee decides under subsection (5) to grant the application, it shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

- 81(9)

Duty of auditor

- The auditor shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and shall prepare a report outlining any apparent contravention by the candidate.

- 81(13)

Costs

- The municipality ... shall pay the auditor's costs of performing the audit.

- 81(14)

Power of committee

- The committee shall consider the report within 30 days after receiving it and may,
 - (a)
if the report concludes that the candidate appears to have contravened a provision of this Act relating to election campaign finances, commence a legal proceeding against the candidate for the apparent contravention;
 - (b)
if the report concludes that the candidate does not appear to have contravened a provision of this Act relating to election campaign finances, make a finding as to whether there were reasonable ground for the application.
- 81(15) Recovery of Costs
- If the report indicates that there was no apparent contravention and the committee finds that there were no reasonable grounds for the application, the council ... is entitled to recover the auditor's costs from the applicant.
- 81(17) Saving provision
- This section does not prevent a person from laying a charge or taking any other legal action, at any time, with respect to an alleged contravention of a provision of this Act relating to election campaign finances.

[6] It should be noted that the statutory framework is substantially identical to the framework included in previous legislation which however provided for the

municipal council to make the decision which has now in the new *Act* been delegated to an independent compliance audit committee. Accordingly, some decisions under the previous legislation may refer to the municipal council as opposed to the committee, but I find the principles established under the previous legislation are still valid. The relevant sections in relation to the expense issue's in the matter are the following:

Expenses

67. (1) For the purposes of this Act, costs incurred for goods or services by or on behalf of a person wholly or partly for use in his or her election campaign are expenses. 1996, c. 32, Sched., s. 67 (1).

Additional rules

(2) Without restricting the generality of subsection (1), the following amounts are expenses:

1. The replacement value of goods retained by the person from any previous election and used in the current election.
2. The value of contributions of goods and services.
3. Audit and accounting fees.
4. Interest on loans under section 75.
5. The cost of holding fund-raising functions.
6. The cost of holding parties and making other expressions of appreciation after the close of voting.
7. Expenses relating to a recount.
8. Expenses relating to proceedings under section 83 (controverted elections).

8.1 Expenses relating to a compliance audit.

8.2 Expenses that are incurred by a candidate with a disability, are directly related to the disability, and would not have been incurred but for the election to which the expenses relate.

9. The nomination filing fee referred to in section 33. 1996, c. 32, Sched., s. 67 (2); 2009, c. 33, Sched. 21, s. 8 (28).

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76. (1) An expense shall not be incurred by or on behalf of a person unless he or she is a candidate. 1996, c. 32, Sched., s. 76 (1).

Only during election campaign period

(2) An expense shall not be incurred by or on behalf of a candidate outside his or her election campaign period. 1996, c. 32, Sched., s. 76 (2).

Who may incur expense

(3) An expense may only be incurred by a candidate or an individual acting under the candidate's direction. 1996, c. 32, Sched., s. 76 (3).

Maximum amount

(4) During the period that begins on the day a candidate is nominated under section 33 and ends on voting day, his or her expenses shall not exceed an amount calculated in accordance with the prescribed formula. 1996, c. 32, Sched., s. 76 (4).

Prescribed formula

(4.1) The prescribed formula must be written so that the amount calculated under it varies based on the number of electors entitled to vote for the office for which the candidate is nominated. 2009, c. 33, Sched. 21, s. 8 (37).

Exception

(5) Subsection (4) does not apply in respect of expenses described in paragraphs 3 and 5 to 8.2 of subsection 67 (2). 1996, c. 32, Sched., s. 76 (5); 2009, c. 33, Sched. 21, s. 8 (38).

[7] STANDARD OF REVIEW

The parties disagree on the Standard of Review for me to apply in these proceedings. Counsel for the committee submitted that as the criteria for the selection of members of the committee requires “demonstrated knowledge and understanding of municipal election campaign financing rules”, the committee members can be found to have special expertise and given the specialized nature of election financing rules, their decision should be accorded deference. If so, the standard of review of “reasonableness” as set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 should apply. Under that “reasonableness” standard of review, I would not substitute my own view of the correct outcome, but rather, provided the committee’s decision making process was reasonable and the decision fell within the range of defensible outcomes, I would be obligated to defer to their decision. The appellant submits that a reasonableness standard should not apply. They submit it is only appropriate to do so where there is a privative clause restricting review by an appellant court, or

where deference should be given to findings made within the field of specialized knowledge of an administrative decision maker or where the reasons provided disclose an analytical process which merits deference. The appellant submits that those criteria are not met in this case, that no deference should be shown to the decision of the compliance audit committee and that I should apply a "correctness" standard of review. Pursuant to *Dunsmuir v. New Brunswick*, a "correctness" standard of review would require me to undertake my own analysis of the question and uphold the committee's decision if my own analysis is consistent with it and substitute my decision for that of the committee if I disagree with it.

[8] I consider that the appropriate standard of review to apply in this matter is one of correctness. I do acknowledge that some Courts have taken a different approach and applied a reasonableness standard where the expertise of the committee members has been established and is at a level that merits according their decision deference. See Lane, J. in *Lyra v. Heaps* [2008] O.J. No. 4243 (Ont. C.J.).

[9] However, while the *Municipal Elections Act* is a specialized area where committee members may have expertise that would merit deference, I consider the correctness standard appropriate in this case as the qualifications of the committee in this matter as selected are not before me. I do not consider the selection criteria alone to be sufficient for me to evaluate the level of expertise of the committee members. They may or may not have the qualifications called for and the qualifying criteria are broad enough that they are not a guarantee of expertise, particularly given the adhoc and sporadic nature of this type of application, that was before them for consideration.

[10] I note as well that the wording of the review section which provides "...the court may make any decision the committee could have made." provides broad discretion to the appellate court and contains no privative clause restricting the Courts discretion or mandating deference being given to the committee's decision. Further, the evaluation of whether reasonable grounds exist is a common function for members of the Ontario Court of Justice, so while the *Municipal Elections Act* context is an uncommon one for the Court to be dealing with, the legal principles and tests to be applied are well within the expertise of the Court. While the committee members may have a background in municipal election finances that will assist them with understanding the broad context of the analysis, they have no expertise superior to the reviewing Court in the area of analyzing whether reasonable grounds exist.

[11] In addition, the lack of reasons for the decision of the committee creates a significant hurdle in evaluating the reasonableness of the decision making process. Given the intermingled considerations of fact and law that underlie the committee's ruling, the lack of reasons showing the decision making process is a significant barrier to appellant review and according deference to the decision. I note further that a correctness standard has been applied by a number of courts in the *Municipal Election Act* context. See for example *Chapman v. Hamilton (City of)*, [2005] O.J. No. 1943.

[12] Accordingly, applying a correctness standard I will conduct my own review to determine whether reasonable grounds exist to order a compliance audit and uphold the committee's decision if I agree it was correct and alternatively

substitute my own decision to the contrary if I consider the committee's decision to have been incorrect.

SCOPE OF REASONABLE GROUNDS

[13] Given the appellant's heavy reliance on supplemental materials that were not available to the elector applicants at the time of filing their applications for an audit, I consider it necessary to decide the framework for determining whether reasonable grounds exist that a candidate has contravened a provision of the *Act*. Is the analysis to be conducted as a review of the Electors subjective and objective belief based on the information in their applications and the Form "4" report only? Alternatively are the grounds to be evaluated from the perspective of the committee based on the supplemental information that may have been provided by the electors or the candidate at the time of its decision? Further again, am I to conduct my own consideration of the reasonable grounds as of the appeal hearing with the supplemental affidavits and materials filed at this stage?

[14] In *Chapman v. Hamilton*, Justice Culver conducted his analysis as a review of the Electors belief, stating at paragraph 39:

"I conclude that if the *Elector* (my emphasis) is found to have had reasonable grounds to believe that a candidate had contravened a provision of the *Act* relating to campaign finances an audit is the only remedy available". "...Council (now the committee) must consider whether the *Elector* has reasonable grounds to believe"....

[15] Justice Culver also dealt with a request to consider evidence from the candidate on the appeal that established his *bona fides* and the adequacy of his

reporting in complying with the election finance law. At paragraph 54 he refused to consider this information holding:

“Counsel for the (Elector) submits that I should not allow this appeal to be turned into an audit, a proposition with which I agree... It is the duty of this court to consider the grounds for the request for compliance audit, not to become the auditor.”

[16] Justice Lauwers in *Jackson v. Vaughan* [2009] O.J. No. 1057 (Ont. Supp. Ct.) was also of the opinion that the issue to be determined is whether the Elector had reasonable grounds as of the time the application for an audit was made:

Paragraph 51

“In the context of the M.E.A. there is minimal discretion in the council’s (now committees’) decision on whether to appoint an auditor under Section 81(1) and (4). *If the application shows* (my italics) reasonable grounds, that is the end of the matter and council must appoint an auditor.”

Justice Lauwers decision was upheld and his reasons approved of by the Court of Appeal at [2010] O.J. No. 588. Considering the foregoing there is in my view strong precedent for confining the issue to whether the Electors applications showed reasonable grounds to believe the *Act* had been contravened.

The appellant has asked that the reasonable grounds be assessed in light of his subsequently provided sworn supplementary evidence. To do so would require me to not only consider post-application materials, but also to take on the role of auditor and trial judge and determine the veracity of the appellant’s facts which is not my function at this stage of the proceeding. I consider my duty to be the

narrow one of acting as a gate keeper and determining whether credibly based reasonable grounds existed for the Elector's applications at the time they were made. This limited role to investigating and evaluating the facts is the approach that was taken by Justice Lauwers in *Jackson v. Vaughan* at paragraph 67 and 68:

"Similarly, In *DeFrancesca et al. v. City of Vaughan* (October 7, 2008), Newmarket, 07-000486 (O.C.J.), Justice H.I. Chisvin reviewed an application in which seven issues were raised concerning the campaign finances of Bernie DiVona, an elected councilor of the City of Vaughan. City Council denied the applicants' request for a compliance audit. Chisvin, J. asked himself the following question: "Does anyone raise a reasonable ground to believe that a violation has occurred?" (para. 12) He looked at only one of the issues, concerning contributions by businesses apparently located at a single address and having similar officers and directors. He found that there were reasonable grounds to believe that there had been a violation of the finance provisions of the MEA. He concluded at para. 17:

"There are six other issues raised by the applicants in this factum with respect to this matter. I do not propose to review them in detail as it is not my function to determine the ultimate veracity of each and every one of these matters. As I've said, it is my function, like that of council's, to determine only if there are reasonable grounds for the electorate to believe that there has been a violation of the campaign finance provisions of the Act...

I find that there are good reasons for this approach. In terms of the statutory structure, the role of the Ontario Court judge in an appeal under s. 81(3.3) of the Act is limited. The judge's responsibility is to deal with the issue of reasonable grounds. It is the responsibility of other actors in the statutory framework, not the Ontario Court judge at this stage, to conduct the audit, evaluate the results, authorize a prosecution, carry it out and try the case."

Accordingly in my opinion, my review of the committee's decision should be confined to the information available to the Electors.

REASONABLE GROUNDS

[17] Reviewing the applications for a compliance audit in this matter, I am satisfied there are credibly based reasonable grounds to support the request for an audit.

[18] Mr. Dickerson's filed Form 4 Report was certified by his auditors to be correct and declared by Mr. Dickerson to be correct and shows a significant spending amount over the spending limit set by the municipal clerk which is sufficient to provide the reasonable grounds. Mr. Dickerson may ultimately succeed with his argument that his auditor incorrectly classified post- voting day expenses and that he was statutorily coerced to declare that classification to be true even though he disagreed with it. That position assumes that his auditor accepted the expenses to be valid post- voting day expenses. The auditors' reasons for the classification are not known to the electors who have applied for the audit. It may hypothetical be that an audit will show the expenses claimed to not be post- voting day expenses at all, but pre- voting day expenses as Mr. Dickerson's auditor has classified them. Determining the true state of affairs is the function of the auditor and ultimately the trial court who will make the ultimate decision on the facts and the law as they find it.

[19] It has been argued by the appellant that a new audit is unnecessary in relation to the over expenditure grounds because it will simply result in a repeat of

the previous auditors work and that myself as an appeal judge can decide what the appropriate classification of the different expenses should be and eliminate the need for an audit on this ground. In my view this argument misperceives the proper scope of the compliance audit. The *Municipal Elections Act* establishes a self-reporting and self-monitoring system while providing public transparency of election finances and expenses. Provided there is a single reasonable ground to support the compliance audit, I consider a wide ranging audit and report to be required to meet the needs of public transparency. As noted by Justice Lauers at paragraph 68 of *Jackson*... "the identification of a problem may suggest that there might be more awaiting discovery. For example, the failure to issue a campaign receipt may be related to an unauthorized expenditure; this is grist for the auditors mill and is well beyond the purview of an Ontario Court Judge on an appeal under Section 81(3.3)." He also articulated this point at paragraphs 64 and 65:

"The Applicant argued that the compliance audit must relate only to the matters in the complaint that are found by the judge hearing the s. 81(3.3) appeal to have reasonable grounds.

I disagree, I find that s. 81 (1) is a threshold requirement only. Once it is plain to a municipal council that there are reasonable grounds for the belief "that a candidate has contravened a provision of this Act relating to election campaign finances" under s. 81(1) then the result is a "a compliance audit of the candidate's election campaign finances"; in other words, the audit is comprehensive and is not restricted to the matters referred to in the complaint. The trigger can be a single contravention, although in this case the applications for a compliance audit identified numerous possible contraventions."

[20] The powers of an auditor under Section 81 (12) confirms the broad scope of the audit. For the purposes of the audit, the auditor is entitled to have access to all

relevant books, papers, documents or things and has the powers of a commission under the *Public Inquiries Act*, which applies to the audit as if it were an inquiry under that *Act*. The audit also clearly includes not simply the audit, but also a report outlining any apparent contravention by the candidate.

[21] Accordingly, it would in my view be contrary to the purposes of the *Act* to have me simply rely on Mr. Dickerson's reply information and make a decision as to the categorization of the expenses as he calculates them and potentially circumvent the fulsome audit and report contemplated by the *Act*.

[22] A similar analysis applies to the unreported inventory of election signs re-used from the previous election which was required to be reported and admittedly was not. The absence of a declaration of sign inventory by a repeat candidate given the electors statement that a large number of signs were displayed by Mr. Dickerson during the campaign, is sufficient reasonable grounds to support the audit request. It would be reasonable to assume that a repeat candidate would have maintained some signs from the previous election for re-use in future campaigns which is exemplified by the specific provisions in the Form 4 report for this item. I do not consider it my role at this stage to accept Mr. Dickerson's statements as to the number of signs in pre-existing inventory or the value of them or whether that value would be low enough to keep pre- voting day expenses below the allowable limit. That is a function that should be left to the auditor in the context of a complete audit.

[23] The final ground raised, questioning whether the post-election party and honorariums were excessive effectively question whether they were *bona fide*. Hypothetically investigation may show the expenses to be personal rather than an

event recognizing the efforts of supporters or not to have been incurred at all. Also hypothetically, post-election honorariums may have been promised and calculated in a way that they amount to salaries and benefits/honorarium/professional fees that are properly included in pre-election expenses which would be subject to the spending limit. Post election expenses may be considered critically in light of the requirement that any surplus monies from donations are required to be paid to the municipal clerk and following the period in which they are held in trust for the benefit of the candidate are forfeited to the municipality. This raises an incentive for candidates, and creates the potential, that candidates would use the funds for purposes not related to the election to avoid having the money forfeited to the municipality. The transparency objective of the act supports the reasonableness of a review of post-election day expenses that are not subject to the spending limit to ensure the legitimacy of the post-election expenses so that those who made donations can ensure their donations were spent on election related costs.

[24] As an aside, I would note that post-election expenses may also disclose expenditures that result in an inventory of goods and materials available for future campaigns that are obligated to be reported in the Form 4 Report.

[25] I am of the view that this final ground as well, given the significant expenditure beyond the expenditures reported by the other candidates, was a reasonable ground for supporting the order for an audit.

[26] None of the foregoing analysis with respect to whether or not reasonable grounds existed requires a determination of the main ground of appeal relied upon by the appellant being the ambiguity created in the legislation by the absence of a

clear policy or direction for determining, what is an expense subject to the spending limit, and what is not. Given the limited role for fact finding when assessing whether reasonable grounds exist the ambiguity does not arise. For the purpose of assessing this ground it is sufficient that Mr. Dickerson's auditor has found his spending to be above the allowable limit. The ambiguity would not affect the other grounds for ordering the audit. Accordingly, I do not consider the Committee to have been in error by deferring consideration of the ambiguity to the auditor. Considering all of the materials and arguments in this matter, I am satisfied the Compliance Audit Committee of the City of Pickering made the correct decision in ordering the compliance audit and the appeal from its decision is dismissed.

[27] The Appellant has asked that I give direction to the auditor on how to interpret the *Act* to determine what are expenses subject to the spending limit and what are not. Courts historically have been reluctant to make rulings on an anticipatory basis. Interpretations of the law tend to be very context sensitive and a broader factual basis tends to highlight the legal implications of different interpretations and accordingly assists in the interpretation of the law. It may well be that during the course of a forensic audit, using the public inquiries power granted to the auditor, expert evidence with respect to accounting and municipal election finances may provide further insight than what is before me at this time. As well, as any statements that I make with respect to the interpretation of the *Act* is *obiter dicta*, it may have little precedential value for future courts dealing with the issue. Notwithstanding those cautions, I feel it is appropriate to indicate my opinion. There will be a large number of candidates who will be required to fill out Form 4 in future elections and any clarity on the legislation may be a benefit to

them. Notwithstanding the many candidates running for municipal office across the province, the *Act* appears to have resulted in very few appeals and even fewer trials before the Provincial Courts to present occasions for the Court to provide a legal interpretation of the various sections of the *Act* and provide guidance to candidates and their advisors. I have had the benefit of experienced counsel making submissions on this matter with full factums and although the factual basis before me is not as fullsome as will be available to the auditor preparing the compliance audit and report, I'm satisfied I have sufficient information to interpret the sections. I would make the following observations:

1. By creating two separate time periods in Sections 76(1) and 76(4), the *Act* creates a distinction between pre voting day (including voting day) expenses and post voting day expenses. Auditors should be willing to designate expenses as one or the other. Post voting day expenses, not "incurred" in the period to the end of voting day, are not limited by the *Act* either by the dollar amount or the nature of them. Specifically, the statutorily deemed post voting day expenses listed in Section 76(5) do not define or limit the nature of post voting day expenses. I consider the 2010 Municipal Election Guide to be in error in stating (except for Section 76(5) expenses)..."all expenses count towards a candidates spending limit." While a cautious candidate would follow that approach they are not bound by law to do so. In the event the Legislature wants all expenses, other than specified ones, to be covered by the spending limit an amendment to the *Act* will be required.

2. I interpret the term "expenses" in Section 76(4) that are subject to the spending limit to be defined by Section 67(1) which provides "for the purpose of

this *Act*, costs incurred for goods or services by or on behalf of the person wholly or partly for use in his or her election campaign are expenses.” The use of the term “incurred” requires that for the purposes of the Section 76(4) spending limits, an analysis be conducted as to whether an expense paid after voting day was wholly or partly for use in the election campaign up to the end of voting day even if actual payment is made after voting day. This flows from the ordinary meaning of the word “incurred”, being: “to make oneself subject to; to bring on oneself an expense or obligation.” See, The Shorter Oxford English Dictionary. The definition supports a requirement that an expense be applied to the period during which the obligation to pay it first arises rather than simply looking at when it is paid.

3. A purposive interpretation of Section 67 would additionally require that post voting day expenses that are integral to the pre voting day election campaign be considered expenses that are incurred for the period ending on voting day and accordingly subject to the spending limit unless they fall within the Section 76 (5) exceptions. On the basis that one of the purposes of the Act is to ensure that all candidates are on an equal footing and that the costs of a campaign are to be kept within reasonable limits, necessary wrap up expenses following voting day should be part of the expenses subject to the spending limit. Accordingly items such as the termination of lease costs, removal of telephones and other electronic equipment and the removal of signs which are a natural by-product of the campaign should be considered to be costs incurred for the election campaign that are subject to the spending limit. I do not accept the narrower interpretation argued by the appellant that only expenses incurred to get the candidate elected should be considered. On this narrow view the cost of erecting a sign would be an expense subject to the spending limit, but the cost of taking it down is not. In my view such

a fine distinction ignores a purposive interpretation of Section 67(1) that speaks of the "costs incurred for goods or services...for use in his or her election campaign" that should be read into Section 76(4). I consider the costs of removing the signs to be one that is incurred at the time they are erected. To permit the deferral of significant necessary expenses associated with the pre-voting day campaign until the post-voting day period would risk undermining the spending limit and defeating the purpose of it. The narrow approach of confining pre-voting day expenses to those directly related to "getting votes" or having the candidate elected is also inconsistent with the broad wording of Section 67(1) and the broad wording of Section 76(4) which would capture most pre-vote and post-vote expenses in the spending limit as they will have been paid for or incurred in the pre-vote period.

4. The issue of the post election data analysis and related data inputting was not argued at a level that I am in a position to comment on it. On the assumption that it is a post voting day expense and no cost was incurred for it before voting day, it would not appear to be a necessary or integral part of the pre-voting day election campaign expenses and should not be subject to the spending limit. It may well, on consideration by the auditor, be found to be an expense that should be considered as an "other" to be listed in the list of expenses, not subject to the spending limit in Form 4. If it is considered an allowable post voting day expense, but still a cost incurred for use in the election campaign as more broadly defined in Sections 67 and 68, consideration may have to be given as to whether or not the reports flowing from it are goods to be listed in the "Schedule for Inventory of Campaign Goods and Materials at the End of Campaign".

5. It will be noted that I have taken a purposive interpretation to the expense provisions and rules. The appellant has argued that the proper interpretation rule to apply is that ambiguities in a penal provision should be interpreted in a manner most favourable to the defendant. I consider that rule of interpretation to only apply if there is an ambiguity after the words of the Act are read in their entire context, in their ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature. See *Bell Expressview* [2002] S.C.J. No.43, where Iacobucci J. held a purposive approach should be taken before resorting to the strict construction of penal statutes rule. I consider the statute to present a coherent framework which given a purposive interpretation leaves no ambiguity.

As indicated previously, the appeal in this matter is dismissed. A compliance audit is ordered pursuant to Section 81 of the *Municipal Elections Act* with regard to the campaign finances of Mr. Doug Dickerson for the 2010 Municipal election. The matter is remitted to the Compliance Audit Committee for the appointment of an auditor, who shall conduct the audit and prepare the report required by Section 81 of the Act.

There has been a request for costs on a partial indemnity basis. Given the significant role that costs play in the *Municipal Election Act* finances regime to discourage frivolous or unnecessary requests for an audit, I view costs to be a proper mechanism to discourage one side or the other from unnecessarily appealing decisions of the Compliance Audit Committee. Accordingly, I award the respondent's their costs in this matter. If the parties cannot agree on costs, I am prepared to receive written submissions by February 21, 2012.

The date of this decision for appeal and other purposes shall be December 21, 2011. I am forwarding it by mail to the parties in advance to avoid the expense of having them attend on the listed date for judgment. No one need attend on December 21, 2011.

P.L. Bellefontaine, Justice

Case Name:
Mastroguiseppe v. Vaughan (City)

Between
Quintino Mastroguiseppe and Gino Ruffolo,
Appellants, and
The City of Vaughan, Respondent, and
Mayor Linda Jackson, Intervener

[2008] O.J. No. 5734

2008 ONCJ 763

61 M.P.L.R. (4th) 138

2008 CarswellOnt 9087

179 A.C.W.S. (3d) 364

Ontario Court of Justice
Newmarket, Ontario

L. Favret J.

February 19, 2008.¹

(74 paras.)

Counsel:

Eric K. Gillespie, for the Appellants.

George H. Rust-D'Eye, for the Respondent.

Andrew L. Jeanriefor, the Intervener.

Reasons for Judgment

1 L. FAVRET J.:-- This is an appeal by Quintino Mastroguiseppe and Gino Ruffolo (the "Appellants") from the decision of the Council of the City of Vaughan (the "City/Respondent") of May 22,

2007, on their application made pursuant to s. 81 of the Municipal Elections Act, 1996 S.O. 1996, C. 32 (the "Act") requesting a compliance audit of the financial statements and auditor report of then Candidate Mayor Linda Jackson (the "Candidate") be directed within 30 days (the "Application"), to extend the time period within which the City may consider the Application to a date after the last supplementary filing date in accordance with the Candidate's extension for filing and in accordance with the Act. The appeal is brought pursuant to s. 81(3.3) of the Act. The Appellants seek an order directing a compliance audit pursuant to s. 81(3) of the Act.

Issues

1. Does this court have jurisdiction to consider this appeal pursuant to s. 81(3.3) of the Act?
2. If the Respondent made a decision under s.81(3) of the Act to extend the period to consider the Application was that decision: (a) ultra vires its statutory authority; (b) a failure to exercise jurisdiction; or, (c) a decision rejecting the Application?
3. If this court has jurisdiction to consider the appeal what relief should be granted if the appeal is allowed?

Position of the Parties

2 The Appellants state this court has jurisdiction to review the Respondent's decision to extend the period within which it could consider their Application pursuant to s. 81(3.3) of the Act. The Application was filed within 90 days of the filing of the Candidate's financial statement and auditor report and as such the Respondent should have exercised its authority to either reject or grant the Application within 30 days of its receipt. The Appellants submit the only two decisions available to the City upon receipt of an application made under s.81 of the Act is to either reject or grant the application. The decision to extend the 30-day period, according to the Appellants is ultra vires the City's statutory authority. On this appeal the Appellants request that the court direct a compliance audit as they have complied with s. 81(2) of the Act and there are reasonable grounds to believe the Intervener contravened a provision of the Act relating to election campaign finances.

3 The Respondent and Intervener state that this court does not have jurisdiction on this appeal because the Application was filed prematurely. The Application did not satisfy the conditions precedent of s.81(2) of the Act. As those conditions were not present, the Respondent and Intervener state there was no application for the City to consider. The Respondent and Intervener state the Act contemplates only one compliance audit may be ordered and that where a Candidate indicates an intention to file supplementary financial statements and auditor's reports, the 90-day filing period referred to in s.81(2) begins when the latest applicable Candidate filing has ended. The Respondent's jurisdiction to consider the Application, the Respondent and Intervener state, only arises when an application has been filed within 90 days of the end of a Candidate's election campaign as defined by the Act. The Respondent and Intervener state there is only one such period. Where that occurs, as here, an application can only be considered at the conclusion of 30 days following receipt of an application filed within the 90-day filing period. As the candidate has indicated she intends to file a supplementary financial statement and auditor report, the Respondent states that on the basis of the current known facts the period for filing an application is March 1, 2008 to May 29, 2008 and the 30-day period for the Respondent to consider any such application would commence following receipt of an application made in that period.

4 As the Respondent has not made a decision pursuant to a validly filed application the Respondent states the court has no jurisdiction to consider this appeal. The underlying Application is not valid and therefore the court lacks jurisdiction to consider the appeal. The Respondent states the court does not have jurisdiction to consider the appeal as the Application was not made within the within the filing period set out in s.81(2) of the Act specifically "within 90 days after the later of the filing date, the Candidate's last supplementary filing date, if any, or the end of the Candidate's extension for filing granted under subsection 80(6), if any".

5 The Respondent and Intervener submitted the Respondent did not decline jurisdiction or either grant or refuse the Application but extended the time to consider the Application until the Application was properly before it. The Candidate indicated she wished to extend the campaign period pursuant to s.68 (1)5 of the Act. Until a supplementary financial statement and auditor's report was filed, the period for filing an application under s.81(2) of the Act was not available until after those documents were filed and as such on May 22, 2007 there was no application under the Act for the Respondent to consider. The decision to extend the period to deal with the Application the Respondent states was valid and consistent with the law.

6 If the court concludes the Respondent's position on jurisdiction is not correct, it takes no position on whether a compliance audit should be directed or not, but states that if the court disagrees with its position the court should return the Application to the City for its consideration or reject the Application because the Application was not properly made.

7 The Appellants state neither the Respondent nor the Intervener is a proper party on the merits of the appeal. Neither made any submissions on the merits of the Application. Both the Intervener and the Respondent have limited their submissions to the jurisdiction of this court to consider the appeal as set out above.

Issue One: Jurisdiction on Appeal

8 This appeal was made pursuant to s. 83(3.3) of the Act which provides:

"The decision of the council or local board under subsection (3) and of a committee under subsection (3) pursuant to a delegation under subsection (31.) may be appealed to the Ontario Court of Justice within 15 days after the decision is made and the court may make any decision either council, local board or committee could have made." (emphasis added)

Jurisdiction on this appeal requires that there be a decision of a municipal council made under s. 81(3) of the Act.

9 Section 81 of the Act provides in part:

"(1) An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

(2) The Application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary fil-

ing date, if any, or the end of the candidate's extension for filing granted under subsection 80(6), if any; it shall be in writing and shall set out the reason's for the elector's belief.

- (3) **Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.**

...

- (4) **If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.**

...

- (11) **If the report indicates that there was no apparent contravention and the council or local board finds that there were no reasonable grounds for the application, the council or local board is entitled to recover the auditor's costs from the applicant. (emphasis added)**

10 It was not suggested as a basis for concluding there is no jurisdiction on this appeal that: (a) the appeal was not filed within 15 days of the Respondent's decision to extend the period to consider the Application; (b) the Appellants were not electors living in the City entitled to vote in the election held November 13, 2006; (c) the Intervener was not a Candidate that stood for election that year; and/or (d) that the Application did not set out the Appellant's belief that reasonable grounds existed for requesting a compliance order be made.

11 On April 2, 2007 the Candidate filed a financial statement and auditor's report for the period April 6, 2006 to December 31, 2006. On March 31, 2007, prior to filing those documents the Candidate sent an email to the City Clerk notifying that she wished to extend her campaign period pursuant to subsection 68(1)5 of the Act. No other detail was provided. In the Intervener's factum she states, having extended her campaign period in this way, the supplementary reporting periods in s. 77 and 78 of the Act came into effect. The Intervener states in paragraph 4 of her factum that the Act provides that the campaign period extends to the farthest date following a candidate's last supplementary filing date In this case that will be 60 days after December 31, 2007, February 29, 2008.

12 In its factum the Respondent stated that December 31, 2007 was the anticipated end of the Candidate's current and last supplementary reporting period pursuant to s.77(c) of the Act. The Respondent stated that on the basis of the current facts the Candidate's last supplementary filing date, after the end of her last supplementary reporting period under s.77(c) of the Act, was February 29, 2008.

13 As of the last date of submissions received on this appeal, there is no evidence the Candidate filed any material relating to her campaign election finances by August 29 2007, the first supplementary filing date pursuant to s.77 (b) of the Act or intended to do so prior to December 31, 2007, described by the City in its factum as the "current anticipated end of the candidate's current and last supplementary reporting period" pursuant to s.77(c) of the Act. Further there was no indication on

this appeal that any anticipated filings would impact on the issues raised by the Appellants in their Application.

14 On May 14, 2007 the Appellants filed an Application in writing with the Clerk of the City requesting a compliance audit pursuant to s. 81 of the Act regarding the financial statements and auditor report of the Candidate, for the period April 6, 2006 to December 31, 2006, filed April 2, 2007 (the "Statement" and the "Report").

15 On May 17, 2007 a memorandum was prepared by Heather A. Wilson, Director of Legal Services for the Mayor and Members of council concerning the Application filed (the "Memorandum") which was marked as "additional information item no 32 report no 26 council May 22 07". Both this item number and report number are on the extract from council meeting minutes of May 22, 2007 at tab E of the Appeal Book filed (the "Minutes") which indicate a confidential memorandum from the Director of Legal Services dated May 17, 2007 was also received. Neither the Appeal record nor Respondent record include that memorandum.

16 The Memorandum referred to s.81(2) of the Act, the filing requirements at issue on this appeal, which provides in part that an application may be filed in the following period, "90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for a filing granted under subsection 80(6), if any". The Memorandum did not state the Application was not properly received or if it failed to comply with any filing requirements. In part the Memorandum stated:

"Subsection 68(1)(5) provides that if, after the election campaign period ends (in this case Dec. 31, 2006), **the candidate incurs expenses relating to a recount and the candidate notifies the Clerk in writing, the campaign period is deemed to have recommenced.**

Mayor Jackson gave written notice to the clerk on March 30 2007 pursuant to the above section.

The act does authorize a candidate to file a supplementary financial statement and auditor's report for a supplementary reporting period, which, pursuant to subsection 78(3) of the act, shall include all the information contained in the initial statement or report filed under subsection (1), updated to reflect the changes to the candidate's election campaign finances **during the supplementary reporting period.**

In view of these provisions, it would be a prudent course of action that no compliance audit should be considered **until the final election expenses for the candidate during the supplementary campaign period have been established,** as shown by the final supplementary financial statement and auditor's report. **This final statement and report may be filed by September 4, 2007 or February 29, 2008: 2 in accordance with the Act."**(emphasis added)

17 I infer that the Mayor's notice refers to a recount and the expenses incurred in relation to that recount. The only basis for the City to consider an application is its authority in s.81 of the Act.

There is no other authority for doing so. Neither the Respondent or the Intervener referred to any statutory authority to extend the time in s.81(3) for it to consider the Application.

18 The Minutes indicate that the deputation by Mr. Eric K. Gillespie and the affidavit of Mr. Mastroguiseppe of May 14, 2007 were item number 32. It had been referred to staff for a report to the council meeting of May 22 2007. I infer from the Memorandum that this occurred. The Memorandum was noted in the Minutes as adopted as amended.

19 Based on the materials listed as received by the City listed in the Minutes, I concluded the City met on May 22, 2007 and that the affidavits of Mr. Mastroguiseppe of May 14, 2007 and May 18, 2007 and affidavit of Mr. Gino Ruffolo dated May 18, 2007, all listed as received, indeed were received by the City. I find therefore the Application requesting a compliance order was before the City at that meeting.

20 The Memorandum set out following options for the City:

- "1. council may resolve that **the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate's extension for filing and in accordance with the act.**
2. council **may reject the application**, if it is provided with information that the act was complied with, or if satisfied there are no reasonable grounds for the application. Council may then deal with the application on May 22, 2007 or at the council meeting of June 11, 2007.
3. council **may grant the application**, however a supplementary financial statement and auditor's report will be filed **and an application for a compliance audit may be made after the candidate's last supplementary filing date. A duplication of effort and expense could be avoided should council proceed with option 1.**(emphasis added)

The Memorandum does not provide an opinion or any information regarding the number of compliance audits that may be imposed, if any.

21 The Minutes provide:

"Item 32, Report No. 26, of the Committee of the Whole, which was adopted, as amended, by council of the City of Vaughan on May 22, 2007, as follows:

By approving the following:

That council resolves that the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate's extension for filing and in accordance with the Act;"(emphasis added)

22 The word "consider" is defined in the Oxford Dictionary of Current English (3rd edition) at page 186 as: "1. think carefully about. 2. believe or think. 3. take into account when making a judgment." The definition of the word "received" in the same text at pages 750, 751 includes "1. be

given or paid. 2. accept or take in (something sent or offered). 3. form (an idea) from an experience. 4. experience or meet with." As well this text referred at page 628 states that the definition for the word "option" includes: "1 a thing that is or may be chosen. 2 the freedom or right to choose. ... "A "resolution" is defined in the above text page 786 to include: "1. a firm decision. 2. a formal expression of opinion or intention by a law-making body. ... 4. the resolving of a problem or dispute. 5. ... The verb "resolve" is defined at the same page to include: "1. find a solution to. 2. to decide firmly on a course of action. 3. (of a law-making body) to take a decisions by a formal vote. ...".

23 I have considered the above facts and the above definitions and conclude an application in writing was prepared and filed with the Respondent and that that Application was received by the City prior to its meeting of May 22, 2007. Indeed staff was directed to prepare a report and did so. The Memorandum is the report prepared. In the Memorandum the City was provided with three options. The options included reviewing the Application to determine if it should be granted or rejected. The only inference I find based on the facts is that the City did make a decision. Of the three options presented the City accepted option one and decided, as set out in its resolution in the Minutes, "that the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate" extension for filing and in accordance with the Act."

24 I do not agree with the Respondent's submission or that of the Intervener that by extending the period for it to consider the Application the Respondent did not make a decision pursuant to its authority under s. 81(3) of the Act. That section provides that within 30 days **after receiving an application**, the council **shall consider** the application and decide whether it should be granted or rejected. The Act provides no authority for the Respondent to extend that period of time. The decision to grant or reject an application should include whether the application meets the requirements of s.81(2) of the Act. Part of the Respondent's consideration of the application should include whether or not an application satisfies these requirements. It would be illogical to conclude no application had been made or received given the minutes of the May 22, 2007 meeting of council and the Memorandum which set out options for council's consideration. I do not accept the submissions of the Respondent or Intervener that there was no application to consider.

25 It was submitted that on this appeal the court should consider whether the Application satisfied s.81(2) and if it did not, conclude there is no jurisdiction to consider the appeal. As the Minutes clearly state the Application was received and that the City resolved how to deal with the Application, that submission in my view is illusory and lacks both logic and common sense. Having received an application, s.81(3) of the Act required that the Respondent consider it and then either reject or grant it. There is no other statutory power available to the Respondent. The statute does not allow the Respondent to extend the period of time to consider an application.

26 The City made a resolution. It is set out in the Minutes.

27 The Respondent acted on the Application received, informed by the Memorandum, and by made a resolution to extend the time to consider the Application. I find the Respondent did indeed consider the Application, albeit in a cursory fashion. Having concluded the City made a decision, I conclude this court has jurisdiction on this appeal.

Issue Two: Was the City's decision, ultra vires, a failure to exercise jurisdiction or a decision rejecting the Application?

(i) Standard of Review

28 Counsel agree that the standard of review to be applied on this appeal is set out in *Pezim v. British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557 (SCC), correctness. At page 23 of that decision Justice Iacobucci said that

"[para. 61] The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved."

[para. 62] Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of determine that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonable end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and whether there is no statutory right of appeal. ...

[para 63] At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in questions, as for example in the area of human rights. ...

29 I agree with Mr. Justice Culver in paragraph 36 of *Chapman v. Hamilton (City)*, [2005] O.J. No. 1943, that whether or not an elector has reasonable grounds to believe a candidate has contravened a provision of the Act relating to campaign finances is a question of mixed fact and law. Further I agree with Justice Culver at paragraph 37 of that decision that there is nothing here to indicate that the City would have any expertise in interpreting the Act. None of the parties on this appeal, suggested the City had any special expertise. Counsel have agreed that correctness is the proper standard of review for this court.

30 I agree with the submissions of counsel, correctness is the standard of review on this appeal. The City did not have any special expertise in determining the legal interpretation of s.81(2) of the Act. Indeed it did not have a legal opinion concerning the interpretation of that section and in its decision did not state the Application received did not comply with the statutory filing conditions of s.81(2) of the Act. The question on this appeal concerns the City's authority as set out in the Act. Applying the legal principles in the above paragraphs, correctness is the standard of review on this appeal. As such the decision by the City is not entitled to deference by this court.

(ii) Was the City's decision ultra vires, a failure to exercise jurisdiction, an available decision or a decision rejecting the Application?

31 The position of the Respondent and the Intervener is that by extending the time to consider the Application the Respondent did not decline to consider the Application or decline to exercise its jurisdiction. As the Application was not properly made, both the Respondent and Intervener stated the decision to extend the time was lawful and not a failure by the Respondent to exercise jurisdiction. As the Application was premature, that is, it was not filed within the period referred to in s. 81(2) of the Act, there was no application to consider. The Appellants disagree. They state the City's decision to extend the time for it to consider their Application was ultra vires its statutory authority, to either grant or reject the application, no more.

32 The Act sets out the framework within which a municipal election is run including determining dates for elections, who is a candidate and who is eligible to vote. As well the Act sets out duties of candidates regarding both the expenses and contributions they may incur and receive along with the obligation of a candidate to file financial statements and an auditor report regarding those expenses and contributions. The financial statements, the duties of a candidate and the ability of a voter to bring to the attention of the City reasonable grounds they have to believe a candidate has contravened any section of the Act regarding expenses and contributions are all determined by the Act. See p. 3-7 of Chapman, supra.

33 S.81 of the Act is a complete code of procedure for any elector who alleges campaign finance wrongdoing by a candidate and elected official: See Chapman, supra, and R. v. Hall [2003] O.J. No. 3613. I accept, as did Mr. Justice Culver in Chapman, supra, the following excerpt by Mr. Justice Trafford in Hall, supra, regarding s. 81 of the Act:

"[para. 21] Given **the Legislative intention, that is, to ensure the legitimacy of attacks on elected officials** and, I infer, other candidates, by electors, it is my view **that s. 81 of the Act is, in its purpose and effect, a provision to screen allegations by electors of election campaign finance wrongdoing by candidates and elected officials**, especially where the allegations are determined by an auditor and / or council, to be frivolous, vexatious, or otherwise devoid of merit." (emphasis added)

34 I accept, as did Mr. Justice Culver in Chapman, supra, that if the elector is found to have had reasonable grounds to believe that a candidate had contravened a provision of the Act relating to campaign finances, an audit is the only remedy available. I also accept as did Mr. Justice Duncan in Savage v. Niagara Falls [2005] O.J. No. 5694 that the Act permits proceedings such as the application filed by the appellants herein. Mr. Justice Duncan concluded in para 11 of his decision in Savage, and I agree that "The filter for this kind of application is the need for that applicant to establish reasonable grounds and I think that that is what Justice Trafford was saying in the decision that he gave in the case of The Queen v. Hall, [2003] O.J. no 3613."

35 In this matter there is no evidence of any debate at the City's meeting which informed the decision made. The only evidence of the information at the meeting is that listed in the Minutes, all of which I have concluded was present and informed the decision the City made.

36 Section 81(3) of the Act, set out above, provides the City, in its screening function, may grant or reject an application made. The Respondent and Intervener state the decision to extend the time

to consider the Application was valid and consistent with the law and not a failure to exercise the City's jurisdiction nor an act declining jurisdiction because the Application did not satisfy the criteria in s. 81(2) of the Act. As set out above, in my view that reasoning lacks common sense. If after considering an application the City concludes it did not satisfy the filing criteria then the only logical decision is to reject such an application. Deferring its decision, by extending the period of time for it to consider an application does not address the filing criteria and cannot logically be viewed as such.

37 Although I agree whether or not an application satisfies that criteria is an appropriate part of the review of any application received, a decision extending the time period for the City to consider an application does not inform an elector their application was deficient and thereby potentially deprives an elector with a remedy, to re-file in the appropriate period of time, if they chose to do so. The decision here did not set a future date when the Application would be considered. The language of s. 81 of the Act in my view did not intend that the period for considering an application would be a mystery to either the elector or candidate.

38 In this case, there is no evidence when the candidate will file the balance of the financial statements and auditor's report required by the legislation or indeed whether she will seek an extension pursuant to s. 80(6) of the Act. I find the request made by the candidate was made on the basis of a recount. There is no evidence on this appeal regarding the length of time the recount required.

39 The purpose of the legislation and section at issue, is to ensure that legitimate attacks by electors regarding a candidate's campaign finances are dealt with expeditiously. Further, section 81 of the Act ensure that attacks which are frivolous or without merit are dealt with expeditiously so that a candidate can be protected. Deciding whether an Application satisfies the filing criteria is part of the City's screening function.

40 The Minutes and the Memorandum, when considered together, do not support a conclusion that the City looked at whether the Application satisfied the filing criteria. I do not accept that the City did so. The Respondent and Intervener submitted that the legislation only contemplates one compliance audit be conducted for an individual candidate's campaign period. Neither the Memorandum nor the minutes support that this was a factor which the city considered. The Memorandum is silent on this issue. The Act does not state there will be one audit per candidate.

41 The City's decision here does not satisfy any of the purposes of the Act referred to above. The Minutes and Memorandum when viewed together suggest the city considered that, (a) the candidate would file a supplementary financial statements and auditor's reports, (b) by inference the cost of the option to grant the Application, and (c) specifically that deciding to extend the time to consider the Application provided cost savings if the City directed a compliance audit.

42 Based on the record filed on this appeal, I am not satisfied that the City considered whether the Application met the filing criteria. I am not satisfied the City considered whether the Appellant's affidavits set out reasonable grounds to believe the Statement and Report demonstrated a failure to comply with the Act and whether a compliance audit should be held or not, in any fashion other than cursory.

43 There is no basis to conclude the City considered whether or not the legislation only provided it may direct one compliance audit per candidate as submitted during this appeal by the Respondent and Intervener. The submissions on this appeal, I conclude, are an effort to justify the City's deci-

sion after the fact. The appeal record does not support a conclusion that those submissions were the basis for the City's decision.

44 Section 81(3) of the Act provides the City, in its screening function, may grant or reject an application made.. For the reasons stated above I cannot conclude that the City declined to exercise its statutory authority. It made a decision. Further as there is no basis to conclude the City concluded the Application was not properly filed, there is no basis for concluding the City rejected the Application for that reason. There is no statutory authority allowing the City to decide to extend the time period for it to consider the Application. The decision to do so was ultra vires.

Issue 3: What relief is appropriate? Should a compliance audit be directed?

(i) Position of the Parties

45 The Appellants state the affidavits filed in support of the Application set out their belief that there are reasonable grounds to conclude the Candidate contravened a provision of the Act relating to election campaign finances. They request a compliance audit of the Candidate's election campaign finances be directed.

46 The Respondent and Intervener both submitted the Application was filed prematurely. Neither made any submission about whether or not the affidavit material disclosed reasonable grounds. The Respondent suggested that if the appeal was granted the Application should be returned to the City for its consideration. The Intervener made no submission concerning the relief which should be granted.

(ii) Statutory Authority for the Appeal

47 S. 81(3.3) of the Act provides that on appeal, this court may make any decision the City could have made. I have agreed with both the Respondent and Intervener that consideration of an application includes whether or not the application satisfies the filing criteria as well as whether the application discloses reasonable grounds for the belief that a Candidate has not complied with the Act. Returning the Application to the City for it to consider, as suggested by the Respondent would constitute a delegation of the court's authority on this appeal. It is not an appropriate remedy.

(iii) Did the Application satisfy the filing criteria?

48 One of the issues on this appeal was whether the Application satisfied the filing criteria in s. 81(2) of the Act. That subsection provides:

"(2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80(6), if any; it shall be in writing and shall set out the reason's for the elector's belief. "(emphasis added)

The Appellants state the above section sets out that an Application may be filed within 90 days of the filing date and no later than 90 days after any further filings the Candidate may make. According to the Appellants an application may be filed for each period for which a candidate submits a financial filing. The Respondent and Intervener disagreed with this interpretation. They submitted

the language of s. 81(2) of the Act provides that only one application may be filed within 90 days after the final financial filing a candidate makes. Both the Respondent and Intervener submitted this interpretation was consistent with the Act which contemplates only one compliance audit per candidate and with the wording of s. 81(2) underlined above "after the later of".

49 The Intervener submitted the decision of the Supreme Court of Canada in *Multiform Manufacturing Co. Ltd. Et al. c. R. et al* (2002) 58 C.C.C. (3d) 257 set out the approach to be taken in interpreting section 81(2) of the Act. In that case the Court considered the meaning of then s. 443 of the Criminal Code which referred to whether a justice of the peace could issue a search warrant and its application to the Bankruptcy Act. At paragraph 9 of that decision the Court held:

"When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute. As sir Peter B. Maxwell stated in *Maxwell on the Interpretation of Statutes*, 12th ed. By P. St. J. Langan (London: Sweet & Maxwell, 1969), at pp.28-29:

If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.

Or, as Professor Piere-Andre Cote synthetically puts it in *The Interpretation of Legislation in Canada*, trans. K. Lippel, J. Philpot and Bill Schabas (Cownaville, Qie.: Yvon Blais, 1984), at p. 2:

"It is said that when an Act is clear there is no need to interpret it; a simple reading suffices."

To the same effect see Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto, Butterworths, 1983), at p. 28."

50 I have reviewed *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, where the Supreme Court of Canada considered the proper interpretation of s. 9(1)(c) of the Radiocommunications Act R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). Mr. Justice Iacobucci stated at paragraph 26:

"In Elmer Driedger's definitive formulation, found at p.87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example ... I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".

In the following paragraphs of the above decision Mr. Justice Iacobucci provided the following analysis regarding the preferred approach to statutory interpretation:

"[para 27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: ... This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the Application of Driedger's principles gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 ..., at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". ...

[para 28] Other principles of interpretation - such as the strict construction of penal statutes and the "Charter values" presumption - only receive Application where there is ambiguity as to the meaning of a provision ...

[para 29] What, then, in law is ambiguity? To answer, an ambiguity must be "real" (Marcotte, [1976] 1 S.C.R. 108, supra, at p.115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p.222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxyChemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[para 30] For this reason, ambiguity cannot reside in the mere fact that several courts - or, for that matter, several doctrinal writers - have come to differing conclusion on the interpretation of a given provision. Just as it would be improper for one to engage in preliminary tallying of the number of decision supporting

competing interpretations and then apply that which receive the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "if the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp.4-5)."

I have also considered Sullivan & Driedger on the Construction of Statutes (4th ed.) at p. 10.

51 I have adopted the modern approach, referred to above, in interpreting s. 81(2) of the Act. For that purpose I have reviewed the Act as a whole. The following sections are helpful in this analysis:

(a) Section 68 of the Act concerns election campaign periods. It provides in part:

"(1) for the purposes of this act, **a candidate's election campaign period for an office shall be determined in accordance with the following rules:**

1. **the election campaign period begins on** the day he or she files a nomination for the office under section 33.
2. **the election campaign period ends on December 31 in the case of a regular election** and 45 days after voting day in the case of a by-election.
3. **despite rule 2, the election campaign ends,**
 - (i) on the day the nomination is withdrawn under section 36 or deemed to be withdrawn under subsection 29(2), or
 - (ii) on nomination day, if the nomination is rejected under section 35.
4. **despite rules 2 and 3, if the candidate has a deficit at the time the election campaign period would otherwise end** and the candidate notified the clerk in writing on or before December 31 in the case of a regular election and 45 days after voting day in the case of a by-election, the campaign period is extended and is deemed to have run continuously from the date of nomination until the earliest of ...;

5. **if, after the election campaign period ends under rule 2,3 or 4, the candidate incurs expenses relation to a recount or to a proceeding under section 83 (controverted elections) and the candidate notifies the clerk in writing, the campaign period is deemed to have recommenced, subject to subsection (2), and to have run continuously from the date of nomination until the earliest of,**

...

- iv. **the following December 31 in the case of a regular election**
..."

- (b) Section 69 of the Act provides in part:

"(1) A candidate shall ensure that,

...

- (k) **financial filings are made in accordance with section 78;**

...

- (m) a contribution of money made or received in contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention;
(n) a contribution not returned to the contributor under clause (m) is paid to the clerk with whom the candidate's nomination was filed;

..."

- (c) Section 70 of the Act provides in part:

"...

- (2) only the following may make contributions;;

1. an individual who is normally resident in Ontario
2. a corporation that carries on business in Ontario.

...

...

(7) a contribution may be accepted only from a person or entity that is entitled to make a contribution. ...

(d) Section 71 of the Act provides in part:

"(1) a contributor shall not make contributions exceeding a total of \$750 to any one candidate in an election...

(e) Section 72 provides in part:

"for the purposes of sections 66 to 82, corporations that are associated with one another under section 256 of the Income Tax Act (Canada) shall be deemed to be a single corporation.

(f) Section 77 of the Act provides in part:

"For the purposes of sections 66 to 82,

- (a) the filing date is**, in the case of a regular election, the following March 31";
- (b) a supplementary filing date** is the date that is 60 days after the end of the supplementary reporting period; and,
- (c) a supplementary reporting period is**, in the case of a regular election, each six-month period in the 12-month period following the year of the election and,"

(g) Section 78 of the Act provides in part:

"(1) on or before 5 pm on the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditor's report, each in the prescribed form, reflecting the candidate's election campaign finances,

- (a) in the case of a regular election, as of December 31, in the year of the election; and,**

...

(2) if the candidate's election campaign period continues during all or part of a supplementary reporting period, he or she shall, on or before 5 pm on the corresponding supplementary filing date, file a supplementary financial statement and auditor's report for the supplementary reporting period.

(3) A supplementary financial statement or auditor's report shall include all the information contained in the initial statement or report

filed under subsection (1) and in any previous supplementary statement or report under subsection (2), as the case may be, **updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period.**"

(h) Section 80 of the Act provides in part:

"(1) a candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act, if, he or she fails to file a document as required under section 78 by the relevant date;

...

(6) The Candidate may, within 91 days after the last day for filing a document under section 78, **apply to the Ontario Court of Justice to extend the time for filing the document under that section** and if, the court is satisfied there are mitigating circumstances justifying a later date for filing the document, the court may grant an extension for the minimum period of time necessary for the candidate to file the document."(emphasis added)

52 I have also considered the purpose of the Act referred to in the above case law. The Respondent and Intervener did not submit that the purpose of s. 81 as described by Justices Trafford and Culver in the decisions of Hall *supra*, or Chapman, *supra*, respectively, is incorrect. I have accepted the conclusions of the court in those cases, as set out above.

53 Section 81(2) of the Act sets out a limitation period for applications to be received from electors. That section refers specifically to financial filings a candidate is required to make not a candidate's election campaign period as submitted by the Respondent and Intervener. The section specifically does not provide that an application must be filed within 90 days after a candidate's election campaign period ends.

54 When read as a whole the legislation is concerned that the City take action expeditiously, if it concludes an elector has reasonable grounds to believe a candidate did not comply with a provision of the Act, and direct a compliance audit. There is no provision to extend that period of time.

55 The legislation is concerned that a candidate file both financial statements and an auditor's report to reflect expenses and contributions. Sections 69, 77 and 78 refer to these financial filings. The legislation does not contemplate an exception when there is a recount as here. If that were so, the Candidate, on March 31, 2007 would have known a filing for the period April 6, 2006 to December 31, 2006 was not necessary.

56 The legislation contemplates that further filings may be necessary, as here, but that those filings would, in this case, pursuant to section 78(2) of the Act be a supplementary financial statement and auditor's report for the supplementary reporting period. Section 78 provides in part:

(2) if the candidate's election campaign period continues during all or part of a supplementary reporting period, he or she shall, on or before 5 pm on the corresponding supplementary filing date, file a supplementary financial statement and auditor's report for the supplementary reporting period.

(4) A supplementary financial statement or auditor's report shall include all the information contained in the initial statement or report filed under subsection (1) and in any previous supplementary statement or report under subsection (2), as the case may be, updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period." (emphasis added)

This section requires that the supplementary financial statement or auditor's report reflect changes during the supplementary reporting period. The section at issue, above, does not refer to the candidate's election campaign period as submitted by the Respondent and Intervener on this appeal. All of the filings are important and provide information. That a further report also includes the initial filing in my view simply ensures the supplementary report is comprehensive.

57 The legislative role assigned to the City, to scrutinize applications and decide if a compliance audit should be directed, does not depend on the cost incurred. Indeed at the conclusion of the audit if a report indicates and the City concludes there were no reasonable grounds, such costs may be recovered from the Appellants. Any delay in scrutinizing an application is inconsistent with the purpose of the Act which requires that the City act expeditiously.

58 I am not in agreement that the Act contemplates only one compliance audit. First the legislation does not state only one audit is available. Secondly, this interpretation does not consider that more than one elector may make an application within the 90-day period in s. 81(2) of the Act. If that occurred, within 30 days of each application the City must consider that application. On that basis alone, it is possible that two meritorious applications could be received which would require two audits.

59 Section 81(4) of the Act provides that if it is decided to grant an Application under subsection (3), by resolution the City shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances. This section does not refer to the campaign period but to the finances. It does not preclude the City from requiring an audit be conducted of a specified period. Similarly sections 80 and 81(1) of the Act refer to finances not the election campaign period.

60 I have considered the grammatical and ordinary sense of the words in section 81(2) of the Act and the broader context as well as the consequences of any action taken by the City, all of which in my view require that the City be able to fulfil its screening function expeditiously so that a candidate is protected and so that the public interest in ensuring election campaign finances are conducted pursuant to the legislation is protected. The public has an interest in ensuring that valid attacks on campaign finances be audited so that any wrongdoing can be dealt with quickly. I conclude therefore that s. 81(2) of the Act refers to a 90-day period following each of the filing periods referred to therein. I do not agree with the Appellant that the period continues beyond any one 90-day period. Such an interpretation would be overly long and unfair to a candidate. An elector must file an application within 90 days of the specific filings referred to in s. 81(2) of the Act.

(iv) Are there reasonable grounds to require a compliance audit?

61 I accept, as did Mr. Justice Culver in *Chapman*, supra at paragraph 41, that the definition of reasonable grounds was stated at page 10 of *R. v. Sanchez* 93 C.C.C. (3d) 357 by Mr. Justice Hill as follows:

"Section 487(1) of the Criminal Code requires reasonable grounds as the standard of persuasion to support issuance of a search warrant. Judicially interpreted, the **standard is one of credibly based probability**"

Mere suspicion, conjecture, hypotheses or "fishing expeditions" fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude it must be recognised that reasonable grounds is not to be equated with proof beyond a reasonable doubt on a prima facie case ... The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and influences asserted"

The above standard was applied by Justice Culver in Chapman, supra and is the standard to apply here.

62 If a review of the Application leads to a conclusion that the Appellants have reasonable grounds to believe the Candidate has contravened a provision of the Act, I agree with Justice Culver in Chapman, supra, the only remedy is a compliance audit.

63 In support of the Application the Appellants filed several affidavits. Mr Ruffolo, in his affidavits of May 14, 2007, May 18, 2007 and May 25, 207 agrees with the information set out in the affidavits of Mr. Mastroguiuseppe and states he shares the concerns of Mr. Mastroguiuseppe that the Candidate may have contravened the Act. His affidavits do not contain any specific details which assist this court in determining whether there are reasonable grounds. The fact that Mr. Ruffolo accepts the evidence of Mr. Mastroguiuseppe does not tilt the balance in favour of this court concluding the information in the affidavits of Mr. Mastroguiuseppe constitute reasonable grounds to believe the Candidate contravened any provision of the Act.

64 Mr. Mastroguiuseppe has raised several issues which he believes are contraventions by the Candidate of sections 69(1)(m), 71(1) and 66(2)(i)(iii) of the Act which include:

- (1) over contribution by associated corporations (affidavit of May 14, 2007, tab 2A, Annual Record);
- (2) undervaluing the cost of tickets for a fundraising event (affidavit of May 18, 2007, tab 2B, Annual Record);
- (3) over contribution of cash donations in relation to fundraising event and failure to issue receipts for cash donations received (affidavit of May 18, 2007, tab 28B, Annual Record);
- (4) failure to report over contributions relating to office expenses (affidavit of May 18, 2007, tab 2B, Annual Record); and,
- (5) failure to record contribution from the lessor of the Candidate's office on Islington Ave. (affidavit of May 25, 2007, tab 2C, Annual Record).

(v) Over contribution by Corporate Donors

65 As set out above a candidate cannot accept contributions in excess of \$750 from individual contributors defined in section 71 of the Act, which includes corporations. Section 72 provides that where corporations are associated they are deemed to be a single corporation if they are associated

under s. 256 of the Income Tax Act. Section 69 of the Act requires a candidate return contributions which exceed \$750 as soon as possible.

66 I agree with Mr. Justice Culver in Chapman, supra, at paragraph 43, that when a candidate is aware of an over-contribution, instructions must be given to a person with signing authority over the candidate's accounts and a cheque must be sent to a contributor in the amount of the over-contribution. I agree with Justice Culver in Chapman, supra, "In my view, that suggests a relatively simple process, not involving much delay."

67 Mr. Mastroguiseppe states he believed the Candidate's Statement and Report disclosed a number of violations of the Act. In his affidavit of May 14 2007 he stated he believed there were reasonable grounds to conclude the candidate contravened s. 69(1)(m) and 71(1) of the Act on four occasions by failing to return over contributions the Candidate should have known were from associated corporations. The Appellants rely on s. 256 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) to found their belief, based on the commonalities between the corporations, set out in the affidavits of Mr. Mastroguiseppe, that the corporations are associated.

68 A list of single contributors totalling more than \$100 was attached to the affidavit along with corporation profile reports for the associated corporations the Appellant believed made over contributions which had not been returned by the Candidate during the period referred to in the Statement and Report.

69 The Appellants suggest that the commonalities between the above corporations should have caused the Candidate to know the corporations were associated. In Chapman, supra, Justice Culver in paragraph 51, concluded he would not extend the obligations of candidates to require that they make inquiries of every corporate donor as to whether or not it is an associated corporation to another corporation unless there is a compelling reason to do so "for example a similar corporate name". I concur. Other similarities which should cause a candidate to make further inquiries include shared ownership and/or similar addresses, directors/officers, and business type or related business type. For example, it would not be far-fetched to conclude businesses with a similar name, the same director/officer located at the same address carrying on related activities in a similar field may be associated corporations. A family relationship alone however is not a sufficient basis for such a conclusion. A conclusion based on that alone in my view is speculative.

70 I agree the affidavit material demonstrates that there are reasonable grounds to conclude some, not all, of the corporations listed are associated and that pursuant to s. 72 of the Act they would be deemed a single corporation for the purpose of who is an eligible contributor. As such I agree that there are reasonable grounds to conclude there was a contravention of the Act as there is no indication over contributions were returned.

(ii) Fundraising Events

71 I do not accept that paragraphs 4 to 6 of Mr. Mastroguiseppe's affidavit sets out a sufficient basis to conclude there was a contravention of the Act by the Candidate in relation to either fundraising event. The affidavit lacks sufficient particularity to support such a conclusion. Regarding paragraph 7 however I find it supports a conclusion that the Candidate failed to issue a receipt for one of the events on one occasion contrary to s. 69(1) of the Act.

(iii) Office Expenses

72 Paragraphs 9 to 11 of the affidavit material do not provide a sufficient basis for believing on reasonable grounds that the Candidate contravened the Act. As above, the affidavit does not contain sufficient particularity to support such a conclusion. Doing so in my view would be speculative on the basis of the information in the affidavit.

CONCLUSION

73 The appeal is allowed. A compliance audit is ordered pursuant to s. 81 of the Act regarding the period in the Statement and Report. The City of Vaughan will appoint an auditor pursuant to section 81(4) of the Act to conduct a compliance audit for the period in the Statement and Report as required by s. 81(6) of the Act following which the auditor will report as required pursuant to s. 81(7) of the Act.

74 An application may be made to address the costs of this Appeal by any of the parties on notice.

L. FAVRET J.

cp/e/qlafr/qlmxb/qlced/qlcas/qlcal

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Lyras v. Heaps

JOHN LYRAS (Applicant / Appellant in Appeal) AND ADRIAN HEAPS and COMPLIANCE AUDIT COMMITTEE OF THE CITY OF TORONTO (Respondents / Respondents in Appeal)

Ontario Court of Justice

M.E. Lane J.

Judgment: October 17, 2008

Docket: None given

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Counsel: Ronald J. Walker, Charles A. Toth for Appellant, John Lyras

Paula Boutis for Respondent, Adrian Heaps

Kalli Y. Chapman for Respondent, Compliance Audit Committee of the City of Toronto

Subject: Public; Property

Public law --- Elections — Candidates — Expenses

Municipal councillor was elected — Councillor filed financial statement with city clerk's office — Applicant sought compliance audit of councillor's election campaign finances pursuant to s. 81 of Municipal Elections Act, 1996 — Applicant alleged councillor incurred campaign expenses exceeding his reported limit, that financial statement failed to disclose full extent of campaign finances, and that councillor failed to account for goods and services which were purchased for less than fair market value — Compliance audit committee rejected application — Applicant appealed — Appeal dismissed — Applicant misinterpreted and misapplied provisions of Act — Act is very clear that value of services provided by voluntary unpaid labour need not be considered contribution, and makes no distinction between free professional services and free services for other campaign assistance — Councillor's evidence was that services used to create and maintain website were provided by voluntary unpaid labour — There was no compelling and credible information to contrary — Committee finding that applicant had no reasonable grounds for his complaint about cost of website was reasonable determination — Committee's understanding of applicable law was correct — Decision that audit of costs of telephone lines was unnecessary was reasonable, given privacy interest at stake and unrealistically onerous burden of determining different types of usage of what were essentially private lines — Applicant's claim regarding cost of flyer, consisting of higher quote from unrelated company after the fact, was no more than speculation and conjecture — Regarding true market value of campaign office rental expenses, there was

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ample evidence before committee to rebut applicant's allegations — Only rental value of premises in question was that paid and declared by councillor for two months of campaign.

Public law --- Elections — Legislation — Election Acts

Municipal councillor was elected — Councillor filed financial statement with city clerk's office — Applicant sought compliance audit of councillor's election campaign finances pursuant to s. 81 of Municipal Elections Act, 1996 — Applicant alleged councillor incurred campaign expenses exceeding his reported limit, that financial statement failed to disclose full extent of campaign finances, and that councillor failed to account for goods and services which were purchased for less than fair market value — Compliance audit committee rejected application — Applicant appealed — Appeal dismissed on other grounds — Meaning of "reasonable grounds" under Act is question of law — Where the statute requires "belief on reasonable grounds", jurisprudence applicable in other contexts indicates that standard to be applied is that of objective belief based on compelling and credible information which raises "reasonable probability" of breach of statute — Standard of "prima facie case" in either its permissive or presumptive sense is too high standard.

Administrative law --- Standard of review — Miscellaneous

Municipal councillor was elected — Councillor filed financial statement with city clerk's office — Applicant sought compliance audit of councillor's election campaign finances pursuant to s. 81 of Municipal Elections Act, 1996 — Compliance audit committee rejected application — Applicant appealed — Appeal dismissed on other grounds — Members of committee had demonstrated knowledge of municipal election campaign finance rules and were appointed with purpose of deciding when applications for compliance audits were appropriate — Span of committee's authority is limited to Act, and issues it has to decide are questions of mixed law and fact — Applicants and candidate respondents have full opportunity to present their positions, and process is open and transparent — Considerable deference must be shown to decision of committee — Fact that committee does not give reasons for its decision is not factor which should weigh heavily given context and their function — Act does not include privative clause and expressly allows court on appeal relating to financing to make any decision council or committee could make — This statutory authority permits court to review decision of committee for its reasonableness, particularly as it may relate to questions of mixed fact and law which arise from allegations before committee — For questions of law which could arise, determinations can be made on correctness standard — As committee was not structured as tribunal with duty to provide reasons for its decisions, it becomes residual role of appeal court to articulate law where those with greater expertise on Act itself are not in position to do so.

Cases considered by *M.E. Lane J.*:

Chapman v. Hamilton (City) (2005), 2005 ONCJ 158, 2005 CarswellOnt 1914, 10 M.P.L.R. (4th) 120 (Ont. C.J.) — distinguished

Devine v. Scarborough (City) Clerk (1995), 1995 CarswellOnt 172, 27 M.P.L.R. (2d) 18 (Ont. Prov. Div.) — referred to

Harris v. Ottawa (City) (1994), 1994 CarswellOnt 641, 27 M.P.L.R. (2d) 36 (Ont. Prov. Div.) — considered

Harrison v. Toronto District School Board (June 19, 2008), Sheppard J. (Ont. C.J.) — followed

Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration) (2005), (sub nom. *Mugesera v. Canada (Minister of Citizenship & Immigration)*) 197 C.C.C. (3d) 233, 2005 SCC 40, 2005 CarswellNat 1740, 2005 CarswellNat 1741, 254 D.L.R. (4th) 200, 28 Admin. L.R. (4th) 161, 30 C.R. (6th) 39, (sub nom. *Mugesera v. Canada (Minister of Citizenship & Immigration)*) 335 N.R. 229, 47 Imm. L.R. (3d) 16, [2005] 2 S.C.R. 100

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(S.C.C.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

R. v. Le (2006), 2006 BCCA 298, 2006 CarswellBC 1464, 210 C.C.C. (3d) 181, 228 B.C.A.C. 73, 376 W.A.C. 73, 142 C.R.R. (2d) 61 (B.C. C.A.) — referred to

R. v. Mezzo (1986), 1986 CarswellMan 327, 1986 CarswellMan 403, (sub nom. *Mezzo v. R.*) [1986] 1 S.C.R. 802, 30 D.L.R. (4th) 161, 68 N.R. 1, [1986] 4 W.W.R. 577, (sub nom. *Mezzo v. R.*) 27 C.C.C. (3d) 97, 43 Man. R. (2d) 161, (sub nom. *Mezzo v. R.*) 52 C.R. (3d) 113 (S.C.C.) — referred to

R. v. Sanchez (1994), 32 C.R. (4th) 269, 93 C.C.C. (3d) 357, 20 O.R. (3d) 468, 1994 CarswellOnt 97 (Ont. Gen. Div.) — considered

R. v. Skorput (1992), 72 C.C.C. (3d) 294, 1992 CarswellOnt 1065 (Ont. Prov. Div.) — considered

R. v. Tran (2006), 212 C.C.C. (3d) vi (note), (sub nom. *R. c. Le*) 361 N.R. 400 (note), (sub nom. *R. v. Le (T.D.)*) 399 W.A.C. 319 (note), (sub nom. *R. v. Le (T.D.)*) 241 B.C.A.C. 319 (note), 2006 CarswellBC 2793, 2006 CarswellBC 2794 (S.C.C.) — referred to

Savage v. Niagara Falls (City) (2005), 2005 CarswellOnt 6534, 16 M.P.L.R. (4th) 252 (Ont. C.J.) — distinguished

Statutes considered:

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched.

Generally — referred to

s. 47(1) — referred to

s. 66(2) ¶ 1(iii) — referred to

s. 66(2) ¶ 2(i) — referred to

s. 66(2) ¶ 2(iv) — referred to

s. 66(3) — referred to

s. 81 — referred to

s. 81(1)-81(4) — referred to

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s. 81(3.1) [en. 2002, c. 17, Sched. D, s. 32(2)] — referred to

s. 81(3.3) [en. 2002, c. 17, Sched. D, s. 32(2)] — pursuant to

Words and phrases considered

reasonable grounds

As the [Compliance Audit Committee] was not structured as a "tribunal" with a duty to provide reasons for its decisions, it becomes the residual role of this appeal court to articulate the law where those with greater expertise on the MEA [*Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.] itself are not in a position to do so.

The meaning of "reasonable grounds" under the MEA is one such question of law.

There is no dispute that "mere suspicion, conjecture, hypotheses or 'fishing expeditions,'" and that which is "speculative and remote" fall short of the minimally acceptable standard. The question is whether the test for "reasonable grounds" is "credibly based probability" or "a prima facie case."

.....

There is a distinction in law between "credibly based probability" and "a prima facie case." A belief is founded on "reasonable grounds" where there is an objective basis for the belief that is based on "compelling and credible information." The standard is "reasonable probability," not proof beyond a reasonable doubt or a prima facie case: *R. v. Le* (2006), 210 C.C.C. (3d) 181 (B.C. C.A.) *leaved to appeal to S.C.C. refused* (2006), 212 C.C.C. (3d) vi (note) (S.C.C.); *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (2005), 197 C.C.C. (3d) 233 (S.C.C.) *at para. 114*. A "prima facie case" connotes a case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction: *R. v. Mezzo* (1986), 27 C.C.C. (3d) 97 (S.C.C.). Black's Law Dictionary 6th ed at p. 1190 also indicates that "Prima facie evidence refers not only to evidence which would reasonably allow the conclusion which the plaintiff seeks, but also to evidence which would compel such a conclusion if the defendant produced no rebuttal evidence." As MacDonnell, Prov. Div. J. noted in *R. v. Skorput* (1992), 72 C.C.C. (3d) 294 (Ont. Prov. Div.), *at pp. 296-297*, the former use is permissive; the latter carries "a degree of cogency (that)...might conveniently be described as "presumptive": *Cross on Evidence* 6th ed at pp. 60-61.

... where the statute requires "a belief on reasonable grounds," the jurisprudence applicable in other contexts indicates that the standard to be applied is that of an objective belief based on compelling and credible information which raises the "reasonable probability" of a breach of the statute. The standard of "a prima facie case" in either its permissive or presumptive sense is too high a standard.

APPEAL by applicant from decision rejecting application for compliance audit of election campaign finances of municipal councillor.

M.E. Lane J.:

1 This is an appeal pursuant to section 81 (3.3) of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched. (the "MEA") from the decision of the Compliance Audit Committee of the City of Toronto (the "Committee") dated July 16, 2007. The Committee rejected Mr. Lyras' application for a compliance audit of the election campaign finances of Adrian Heaps, now Municipal Councillor for Ward 35, incurred during the 2006 Toronto municipal elections. The appellant seeks an order setting aside the decision of the Committee and requiring a compliance audit of

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Mr. Heaps' election campaign finances.

The Legislative Framework

2 This appeal is based on the statutory provisions set out in Section 81(1) to (4) of the MEA. An elector who believes on reasonable grounds that a candidate has contravened a provision of the MEA relating to election campaign finances may apply in writing for a compliance audit of those finances. Within thirty days of receiving the application, the council or local board must consider the application and decide whether it should be granted or rejected. Under s. (3.1), the council may establish a committee and delegate its powers and functions with respect to applications received in relation to an election for which it was established. The committee to which these powers are delegated shall not include employees or officers of the municipality, or members of the council. Under s. 3.3, the decision of the council or of the committee may be appealed to the Ontario Court of Justice within 15 days after the decision is made, and "the court may make any decision the council...committee could have made." If it is decided to grant the application, the council shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

Issues

3 In this appeal, the following issues are to be addressed:

1) What is the appropriate standard for review on this appeal? Is the decision of the Compliance Audit Committee entitled to deference such that a standard of reasonableness should apply? Or should this court undertake its own analysis of the issues and apply a correctness standard?

2) What is the test of "reasonable grounds" under the MEA?

3) On the material before the Committee, were there reasonable grounds to believe that Mr. Heaps has contravened any provision of the MEA? Mr. Lyras alleges that Mr. Heaps filed a Financial Statement and Auditor's Report which was defective in that he failed to:

- i. account for the value of a professional webmaster and website design services;
- ii. disclose all of the telephone expenses incurred during the campaign;
- iii. accurately disclose the cost of a flyer which was produced and distributed during the campaign, and
- iv. account for the market value of his campaign office rental expense.

The Facts

4 On or about November 16, 2006, Mr. Heaps was elected as Municipal Councillor for Ward 35 (Scarborough Southwest) in the City of Toronto. On or about March 29, 2007, Mr. Heaps filed a Financial Statement with Elections and Registry Services of the City Clerk's Office. According to his Financial Statement, Mr. Heaps spending limit for the campaign period March 20, 2006 to January 2, 2007 was \$25,957.30. He reported total campaign expenses which were subject to the spending limits of \$24,354.04. He reported additional campaign expenses of \$4,193.49 which were not subject to any spending limits and which are not in issue on this appeal.

5 Mr. Lyras assisted Michelle Berardinetti in her campaign for election as Municipal Councillor in the same ward. He also works in the office of Ms. Berardinetti's husband who is the M.P.P. for Scarborough Southwest. On

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June 29, 2007, he applied to the Clerk of the City of Toronto for a compliance audit of Mr. Heaps' election campaign finances pursuant to s. 81 of the MEA. He alleged that Mr. Heaps incurred total campaign expenses in excess of his reported limit, that his Financial Statement failed to disclose the full extent of his campaign finances and that his expenses exceeding his spending limit, and that he failed to account for goods and services which were purchased for less than fair market value.

6 On July 16, 2007, the Committee which was comprised of a three member panel, heard representations on behalf of Mr. Lyras and Mr. Heaps, and reviewed the materials which were filed in support of their positions. On motion by Mr. Love, the Committee rejected Mr. Lyras' application by a vote of 2 to 1, Ms. MacLean voting in the negative. There were no reasons given for why the committee members voted as they did.

1) *The Standard of Review?*

7 The Supreme Court of Canada in its recent decision of *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) determined that there ought to be only two standards of judicial review: correctness and reasonableness. When applying the correctness standard, a reviewing court will not show deference to the decision makers' reasoning process but will undertake its own analysis of the question, decide whether it agrees with the decision under appeal and, if not, will substitute its own view and provide the correct answer. A court conducting a review for reasonableness will inquire into the qualities that make a decision reasonable, including the existence of justification, transparency and intelligibility in the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible on the facts and the law. This deferential standard involves respect for the need for particular expertise and experiences in decision making, and the legislative choice to leave some matters in the hands of administrative decision makers.

8 The majority of the Supreme Court directed that an appellate court must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker in a particular category of question. Only if this inquiry proves unfruitful, should a court analyze the factors making it possible to identify the proper standard of review. Those factors tending to deference include: the existence of a privative clause; whether the question is one of fact, discretion or policy, or whether the legal issue is intimately intertwined with and cannot be separated from the factual issue; where a decision maker is interpreting the statute closely connected with its function with which it will have particular familiarity; or where the decision maker has developed particular expertise in the application of the common law to its own statute. Questions of central importance to the legal system as a whole, outside the specialized area of administrative expertise, questions regarding jurisdiction or the constitution, will always attract a correctness standard.

9 Binnie J. indicated that "contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute, and the extent of the discretion conferred. He stressed the need for careful consideration of the reasons given for the decision.

10 Justices Deschamps, Charron and Rothstein re-emphasized the significance of the nature of the questions at issue: whether questions of law, questions of fact or questions of mixed law and fact. Questions of fact always attract deference, particularly if there is a privative clause. If the body oversteps its delegated powers, is asked to interpret laws outside its area of expertise, or the legislature has provided for a statutory right of review, deference is not owed to the decision maker. When considering a question of mixed fact and law, a reviewing court should show the same deference as an appeal court would show a lower court.

11 The jurisprudence dealing with the standard of review applicable to appeals from decisions about compliance audits under the MEA is mixed. The appellant relies on decisions of my brothers Culver and Duncan in *Chapman v. Hamilton (City)*, [2005] O.J. No. 1943 (Ont. C.J.) and *Savage v. Niagara Falls (City)*, [2005] O.J. No. 5694 (Ont.

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C.J.) respectively. In *Chapman*, Culver J. found that there was no privative clause, nor any specialized skill and knowledge exercised by the Council in making its decision. He concluded that political considerations that are the particular responsibility of the local Council have no place in the analysis of whether an elector has reasonable grounds to believe that a candidate has contravened the provisions of the MEA. He also found that the Council debate on the issue indicated that the councillors were unwilling to judge their peers and wanted the court to make the ultimate decision which, in his view, amounted "to a failure or refusal to meaningfully exercise jurisdiction." (para. 37) In *Savage*, Duncan J. agreed with Culver J. that the MEA grants the appellate court the widest possible power of review on appeal. He also noted that the decision before him was made in camera, with no record and no reasons given. In his view, "it is implicit...in a deferential or more limited approach, that the reviewing court must have some record of the reasons or the process that brought about the decision. Where that is completely lacking, there is nothing to show deference to." (para 8)

12 Sheppard J. in *Harrison v. Toronto District School Board* [(June 19, 2008), Sheppard J. (Ont. C.J.)], unreported decision of the O.C.J. released June 19, 2008, had occasion to consider a decision not to grant a compliance audit made by the Compliance Audit Committee delegated to perform that function by the Toronto District School Board. He found that the Committee consisted of two chartered accountants and a lawyer in the municipal field, all of whom "have extensive knowledge of the election campaign finance provisions of the Municipal Elections Act, 1996." As "the Committee was appointed by a non expert School Board and the City because of their expertise," he found that far greater deference was owed to their decision than to that of the political bodies in *Chapman* and *Savage*. He also found, however, that on either the correctness standard or the less demanding deferential standard, the hard copy documents making up the applicant's initial complaint in that case "simply do not support the complaint."

13 The Committee which made the decision under appeal before this court is exactly the same Committee whose decision came before Justice Sheppard. In this case, however, they were acting under s. 81(3.1) of the MEA as the committee delegated to make the decision by the Council itself.

14 The Compliance Audit Committee for the 2006 Municipal Election was established by the Toronto City Council pursuant to recommendations considered June 27-29th, 2006 and September 25-27th, 2006. The express intention was to establish an independent, quasi-judicial committee which would have "demonstrated knowledge and understanding of municipal election campaign financing rules, proven analytical and decision-making skills, and experience working on a committee, task force or similar setting." After a selection process, three members were chosen for the committee: two chartered accountants who had been members of the Toronto Election Finance Review Task Force, and a lawyer with municipal law experience who had been on various committees of the Canadian Bar Association.

15 On April 17, 2007, the Committee adopted Rules of Procedure which, among other things, provide that meetings shall be based on an agenda, open to the public, with an opportunity for the applicant and the candidate to address the Committee, answer questions and view any documents submitted to the Committee, and setting out rules for debate. Decisions are to be made by vote in the form of a motion, and recorded in the minutes of the Committee.

16 The Minutes indicate that, at their meeting of July 16, 2007, the Committee considered three applications for a compliance audit relating to the expenses of three different politicians. The Committee granted the first application, denied Mr. Lyras' application on a vote of two to one, and unanimously denied the third application. The Minutes also indicate the materials that were before the Committee for review, and that the Committee unanimously agreed to extend the usual speaking time for both the applicant and Mr. Heaps to address the Committee.

17 I agree with Justice Sheppard that the professional expertise of the specialized Compliance Audit Committee appointed by the Toronto City Council distinguishes this case from those of *Chapman* and *Savage*. The members of the Committee have "demonstrated knowledge of municipal election campaign finance rules" and were appointed with the precise purpose of deciding when applications for compliance audits were appropriate. Their function is to

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screen applications for such audits, so that only those which show "reasonable grounds" that a contravention occurred will proceed. This function is a narrow one, the span of their authority is limited to the MEA, and the issues they have to decide are questions of mixed law and fact. Applicants and candidate respondents have full opportunity to present their positions and relevant materials to the Committee in both oral and written submissions, and to answer any questions put by Committee members. Although the Committee does not issue reasons for its vote, the process of considering the application is an open and transparent one. The Committee does not deliberate in private and, like other municipal committees, their decision is made by motion on the record. In these circumstances, I have concluded that considerable deference must be shown to the decision of the Committee.

18 In my view, the fact that the Committee does not give reasons for its decision is not a factor which should weigh heavily given the context and their function. When judicial or quasi-judicial officers are acting in a "gate-keeper" function, not giving reasons is not an unusual practice. I note that a justice of peace or judge does not normally give written reasons for issuing or denying a search warrant, nor does the Supreme Court of Canada give reasons for refusing leave to appeal.

19 The MEA, however, does not include a privative clause and expressly allows this Court on an appeal relating to election financing to "make any decision the council...or committee could have made." In my view, this statutory authority permits this court to review the decision of the Committee for its reasonableness, particularly as it may relate to questions of mixed fact and law which arise from the allegations before the Committee. Should this court identify any questions of law alone which could potentially arise from these allegations, this Court can also make determinations of general application on a correctness standard. As the Committee was not structured as a "tribunal" with a duty to provide reasons for its decisions, it becomes the residual role of this appeal court to articulate the law where those with greater expertise on the MEA itself are not in a position to do so.

2) The meaning of "reasonable grounds"?

20 The meaning of "reasonable grounds" under the MEA is one such question of law. The appellant submits that "reasonable grounds" should be defined as "credibly based probability... ..not to be equated with proof before a reasonable doubt or a prima facie case." This is the standard of persuasion articulated by Justice Hill in *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 (Ont. Gen. Div.) with respect to the issuance of a search warrant and adopted by Culver J. in *Chapman*, *supra* at para. 41-42. The respondent submits that a more appropriate standard is the standard of "reasonable grounds" as determined by the jurisprudence relating to applications for judicial recount under s. 47(1) of the MEA: *Devine v. Scarborough (City) Clerk* (1995), 27 M.P.L.R. (2d) 18 (Ont. Prov. Div.) (*MacDonnell Prov. J.*) and *Harris v. Ottawa (City)* (1994), 27 M.P.L.R. (2d) 36 (Ont. Prov. Div.) (*Blishen Prov. J.*). In *Harris*, the court held at paras 17 and 18 that the test for "sufficiency and reasonableness of the grounds" is "certainly a lower test than the usual civil burden of proof on a balance of probabilities....but must simply provide a prima facie case."

21 There is no dispute that "mere suspicion, conjecture, hypotheses or 'fishing expeditions,'" and that which is "speculative and remote" fall short of the minimally acceptable standard. The question is whether the test for "reasonable grounds" is "credibly based probability" or "a prima facie case."

22 In *Savage supra*, Duncan J. at para 10 thought that the "reasonable grounds" requirement had been met where the applicant raised issues which "an auditor might very well choose to investigate." In *Sanchez* (adopted in *Chapman, supra*), Hill J. defined "reasonable grounds" as "a practical, non-technical and common sense probability as to the existence of the facts and the inferences asserted."

23 I note that, in this case, the two chartered accountants on the Committee made up the majority who did not think the grounds for a compliance audit had been made out. If the test were as set out in *Savage*, their decision warrants considerable deference. It also strikes me that even if the appellant had what he considered reasonable grounds to ask for an audit, the Committee has considerably more information at their disposal. Having heard all the submis-

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sions and reviewed all the material before them, the Committee is in a better position than the appellant to determine whether, in fact, "reasonable grounds" do exist to proceed with an audit. It is the role of the Committee to weigh the evidence and to make determinations of what weight should be accorded to the representations before it.

24 There is a distinction in law between "credibly based probability" and "a prima facie case." A belief is founded on "reasonable grounds" where there is an objective basis for the belief that is based on "compelling and credible information." The standard is "reasonable probability," not proof beyond a reasonable doubt or a prima facie case: *R. v. Le* (2006), 210 C.C.C. (3d) 181 (B.C. C.A.) *leaved to appeal to S.C.C. refused* (2006), 212 C.C.C. (3d) vi (note) (S.C.C.); *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)* (2005), 197 C.C.C. (3d) 233 (S.C.C.) at para. 114. A "prima facie case" connotes a case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction: *R. v. Mezzo* (1986), 27 C.C.C. (3d) 97 (S.C.C.). Black's Law Dictionary 6th ed at p. 1190 also indicates that "Prima facie evidence refers not only to evidence which would reasonably allow the conclusion which the plaintiff seeks, but also to evidence which would compel such a conclusion if the defendant produced no rebuttal evidence." As MacDonnell, Prov. Div. J. noted in *R. v. Skorput* (1992), 72 C.C.C. (3d) 294 (Ont. Prov. Div.), at pp. 296-297, the former use is permissive; the latter carries "a degree of cogency (that)...might conveniently be described as "presumptive": *Cross on Evidence* 6th ed at pp. 60-61.

25 In my view, where the statute requires "a belief on reasonable grounds," the jurisprudence applicable in other contexts indicates that the standard to be applied is that of an objective belief based on compelling and credible information which raises the "reasonable probability" of a breach of the statute. The standard of "a prima facie case" in either its permissive or presumptive sense is too high a standard.

3) Application of this standard to the decision of the Compliance Audit Committee?

26 Having determined the test for "reasonable grounds" in law and having decided that this court ought to show considerable deference to the expertise of the Compliance Audit Committee in its determinations of fact and law, I now consider whether their majority conclusion rejecting the request for a compliance audit was reasonable. This requires that I examine the record of the proceedings and particularly the materials and representations which were before the Committee when their decision was made. I will address each of the contested issues in turn.

a) The value of a "professional webmaster" and website design services?

27 The novel issue in this appeal is the claim that Mr. Heaps failed to accurately disclose the cost of his campaign website. The only expense information filed by Mr. Heaps in respect to this website was an invoice in the amount of \$120 for "3 months web hosting" issued by Peter Diplaros who is the Executive Editor of Corporate Knights, a company run by Mr. Heaps' son Toby Heaps. According to an excerpt from the Corporate Knights website, Peter Diplaros is "the webmaster and chief analyst for the fundlibrary.com" and "his favourite hobby is large-scale web site architecture and design." Given the quality and comprehensiveness of the thirty-page website, Mr. Lyras asserted that "it was implausible that it was designed and created, as well as hosted for a three-month period, by a professional webmaster" with such experience for a cost of only \$120. Mr. Lyras obtained two quotes for the design, creation and hosting of websites similar to that operated by Mr. Heaps during the campaign, one was for more than \$5,965.00, the other for \$2,800.00. In his view, even the lower of these costs would have caused Mr. Heaps to exceed his campaign spending limits.

28 Mr. Heaps replied that the cost of developing the website was not reported as it was not "paid for", but rather obtained through "voluntary unpaid labour," a specific exemption from the definition of "contribution" under section 66(2)2.i of the MEA. He indicated to the Committee that the work was done "on volunteer time," took approximately 10-14 hours, and was done by Peter Diplaros, himself, his wife, his son and others who contributed volunteer time to the content and upkeep of the site.

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29 In his written submissions to the Committee in support of his application, counsel for Mr Lyras asserted that the "voluntary unpaid labour" provision of the MEA does not apply to the contribution of services by those who are in the business of providing such services, i.e. that the MEA distinguishes between voluntary unpaid labour and the contribution of professional services. He also submitted that "allowing candidates to evade the application of the election spending limits to professional services obtained on a no-charge basis would result in inequality and unfairness among candidates."

30 There is no dispute that the cost of producing a website is not distinguishable from the cost of producing other campaign literature or advertising. Mr. Heaps submits, however, that to the extent that a brochure, website or other advertising is produced by "voluntary unpaid labour," these are not "contributions" under the MEA and need not be declared as such. Unless something is a "contribution," then the rules for the valuation of the goods and services dealt with in s. 66(3) of the MEA do not apply.

31 I agree with counsel for the Committee that Mr Lyras has misinterpreted and misapplied the provisions of the MEA. Section 66(2)1.iii specifies that "if goods and services used in a ... campaign are purchased for less than their market value, the difference between the amount paid and the market value" are considered a "contribution." Section 66(2)2.i provides that "the value of services provided by voluntary unpaid labour..." are not contributions." Section 66(3) describing how to value goods and services only applies to "goods and services provided as a contribution." (my underlining)

32 Under the MEA, the level of expertise that a volunteer has in the area in which they elect to provide volunteer services is an irrelevant consideration in the definition of what is a "contribution." It is also clear that the rules about valuing "contributions of goods and services" add nothing to the specific statutory definitions of what is or is not a "contribution." The MEA is very clear that "the value of services provided by voluntary unpaid labour" need not be considered a contribution, and makes no distinction between free professional services and free services for other campaign assistance.

33 Mr Lyras also submitted that the contribution of services to design and create a website is a contribution of "political advertising" within the meaning of section 66(2)2iv of the MEA, and that the existence of the specific exemption for "the value of political advertising provided without charge on a broadcasting...under the Broadcasting Act (Canada)" implies that other forms of "political advertising" such as a website are not exempt from the reporting requirements. In my view, this is a further misreading of the MEA. This specific exemption relates to the value of the time provided for using the broadcast medium to distribute the message. The cost of developing the message is akin to all other advertising used in the campaign and is reportable, except in so far as any of the services used to produce it were provided by "voluntary unpaid labour."

34 The clear statutory exemption for "voluntary unpaid labour" is a policy decision of the Legislature which reflects the realities of political life, including the range of competencies volunteers bring to political campaigns and the difficulties of tracking and putting a value on volunteer services. Any inequality in the application of the rules to particular candidates is balanced by an exemption to the definition of "contribution" which encourages public participation in the electoral process. The Legislature has chosen to encourage "services provided by voluntary unpaid labour" in election campaigns and it is not the role of the Committee or the Court to question that policy decision.

35 The only remaining issue is whether there was any "compelling and credible information" before the Committee that objectively raised a "reasonable possibility" that Mr. Heaps failed to report the cost of developing and maintaining his website. Mr. Heaps' evidence was that the services used to create and maintain the website were provided by voluntary unpaid labour, including that provided by Peter Diplaros. There is no "compelling and credible information" from Mr. Lyras to the contrary. What he put before the Committee is nothing more than speculation and conjecture. That Mr. Diplaros works for Corporate Knights, does some "webmaster" services as part of one of

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his jobs, and likes to construct complex websites as a hobby is not evidence that he did not donate his time to create the original website. The quality of the website is irrelevant, as is the fact that other candidates may have paid for similar services, or that the services may have had substantial market value if purchased on the market.

36 In my view, it is the role of the Committee to make findings of credibility on the information and representations before them. In this case, the majority finding that Mr. Lyras had no reasonable grounds for his complaint about the costs of the website is a reasonable determination. I also find that their understanding of the applicable law was correct.

b) All telephone expenses?

37 Mr. Lyras submitted that Mr. Heaps failed to account for the cost of two telephone numbers which were listed on his campaign website and his campaign literature and which he asserts were utilized during the course of the campaign. Mr. Heaps responded that he was not required to account for the expenses of his home telephone number and his son's cellular telephone number which was "on a plan" and "was utilized for a total of 14 incoming calls from media." On the evidence before the Compliance Audit Committee, Mr. Heaps did account for the cost of the main telephone line used in his campaign and indicated that the use of these private telephone lines for the campaign was negligible.

38 The decision that an audit of the costs of these lines was unnecessary is reasonable, given the privacy interests at stake and the unrealistically onerous (if not impossible) burden of determining different types of usage of what are essentially private lines. In my view, the legislative intent is not to extend the ambit of the MEA to the privacy of the home telephone lines of candidates for public office and their families. To hold otherwise would only lead to fishing expeditions which could well deter persons from seeking public office. If correctness were the standard of review this court was to apply, I would also say that this decision is correct

c) The cost of a flyer?

39 Mr. Lyras submitted that Mr. Heaps did not accurately disclose the cost of an 11 inch by 17 inch flyer that was produced and distributed during the campaign. More specifically, he asserted that the receipt filed for obtaining 15,000 copies of this flyer from Meade Graphics Inc. for a cost of \$2,494.32 was some \$351 below the quote Mr. Lyras later obtained from Arco Graphics (operating at the same location) for printing a similar product, which quote did not include a graphic charge estimated at an additional \$300-\$500.

40 Mr. Heaps replied that he contracted only with Meade Graphics and the invoice he submitted was the total amount he was charged for the brochure. There was also evidence before the committee that Meade Graphics and Arco are not related companies, and that Meade used Arco "as a supplier for smaller projects." As against this concrete evidence of the invoice and a letter from the owner of Meade Graphics, a higher quote obtained by the appellant from an unrelated company after the fact is no more than speculation and conjecture, hardly compelling and credible information which raises the reasonable possibility that Mr. Heaps underreported the actual cost of the brochure. Again, I find the decision of the Committee reasonable and correct.

d) The true market value of his campaign office rental expenses?

41 Mr. Lyras asserted that the campaign office rental expenses claimed by Mr. Heaps did not reflect the market value of this expense, and suggested that a non-arms length corporation may have paid a portion of his rental expenses or entered into a space sharing arrangement to reduce his rental expenses without this benefit having been declared. In support of these submissions, he asserted that Mr. Heaps rented a property at 3280 Danforth Avenue in Scarborough which the owner after the election indicated would be rented for \$1200 per month. Mr. Heaps claimed a total rental cost of \$1600, or \$800 per month. Mr. Lyras also pointed to a handwritten notation on the rental receipt

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submitted by Mr. Heaps which indicated that "\$1000 paid by Corporate Knights Inc. for use of office space." He indicated that Mr. Heaps' eldest son Toby Heaps was the president, and sole director of Corporate Knights.

42 There was ample evidence before the Committee to rebut all these allegations. There was evidence that Toby Heaps acted as an agent for the campaign to find the rental property and that he paid a deposit which Mr. Heaps subsequently reimbursed. There was evidence that he negotiated the rental of the premises from one of the co-owners and that Corporate Knights neither shared the space, nor subsidized the rental cost. The fact that Mr. Lyras obtained a higher quote for rental of the premises after the election is irrelevant to the rental actually paid by Mr. Heaps. There is evidence that this higher quote was based on a potential long-term lease with upgrades to the basement, washroom and the exterior paid for by the owners, whereas Mr. Heaps' campaign rented the premises on an "as is" condition. In actual fact, the premises were never leased to anyone other than Mr. Heaps' campaign and, as of July 2007, were listed for sale. In the circumstances, the only rental value of the premises was that paid and declared by Mr. Heaps for the two months of the campaign.

43 Against this evidence put before the Committee by Mr. Heaps, the allegations of Mr. Lyras were nothing more than speculation and conjecture. On either a reasonableness or correctness standard, there were no "reasonable grounds" to order a compliance audit on this issue.

Decision

44 For the reasons indicated above, the appeal is dismissed. Counsel can make further submissions as to costs upon application to the trial coordinator at the Old City Hall for a hearing date.

Appeal dismissed.

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