IN THE MATTER OF AN APPLICATION BY **DAVID DEPOE** UNDER THE *MUNICIPAL ELECTIONS ACT, 1996* TO THE CITY OF TORONTO COMPLIANCE AUDIT COMMITTEE IN RESPECT OF THE FINANCIAL STATEMENT OF GIORGIO MAMMOLITI, CANDIDATE FOR ELECTION TO TORONTO CITY COUNCIL, WARD 7.

WRITTEN SUBMISSIONS ON BEHALF OF GIORGIO MAMMOLITI

Background

1. The Application and supporting submissions advance a number of propositions which, if accepted, would affect the exercise of the Committee's authority and discretion in deciding upon the disposition of this matter. In particular, the Applicant asserts that a single contravention of the Act may require the Committee to direct a compliance audit, the scope of which would cover all aspects of the election finances of a particular campaign;

2. While a single finding of a compliance audit committee, to the effect that an apparent contravention of the relevant provisions of the Act has been identified, can give rise to a compliance audit, the Committee retains a discretion to assess the nature of any alleged contravention and to decline to order a compliance audit of potentially unlimited scope, where the issue is of a *de minimus* nature or otherwise less than substantive.

The "Belief on Reasonable Grounds" threshold

3. Subsection 81(1) of the Act provides as follows:

> "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."

4. Subsection 81(5) of the Act provides as follows:

> "Within 30 days after receiving the application, the [compliance audit] committee shall consider the application and decide whether it should be granted or rejected."

5. On a plain reading, it may be seen that the question of "belief on reasonable grounds" is a threshold question – a condition precedent for an application to be brought. An application that does not evidence a belief on reasonable grounds is not proper, and if the Committee finds that such a belief is not evidenced on the material before it, then it should dismiss the application on that basis. In contrast, the language of subsection 81(5), which confers the decision-making power upon the Committee, contains no such direction or standard. Rather is it a question for the Committee to "decide whether [the application] **should** be granted or rejected".

6. If, as the Applicant suggest, the Committee has "little discretion" to decide whether to hold a compliance audit, there is little point in having a Compliance Audit Committee with specialized expertise, at all. In fact the court decision underlying this line of reasoning is based upon the legislation as it existed prior to the passage of extensive amendments in 2009, and is directed to the decision of a non-expert municipal council that could make such a decision at that time.[1] Moreover, the point made by the court was little more than an editorial comment, upon which the outcome of the case did not turn; in lawyers' parlance, an "obiter dicta" - a thing said in passing.

7. In contrast, the Courts have acknowledged that this Committee (differently constituted) is entitled to a higher level of deference than a City Council in two cases to date,[2] and the expertise giving rise to that deference is such that the Committee is entitled to exercise a measure of discretion in determining whether or not an application has sufficient merit such that a compliance auditor should be appointed. The Court will not interfere in the Committee's exercise of this discretion unless it finds the Committee's decision to be unreasonable.

8. This is congruent with the decision of the Court in *Harrison*, which found that a minimal transgression did not warrant a compliance audit, and with the comments of Justice Lane in *Lyras*, who set out the role of the Committee as follows:

> "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 submissions 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[3]."

9. Although there is no question that the Committee's task is to assess the existence of "reasonable grounds," what is required, as Justice Lane put it in *Lyras*, is "an objective belief based on compelling and credible information which raises the "reasonable probability of a breach of the statute." It should be stressed that the standard includes **each** of the following:
   - objective belief
   - compelling information
   - credible information, and
   - reasonable probability of a breach.

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[1] *Jackson v. Vaughan (City)* 2009 CanLII 10991 (ONSC)

[2] *Harrison v. Toronto District School Board*, unreported, OCJ, June 19, 2008 and *Lyras v. Heaps* 2008 ONCJ 524 (CanLII)

[3] at page 6

10. In making this determination and as previously indicated, this Committee is entitled to considerable deference.

11. Further, Justice Lane, in *Lyras*[4], comments on the "gatekeeper" function of the Committee. This is an important element in the enforcement of electoral law at all three levels - municipal, provincial and federal (although, as will be discussed below, the nature of the "gate" in the municipal context has been altered by the recent addition of subsection 81(17) of the Act).

12. The *Canada Elections Act* establishes, in sections 509 - 512, a process whereby any prosecution under the Act requires the consent of the Director of Public Prosecutions, acting in concert with the Commissioner of Canada Elections (the "Commissioner"), who applies a test of whether the public interest justifies a prosecution.[5]

13. Similarly, the Ontario *Election Act* provides in subsection 98.1(1) that "(n)o prosecution shall be instituted under this Act without the Chief Electoral Officer's consent." In this respect, Counsel is unaware of any particular guiding principle applied by that official, but understands that this question is very much within the unique expertise of this Committee.

14. It is submitted that this "gatekeeper" function is intended to provide a check against the potential for frivolous or politically-driven charges against candidates for elected office, who, by virtue of the public office which they hold or have sought and the risk of vindictive behaviour before, during or after a campaign that may be vociferously contested, might otherwise be subject to private prosecutions that seek less to enforce the law than to embarrass or weaken a political opponent.

15. Prior to 2010, this was equally the case under the Act, and this function, whether it had as gatekeeper the municipal council or local board, was found by the Superior Court in *R. v. Hall*[6] to be the legislative intention behind the compliance audit application process:

> " 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."

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[4] at page 5

[5] See for example, http://www.elections.ca/content.aspx?section=pol&document=page13index&dir=thi/ec20227&lang=e and http://www.elections.ca/content.aspx?section=med&document=feb0499&dir=pre&lang=e

[6] [2003] O.J. No. 3613

16. In *R. v. Hall*, the Court found that the nature of the Act was then structured such that a voter could not initiate a charge against a candidate other than through the section 81 process. This specific constraint informs much of the judicial decision-making under the Act prior to the present election cycle.[7]

17. But this "only means" constraint was statutorily overridden by the Province with the enactment of subsection 81(17) of the Act, as part of the 2009 amendments:

> "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."

18. The amendment represents a complete paradigm shift from the previous case law. In effectively overruling *Hall*, the legislature has changed the context of a compliance audit request. It is no longer the only means by which an elector may pursue a prosecution for a perceived contravention. Now it is the only means by which such a voter may cause the municipality to carry out an audit of the candidate at its own expense, invoke the extraordinary powers of a commission under the *Public Inquiries Act* and potentially cause the municipality to prosecute the perceived contravention, all the while fully insulating the complainant from any potential civil action for malicious prosecution where a conviction is not obtained.

19. Under both paradigms, the Committee was a "gatekeeper," but it is submitted that the nature of the gatekeeping has now changed. Previously, the gate was one through which all complainant-driven prosecutions must pass, now it is one through which only the compliance audit driven path of prosecution must pass. In this context, the Committee can and should adopt a higher threshold for making a decision that can result in a substantial expenditure of public funds. It is suggested that the Commissioner of Canada Elections' test of "in the public interest" has an intrinsic appeal.

20. In short, it is respectfully submitted that the Committee should engage in a two stage process. First, it should consider whether the application reflects "an objective belief based on compelling and credible information which raises the "reasonable probability of a breach of the statute," and secondly, whether the conduct of a compliance audit of the financial affairs of the subject councillor is in the public interest.

Interpretation of the Act

21. It has been said that this Act creates genuine and considerable ambiguity, and that it is "not pretty legislation."[8] It must therefore be read most carefully.

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[7] See *Chapman v. Hamilton*, 2005 ONCJ 158 (CanLII) at ¶39 ("unequivocally a condition precedent"), *Mastroguiseppe v. Vaughan (City)*, [2008] O.J. No. 5734 at ¶33-34 "only remedy"), *St. Germain v. Bussin* [2008], O.J. No. 408 at ¶34, *Savage v. Niagara Falls (City)* [2005], O.J. No. 5694 at ¶11,

[8] *Vaughan (City) v. Di Biase* [2011] O.J. No. 1364 at ¶27 - 37

22. While it is a truism that electoral law must strive to create a "level playing field," it does not follow from this proposition that the law should be applied "restrictively"

23. To the contrary, Part VI of the Legislation Act, 2006 deals with statutory interpretation. Section 64 of that Act directs that Ontario Acts be interpreted as being remedial in these terms:

> "An Act shall be interpreted as being remedial and shall be given such fair, large and **liberal** interpretation as best ensures the attainment of its objects." [emphasis added]

Fund-Raising Functions

24. The Applicants' complaint does not identify fund-raising functions, and accordingly Mr. Reeds submissions cannot inform any reasonable belief in a contravention that he may or may not have had as of the date of the application. It may nevertheless be of value for the Committee to consider the scope of this term, given the submission before it.

25. Prior to the 2009 amendments, the definition of "fund-raising function" contained in the Act was as follows:

> "fund-raising function" means **an event** intended to raise money for a person's election campaign; [emphasis added]

26. This is the definition that was in place and applied in the writing of the *Municipal Elections 2006 Guide* approved of by Justice Lauwers in the Jackson[9] decision.

27. But the 2009 amendments changed this definition to read as follows:

> "fund-raising function" means **an event or activity** held by or on behalf of a candidate for the purpose of raising funds for his or her election campaign;

28. It is a fundamental rule of statutory interpretation that each word of a statutory pronouncement is to be given meaning; no word is superfluous. If two words are used in a definition, they cannot mean the same thing. Moreover it is also presumed that amendments to statutory language are enacted to effect change. This is referred to as the "presumption of purposeful change"[10]. Accordingly, in adding the words, "or activity" to the statutory definition of "fund-raising function", it is evident that the Legislature intended, for the purposes of this legislation, to modify both the dictionary definition of a "function" and the previous statutory definition.

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[9] See footnote 1

[10] *Sullivan on the Construction of Statutes, 5th Ed.*, (2008) LexisNexis, at pp. 216, 579.

29. Another notable amendment enacted in 2009 is the addition of subsection 67(2.1) to the Act:

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

30. It is submitted that, when read together, the intention of these two amendments is clear. It is not to create an artificial barrier between fund-raising methodologies such as dinners, dances and auctions on the one hand, and the use of paid fund-raising staff or consultants on the other; this, it is submitted, is a distinction without a difference. Rather the legislative intent is to ensure that candidates be prevented from cloaking a campaign activity in a fictitious guise of fund-raising, in order to take an event OR activity outside of the spending limits that are so necessary to ensure a level playing field in a campaign.

31. It is simply incorrect in this context, for the someone to assert that reliance, whether judicially approved or not, should be placed upon language written and included in a 2006 municipal elections guide[11], despite the fact that this wording does not appear to have been revised in the wake of the 2009 amendments. The inescapable fact is that the law was changed.

32. Moreover the very presence of clause 67(2.1)(b) further highlights the fact that the Legislature's concept of a "fund-raising function" is broader that that of the Applicants. The plain implication of this provision is that the costs of bare promotional materials (i.e. not merely those which promote an event) in which the soliciting of contributions is a substantial purpose are costs of holding fund-raising functions. Pursuant to subsection 76(5), such expenses are not subject to the spending limit. Hence, direct mail or telephone solicitations plainly fall within the statutorily defined concept of a fund-raising function, and their cost, whether or not tied to a personally attended event, is not subject to the maximum expenses set out in the Act[12].

33. The Legislature's intention, in fact, is quite clear: it is to establish a transparent election spending regime that applies a consistent spending limit to candidates, but which

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[11] Such guides, do not, in any event, constitute a statement of the law that the Committee should take into account. They are summaries and interpretations of the legislation. The 2010 Ministry Guide in facts contains the following caution on the cover: "This guide is prepared for information purposes only. Reference should always be made to the relevant legislation and regulations."

[12] See also, in this respect, Elections Ontario Guideline G31.05, which cautions that mail solicitations "must not be a disguised form of campaigning," lest the cost of the mailing thereby become an expense subject to the spending limit. The statutory definition upon which this Guideline rests is substantively identical to the definition in the Municipal Elections Act, 1996.

excludes from that limit, the costs incurred in raising the money required to pay those expenses.

PART 2 – THE ALLEGATIONS IN RESPECT OF GIORGIO MAMMOLITI

Advertising and Brochures

34. The Applicant has identified four invoices and submitted that they reflect an under-reporting of expenses incurred for advertising and brochures.

35. As acknowledged at the previous Committee meeting, it is accepted that the only area of flaw is in the categorization of the expenses, but it is submitted that a mere misallocation of expenses between categories included as within the spending limitation is of a trivial or *de minimus* nature as discussed above and should not constitute the basis for ordering a compliance audit.

36. In particular, the advertising and brochure categories have been conflated and should be read as one, as the applicant has in fact done, without taking issue.

37. Additionally, an installment payment of $1,000.00 to In-House Print and Graphics was paid by way of bank draft drawn on the campaign account. This was as a result of a returned cheque. It would appear that the auditor, in the absence of the corresponding cheque and detail, misattributed the charge for the bank draft to office expenses, which are also reported as subject to the limit. No portion of this payment was excluded from the calculation of expenses subject to the limit.

38. A payment of $1,710.97 was attributed by the auditor to "brochures on loan" because a portion of the invoiced brochures were unused or unusable. This was reported as such on the return as not subject to the limit.

39. But the Applicant has included in his alleged "advertising and brochures" amount, components that do not belong there. Specifically, the In-House Print and Graphics invoice of August 31, 2010 included an invitation to a fundraising barbeque at a cost of $470.52, which is a fundraising expense and not an advertising or brochures expense.

40. Similarly, the Applicant has included in his calculation an invoice from InfoDesign for $564.89, which was in fact properly reported by he candidate as a phone and internet expense.

Office, Phones and Internet

41. As reflected on the attached table, and reinforced by the accompanying correspondence from the auditor, Mr. B. Nayman, the Applicant's submission in respect of these selected invoices is entirely misconceived. In particular,

    (a) He has included expenses that relate to the mayoralty campaign and not the campaign at issue;

(b) He has included expenses or portions of expenses that are properly excluded from the spending limit as incurred in respect of fund-raising functions;

(c) He has included expenses incurred after the day of the election and which could not constitute part of a campaign or election that had ended;

(d) He has, without consistency in even his own approach, relied on previous balances referenced in account statements that he has included in his application and treated them as if they were current charges; and

(e) He has made no allowance for credits applied by the service provider on the face of a statement;

42. Accordingly, it is submitted that the Application, and this portion of it in particular, lacks the necessary detail and rigour to evidence reasonable grounds for a belief in a contravention.

43. Moreover, as reflected on the table referred to above, the office expense, phone and Internet charges complained of by the Applicant, when properly broken down by limited campaign expenses, fundraising and mayoralty campaign expenses, fall well below the amount reported by the candidate in these categories. The reason for this is twofold:

(a) It does not include other charges properly reported in these categories that were not identified by the Applicant. This may be due to expenses transferred from the mayoralty campaign to the councillor campaign by the auditor, or expense vouchers not submitted with the return, there being no requirement in the Act to do so.

(b) It does not include rent paid for the campaign office at 2958 Islington Avenue, such payments having been made pursuant to a lease, with no invoices issued.

Office Rental, Contributions of Goods and Services

44. As pointed out in the preceding paragraph, rent payments for the campaign office at 2958 Islington Avenue were in fact made. The auditor has confirmed in his correspondence of January 20, 2012 that the rent cheques were included in the Statement. There are, accordingly, no reasonable grounds to believe that rent was either undeclared or that the use of office space amounts to an improper contribution of goods or services.

Subsequently Identified Complaints

45. It is the strong position of the candidate that issues not raised in the Application of December 27, 2011 cannot possibly inform the requisite belief of the Applicant in the occurrence of a contravention of the Act. The issues so raised, either by Mr. Reed or in Applicant's Counsel's submission, should not be considered by the Committee.

46. Even more so, the exact document complained of by Mr. Reed was considered by this Committee in the previous application against the candidate, and should not now be re-litigated.

47. Nevertheless, the candidate wishes it to be known that complete records of all contributors were in fact kept, and will be made available to the Committee upon request. These records contain personal information of contributors and are not therefore included in these public submissions.

48. As well, the complained of "over-limit" contribution entry of $1,250.00 in fact refers to two contributions, one of which is from the candidate, as reflected in material submitted to the Committee on January 20.

PART 3 – CONCLUSIONS

49. Any assessment of reasonable grounds for belief that a contravention has occurred must be based upon a full, fair and coherent reading of the legislation within the context of the above analysis. It is respectfully submitted that no such grounds have been raised by the application, and that, accordingly, this Committee should dismiss the Application for a compliance audit of the campaign of Giorgio Mammoliti.

50. In the alternative, if any potential contravention is seen by the Committee to have been made out, it is an issue merely of classification of expenses, something not expressly required by the statute, and the issue is not substantive in nature, since all amounts were properly classified as within or outside of the spending limit, with no compromise of that limit or the transparency principle. This would therefore constitute a case in which the Committee may properly exercise its discretion and decline to order a compliance audit.

All of which is respectfully submitted,

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Documents Referred to in the Complaint of David DePoe

Office Expenses, Phone and Internet

	Inv. # / Date	Reported by DePoe	Attributed to Councillor Campaign	Attributed to Fundraising	Attributed to Mayoralty	Comments
Motion Technologies	10123	$ 2,700.65	$ 791.50	$ 647.58	$ 1,261.57	Expenses on this invoice dated prior to August 27 are 100% Mayoralty. Although registered as of July 9, the Councillor campaign did not start active operations out of the campaign office, using this equipment, until that date. The balance of the expenses have been prorated 36.7% to councillor expenses subject to limit, 30% to fundraising, and 33.3% to mayoralty fundraising and cleanup. This is based on the overall amount of time spent by staff and volunteers working out of the campaign
Motion Technologies	10340	$ 254.25	$ 93.31	$ 76.28	$ 84.67	prorated 36.7%, 30%, 33.3%
Motion Technologies	10440	$ 1,508.55	$ 446.48	$ 364.97	$ 405.12	This invoice includes post-election day rental charges (Oct 26 - 31 = 6 days) Those days are excluded entirely and hence $291.98 of the invoice value of $1,508.55 is excluded from this allocation, and only 25 days' of these costs are included, and then prorated 36.7%, 30%, 33.3%
Thinq Technologies	287459	$ 127.69	$ 127.69			Bar code scaners used for councillor campaign only
Thinq Technologies	288308	$ 127.69	$ 127.69			Bar code scaners used for councillor campaign only
Rogers	12/10/10	$ 1,661.14	$ 441.87	$ 361.20		The amount reported by the Applicant is wrongly inflated by a prior balance. The invoice in question only shows $803.07 in current charges. Since the invoiced cell phones were not used during the invoice period by the mayoralty campaign (note that this was originally a mayoralty campaign account), the current charges only are prorated at a ration of 36.7 to 30 for councillor campaign and fundraising.
Rogers	11/10/10	$ 163.84	$ 60.13	$ 49.15	$ 54.56	Oddly, the complainant recognized on this smaller statement that only the current charges should be considered. This invoice is for office internet and cable, prorated 36.7%, 30%, 33.3%
Intact Insurance	02/12/10	$ 900.61	$ 93.73	$ 76.62	$ 85.05	This invoice reflects one statement for a full year policy from Aug 2010 to Aug 2011, and shows a $929 credit for the cancellation of the policy. The actual insurance cost incurred for the campaign office was 3 x $128.66 less the $130.58 rebate shown on this invoice = $255.40. This is then prorated 36.7%, 30%, 33.3%
Enbridge	11/05/10	$ 151.81	$ 55.71	$ 45.54	$ 50.55	prorated 36.7%, 30%, 33.3%
Toronto Hydro	05/11/10	$ 930.92	$ 341.65	$ 279.28	$ 310.00	prorated 36.7%, 30%, 33.3%
Sunoco	11/30/10	$ 3,359.18				The invoices submitted show no current charges at all. The accumulated totals for the year to date shown on the invoices include the entire mayoralty campaign. In any event gas charges on this account were only incurred in the fundraising functions of the two campaigns (other gas charges having been declared as office expenses), and none of them are attributable to limited campaign expenses.
City of Toronto (ticket)	10/14/10	$ 66.00	$ 66.00			parking ticket paid for campaign volunteer
City of Toronto (voters list)	01/09/10	$ 282.50	$ 282.50			Paid to City for Voters' list etc.
Staples	10/08/10	$ 200.70	$ 73.66	$ 60.21	$ 66.83	prorated 36.7%, 30%, 33.3%
Michael's	9/17/10	$ 16.92	$ 6.21	$ 5.08	$ 5.63	prorated 36.7%, 30%, 33.3%
GV Group	9/13/10	$ 8.14		$ 8.14		12 inch nails for holding down tent at fundraiser
various suppiers		$ 576.40	$ 211.54	$ 172.92	$ 191.94	miscellaneous expenses including canddiate gas, office meals etc. Prorated 36.7%, 30%, 33.3%
Home Depot	9/28/10	$ 81.79	$ 81.79			ties for signs
Staples	9/25/10	$ 39.58	$ 14.53	$ 11.87	$ 13.18	prorated 36.7%, 30%, 33.3%
Suncor credit charges		$ 57.76				see gasoline charges noted above
TOTALS		$ 13,216.12	$ 3,315.98	$ 2,158.84	$ 2,529.10	