IN THE MATTER OF A COMPLIANCE AUDIT UNDER THE *MUNICIPAL ELECTIONS ACT, 1996* IN RESPECT OF THE FINANCIAL STATEMENT OF GUS CUSIMANO, CANDIDATE FOR ELECTION TO TORONTO CITY COUNCIL, WARD 9

WRITTEN SUBMISSIONS ON BEHALF OF GUS CUSIMANO

1. In light of the 5 minute limit placed upon oral submissions by the Compliance Audit Committee, these submissions made on behalf of Gus Cusimano constitute his more detailed position in response to the Compliance Audit Report relating to his campaign, and dated May 25, 2012, prepared by Froese Forensic Partners LLP.

The Allegations

2. As the Committee is aware, it directed a Compliance Audit with respect to the campaign finances of Mr. Cusimano relating to the 2010 Municipal General Election for City of Toronto. The audit arose from the application of Ms. Donna Lynn Tucker and Mr. Howard Moscoe, which raised six issues as follows:

   (i) That Mr. Cusimano failed to report the purchase of all of the wooden stakes that would have been required to support all of his campaign signs;
   (ii) That Mr. Cusimano failed to report the replacement value of a large arterial election sign that was retrieved from inventory;
   (iii) That Mr. Cusimano failed to report the use of donated computers for his campaign;
   (iv) That Mr. Cusimano accepted corporate contributions of goods in kind;
   (v) That campaign expenses were incorrectly classified as fundraising in an attempt to remain below the campaign spending limit; and
   (vi) That Mr. Cusimano improperly commenced the proceeding for a controverted election and his associated legal expenses were improperly accounted for.

   The Report now before the Committee relates to a more broad examination of the affairs of Mr. Cusimano's campaign than addressed in the original complaint, and came to several conclusions, including the finding of some apparent contraventions of the financial provisions of the *Municipal Elections Act, 1996* (the "Act").

Legal Issues Which Have Subsequently Been Drawn To The Attention Of The Auditor

3. In the course of reviewing the Report, counsel for Mr. Cusimano identified two categories of findings, namely those relating to corporate contributions and those relating to post-June 30, 2011 contributions, where he believes conclusions contained in the Report to be based, in the first case upon an error of law, and in the second case upon a combined error of fact and law, the fact in question being one that had not come to the auditor's attention during the course of his investigation. By letter dated June 5, 2012,

counsel wrote to the auditor providing a detailed explanation of the nature of these concerns, and requesting that a supplementary report be prepared.

4. For convenience of reference the correspondence disputes the finding that there could be a contravention of the statute or relevant City By-Law with respect to the acceptance of corporate contributions, and argues that the campaign period did not end on June 11, 2011, but has in fact been recommenced and continues as of the present date.

5. At the time of preparation of these submissions, it is unknown whether a supplementary report will in fact be provided to the Committee. In the event that such a report is either not prepared, or does not fully adopt the points raised in that correspondence, Mr. Cusimano relies upon the contents of the June 5 correspondence (a copy of which is attached hereto) in support of his position that there has been no apparent contravention either of subsection 70.1(1) of the Act, of City of Toronto By-Law 1177-2009 by Mr. Cusimano with respect to corporate contributions, or of section 68(1)(4)(i) with respect to contributions deposited after June 30, 2011.

Findings Related to the Complaint of Ms. Tucker and Mr. Moscoe

6. With respect to the allegation that Mr. Cusimano failed to report the purchase of all of the wooden stakes that he would have needed, the Auditor concluded at paragraph 2.15 of the Report that there are no apparent contraventions of the Act.

7. With respect to the allegation that Mr. Cusimano failed to report the replacement value of a large arterial election sign, the Auditor did find that this was not reported on the initial Financial Report, which would constitute an apparent contravention, but that it was duly reported with a reasonable replacement value attributed to it of $350, in the Supplementary Financial Report. The inclusion of this deemed expense did not cause Mr. Cusimano's election expenses to exceed the allowable limit.

8. With respect to the allegation that Mr. Cusimano failed to report the use of donated computers for his campaign, the Auditor found that this was omitted from the original Financial Report, constituting an apparent contravention of the Act, but that a reasonable expense of $100 was added in the Supplementary Financial Report reflecting the value of such usage. The addition of this expense did not increase Mr. Cusimano's campaign expenses above the allowable limit.

9. With respect to the allegation that Mr. Cusimano's campaign accepted corporate contributions of goods in kind, the specific allegation made with respect to email being sent by an employee of the candidate was found to be a permitted contribution of supervised employee time under subsection 66(2) Rule 2(ii) of the Act. There was no apparent contravention in respect of the allegation, however as will be discussed further below, there was a minor apparent contravention found of a similar nature, that had not been contained in the original allegations.

10. The allegation that Campaign expenses had been incorrectly classified as fundraising was considered by the Auditor, who determined that the material at issue had been properly produced for the purposes of fundraising and properly declared. Similarly the allegation

relating to a fundraising event on June 10, 2010 was also found not to be borne out by the Auditor.

11. With respect to the allegation about improperly commencing the controverted election proceeding, the Auditor found that there was no apparent contravention of the Act.

12. It is noted accordingly, that the only apparent contraventions borne out by the Compliance Audit that had been identified in the complaint, were of a somewhat minor nature, and their inclusion in the candidate's election expenses did not affect his compliance with the election spending limit contained in the Act.

Other Findings

13. The Compliance Audit Report identifies some other apparent contraventions that were not identified in the complaint that triggered the audit.

14. The Auditor identified two corporate contributions found to have been accepted by the campaign, and found them to constitute an apparent contravention of subsection 70.1(1) of the Act. With respect to this, please see any supplementary report that the Auditor might provide, and the attached correspondence to the Auditor, dated June 5, 2012. It is the position of Mr. Cusimano that no apparent contravention could have taken place with respect to this provision of the Act. Without prejudice to Mr. Cusimano's position that a purported contravention of a Toronto City By-law is not within the scope of the compliance audit, it is also Mr. Cusimano's position that there could be no apparent contravention of the by-law at issue.

15. The Auditor found that Mr. Cusimano accepted and deposited 28 cheques dated after June 30, 2011, amounting to a total of $5,050.00, and that this constituted a contravention of subsection 68(1) Rule 4(i) of the Act. The attached correspondence sets out in some detail, Mr. Cusimano's position to the effect that these cheques were accepted during a recommenced campaign period pursuant to subsection 68(1) Rule 5, and regardless of whether the Auditor has produced a supplementary report concurring with that argument, it remains Mr. Cusimano's position that there could be no apparent contravention in this regard.

16. The Auditor identified a further six cheques amounting to a total of $2,550.00, where he had concluded that the original cheque date had been altered from July to June. A number of findings are made with respect to this, and the conclusion drawn in paragraph 2.8 of the report, to the effect that these contributions were received outside of the campaign period, falls within the argument contained in paragraph 15 above.

17. The Auditor further concludes that the submission of these allegedly altered cheques constitutes an apparent contravention of subsection 89(h) of the Act, on the basis that the provision of these materials constituted the furnishing of false or misleading information to a person whom the act authorizes to obtain information. This warrants further discussion.

18. As reflected in the Auditor's report, these seven cheques were all collected by a fundraising consultant, one Rob Davis, who was found in paragraph 2.2 of the report to have failed to respond to all of the Auditor's requests on a timely basis, and who did not retain or provide to the Auditor all documents requested that in the Auditor's opinion should have been generated and retained with respect to the solicitation of contributions. In contrast, at paragraph 2.1, the Auditor found Mr. Cusimano to have been fully cooperative and to have provided well maintained, organized campaign records that were generally consistent with the requirements of the Act.

19. As reflected in the Report starting at paragraph 3.5, each of these cheques were obtained as a result of solicitations made by Rob Davis through his business, Campaign Solutions. Rob Davis had been retained by Mr. Cusimano in June 2011, to provide fundraising services prior to what was understood at the time to have been the end of the campaign period, on June 30, 2011. According to the contract reproduced in the report, Rob Davis was to receive both a flat fee, and 10% of the gross fundraising proceeds that he produced.

20. It is to be noted that all of the solicitations made by Rob Davis included a direction to remit the cheques payable to the Gus Cusimano campaign to the address of Rob Davis, as reflected in Exhibits "B" and "C" to the Compliance Audit Report.

21. Mr. Cusimano advises that all of the cheques received by Rob Davis, including all of the cheques here at issue, were personally delivered by Rob Davis to Mr. Cusimano at his office. Mr. Cusimano photocopied the cheques received and made no marks whatsoever on any of the cheques other than on the reverse side, to endorse them for deposit into the campaign account. Mr. Cusimano conducted no review of the dates on the cheques; he relied on Rob Davis as a professional in the field to deliver to him material that was entirely proper and in order.

22. The Compliance Audit Report reflects, further, that six of the seven contributors whose cheques would appear to have been altered have confirmed that the month was in fact altered from "07" (July) to "06" (June), but that three of the six believe that they made this change themselves. With respect to the other three (payment was stopped on the seventh cheque) the Auditor has expressly stated that he has been unable to identify who altered those cheques.

23. It is understood that it may be possible, even in the absence of <u>any evidence whatsoever</u> to the effect that Mr. Cusimano either altered or was in any way party to or complicit in such alterations, to initiate a prosecution on the basis, effectively that he furnished false or misleading information to the Auditor, albeit with a complete lack of knowledge as to any false or misleading character to the information.

24. With respect, it is submitted that this would constitute the imposition of an exceptionally difficult, if not impossible barrier upon candidates who rely on others to raise funds or provide other services relating to campaign finances. A considered review of the situation should lead the Committee to exercise its discretion not to proceed with such a charge, because the more compelling inference to be drawn is that the changes to the

cheques were more likely than not to have been made by Rob Davis than by Mr. Cusimano.

25. It would be counterintuitive to conclude that Mr. Cusimano would have made such changes, and then photocopied the altered cheques to retain as records that he must have known could be subject to review. If he was engaged in making the changes, or was in any way aware of them, it would make far greater sense for him to either choose not to photocopy them (there being no obligation in the Act to keep photocopies of cheques, as opposed to records of the contributions), or to do a more convincing job of it. In contrast, Rob Davis had charged a modest flat fee for this fundraising endeavor, and had a financial interest in the processing of these cheques, given the 10% commission contained in his letter of engagement. The cheques were submitted directly to Rob Davis, and the opportunity to make such changes certainly presented itself.

26. It is respectfully submitted that the committee should take specific account of the comments contained in paragraphs 2.1 and 2.2 of the Compliance Audit Report about the comparative levels of cooperation of Mr. Cusimano and Rob Davis, which could well be accounted for by the fact that Rob Davis may have had something that he did not want the Auditor to find out.

27. Accordingly, and fully understanding that there is a discretion to be exercised, it is respectfully requested that the Committee not proceed with a prosecution of this nature.

28. The Auditor identified $900.00 of cash that was provided to Mr. Cusimano from his two children and one other individual, each contribution being in the amount of $300.00. As reflected in the Report, Mr. Cusimano attended at a bank, and used the cash to purchase money orders which he then deposited into the campaign account. Despite the fact that it was the money orders that were deposited into the account, and not the cash, the Auditor has concluded that these events reflect the receipt of prohibited cash contributions contrary to subsection 70(8) of Act.

29. Mr. Cusimano advises that with respect to the contributions from his children, he purchased the money orders at their specific request, since neither of them had chequing accounts at the time.

30. It is submitted that an alternate analysis of this sequence of events could lead to the conclusion that Mr. Cusimano fully understood that the cash contributions could not be accepted as such, and specifically attended at the bank in an effort to comply with the legislation and obtain money orders instead. The Auditor made specific note of the fact that with respect to a different $300.00 contribution, the person who gave the cash to Mr. Cusimano attended at the bank, and the submission of that money order did not constitute an apparent contravention. It would appear that what therefore troubled the Auditor is the fact that the money orders were purchased by the candidate and not the contributor, even where he was the father of two of them. If a prosecution were to proceed with respect to this sequence of events, it would depend upon a finding that the candidate could not do on behalf of the contributors what the contributors could do themselves. With the greatest of respect, it is submitted that this is an unduly technical approach to

the legislation, and that it would reflect the sort of technical enforcement of the Act that could serve as a disincentive to good people who act in an effort to comply with the legislation, to seek election to public office.

31. Due to a failure of a PayPal system, the Auditor found that Mr. Cusimano used the credit card terminal of his business to process $2,400.00 worth of credit card contributions, and that he had his company then issue a cheque to the campaign, in the amount of $2,385.30, accounting for credit card processing fees of $14.70 that were payable for American Express. The calculation however, omitted to make similar deductions for MasterCard and Visa fees, amounting to a total of $70.83.

32. The Compliance Audit Report reflects the conclusion that this clerical error constitutes a donation of goods in kind from a corporation.

33. It is respectfully submitted as discussed both above and in the attached correspondence of June 5, that there can be no apparent contravention of the Act for a campaign to accept a contribution from a corporation. Over and above that, however, it is further noted that the problem here would both appear to be inadvertent from the facts as contained in the Report, and is for a very small amount of money.

34. The Auditor noted that a sum of $3,355.00 paid to Campaign Solutions (Rob Davis) for fundraising work had been reported as event advertising, when, in fact, it was unrelated to the event referenced. The Auditor found that this error constituted an apparent financial reporting contravention, but it is to be noted that this constituted strictly a reallocation within the expenses that are not subject to the spending limit, and accordingly the correction has no effect upon the bottom line numbers contained in the financial statement. It is respectfully submitted that a trivial error of this nature should not be the subject of a prosecution.

Discussion

35. It is important to note that the *Act* provides an unfettered discretion to the Compliance Audit Committee, in the face of an Audit Report disclosing apparent contraventions of the election campaign finances provisions of the *Act* (Subsection 81(14)(a)).

36. This is in keeping with what are sometimes referred to as "gatekeeper" provisions of election finance law at the provincial and federal levels. The *Canada Elections Act* establishes, in Sections 509-512, a process whereby any prosecution under that *Act* requires the consent of the Director of Public Prosecutions, acting in concert with the Commissioner of Canada Elections. The Commissioner applies a test of whether the public interest justifies a prosecution.[1]

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[1] 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

37. Similarly, the *Ontario Election Finances Act* provides in subsection 53(1) that "no prosecution shall be instituted under this Act without the Chief Electoral Officer's consent."

38. It is submitted that this "gatekeeper" function is intended at all three levels to provide a check against the potential for frivolous, trivial, 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 prosecutions that seek less to enforce the law than to embarrass or weaken a political opponent.

39. It is respectfully submitted therefore, that it is appropriate, in making its determination with respect to a possible prosecution, for the Committee to consider the gravity of the apparent contraventions that have been found by the auditor, and in this context to make its determination as to whether or not a prosecution is "in the public interest"; the federal Commissioner's test, which commends itself as a matter of good sense in the exercise of prosecutorial discretion.

40. It is further submitted that a proper consideration in the exercise of prosecutorial discretion is an evaluation of the likelihood of obtaining a conviction. Specifically with respect to the apparent contravention identified by the Auditor in respect of subsection 89(h) of the *Act* (furnishing of false or misleading information), there is no evidence that Mr. Cusimano either made the alterations or had knowledge of them prior to their identification by the Auditor. To the contrary, he quite reasonably believed the cheques to be proper. Were a charge to proceed, Mr. Cusimano would be in a position to defend it on the basis of the "due diligence defence", an element of which is whether "the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent."[2] In this context, and in the circumstances of this case, it is submitted that the defence would likely be successful and that hence, there is little likelihood of obtaining a conviction. It is therefore submitted that the Committee should exercise its discretion and decline to commence a prosecution on this issue.

41. The Committee may also wish to give consideration to some of the decisions of the Compliance Audit Committee in the City of Vaughan. This is one of the only Compliance Audit Committees that has yet addressed a report that made a positive finding of apparent contraventions, although it is to be noted that in prior elections, this discretion was exercised in Vaughan by the City Council.

42. In Vaughan, arising out of 2006 election, the City Council approved charges against two mayoralty candidates, Michael DiBiase and Linda Jackson, and a city councillor, Bernie DiVona. At the same time it declined to prosecute Councillor Joyce Frustaglio. The nature of the charges against Mr. DiBiase, Mr. DiVona, and Ms. Jackson are itemized in the court cases which ultimately led to the dismissal of all charges. The charges ranged from allegations of massive undeclared contributions to deliberate mischaracterization of

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[2] *R. v. Sault Ste. Marie (City),*, [1978] 2 SCR 1299

campaign expenses as fundraising expenses, to the over-spending of the campaign limit and the personal misappropriation of funds by a candidate. On the other hand, counsel has been unable to identify the specific nature of the allegations against councillor Frustaglio, but is of the understanding that the allegations were of a more technical and less substantive nature of contravention.

43. Most recently, the Vaughan Compliance Audit Committee had occasion to consider the further compliance audit of Mr. DiBiase's 2010 regional councillor campaign, and decided not to prosecute. The compliance audit report was prepared by the same auditing firm as has been retained by this Committee. In that report, the nature of the apparent contraventions found included:

    a. A failure to return a $250.00 over-contribution;

    b. Three failures to issue receipts for campaign contributions that had been received;

    c. One failure to issue a contribution receipt that correctly matched the contribution details that had been recorded properly elsewhere;

    d. A failure to properly report the campaign deficit from the candidate's prior campaign;

    e. The exclusion or misclassification of a number of items, including the replacement value of a large sign left over from the previous election, the classification of "brochures" as opposed to "signs", the reclassification of amounts from "voting day party/appreciation notice" to "brochures", and a reclassification of an amount from "advertising" to "voting day party/appreciation notices".

44. The report further noted that all of the resultant adjustments, if made to the Financial Statement of Mr. DiBiase, would still leave him within his allowable threshold of expenses subject to limitation.

45. While each case certainly must be considered upon its own merits, the consideration given to the DiBiase finances from 2010 is certainly instructive. It is to be noted that the Vaughan Committee declined to prosecute despite several apparent contraventions.

46. It is submitted that where the significance of the identified apparent contraventions is small and the compliance audit report identifies neither a level of campaign spending in excess of the spending limit nor any suggestion that a candidate deliberately misreported or sought to avoid the transparency requirements of the legislation, then the public interest would not be served by such a prosecution.

47. Accordingly, it is submitted that the Committee should decline to institute a prosecution of any of these apparent contraventions at public expense. The general absence of prosecutions of a similar nature from the federal and provincial jurisprudence would suggest that such a determination would be consistent with the approach taken at both of those levels.

All of which is respectfully submitted.

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Counsel for Gus Cusimano

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EXPECT THE BEST

June 5, 2012

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Dear Gentlemen:

Re: Compliance Audit Report for the City of Toronto, Re: Gus Cusimano May 25, 2012

I write further to the receipt of the Compliance Audit Report regarding my client, Gus Cusimano, for which I thank you. Although, understandably, I am disappointed in a number of your conclusions, I do appreciate your commentary to the effect that Mr. Cusimano and his campaign team were cooperative with your process. Your patience and collegiality, and that of your colleagues throughout, is most sincerely appreciated.

Nevertheless, upon detailed review and analysis of the Report in preparation for the meeting of the Compliance Audit Committee now set for Friday, June 8, there are a number of issues that relate to the Report, with respect to which I have concerns, and I would respectfully request that you address your minds to these concerns in advance of the Compliance Audit Committee meeting, possibly with a view to the preparation of a supplementary report, as I understand you to have done in other cases in other municipalities.

Corporate Contributions

In Paragraph 2.6 of your Report, and further at Paragraphs 3.1 - 3.4, you discuss the two contributions received by way of corporate cheque from Shoreham Chronic Pain and Assessment Center Inc. and Fine Arts Assessment and Treatments.

While I do have some concern with respect to your statement, contained in Paragraph 3.4 to the effect that the principals of these companies had indicated that the corporate

cheques involved had been recorded as loans or advances to them, a transaction which would have the effect of the funds having come from the individuals by way of their corporate entities, you did not seek corroboration of this statement, and did maintain contraventions to have occurred.

Over and above that concern, however, I would respectfully suggest to you that you are in error to conclude that the acceptance of corporate contributions would constitute a contravention either of the Act, or of the relevant Toronto City By-Law, #1177-2009.

The identified section of the Act with respect to which you have found an apparent contravention is Section 70.1(1) which reads as follows:

> "The City of Toronto may by by-law prohibit a corporation that carries on business in Ontario or a trade union that holds bargaining rights for employees in Ontario from making a contribution to or for any candidate for an office on city council."

With the greatest of respect, this is not a provision that is capable of being violated by an individual candidate. On its clear wording, the subsection at issue merely grants to the City the authority to enact a by-law prohibiting a corporation from making a contribution. There is no enactment here that a candidate could violate.

Moreover, upon review of the relevant Toronto City By-Law, No. 1177-2009 (copy attached) it is clear that the By-Law does not speak to the actions of a candidate. Rather, the By-Law is quite consistent with the grant of power contained in subsection 70.1(1) and in respect of corporate contributions, it only says, at Paragraph 1,

> "A corporation that carries on business in Ontario is prohibited from making a contribution to or for any candidate in any regular election or by-election for an office on Toronto City Council."

There is, quite simply, no prohibition on acceptance, and while conceivably, the corporations at issue could be prosecuted for a violation of the By-Law (as opposed to the Act), there is no possible basis for a conclusion that there has been an apparent contravention by my client of this By-Law, and I would respectfully request that you amend the relevant provisions in your Report accordingly.

Post June 30, 2011 Contributions

Your Report, at Paragraphs 2.7 and 3.5 - 3.15, makes extensive reference to problems ostensibly arising from the acceptance of contributions after June 30, 2011, which is the end of the extended campaign period pursuant to Section 68(1) Rule 4 of the Act. This extension, which arises as a result of a campaign deficit at the end of the initial campaign period on December 31 of the year of the election, continues under Sub Rule (i) until the following June 30, in the case of a regular election. In this clause, the reference to "the following June 30, is clearly back to December 31, and therefore unambiguously references June 30, 2011.

In our various discussions, the fact that the campaign period could properly be extended beyond that date never arose. I draw your attention, however, to Section 68(1) Rule 5 which provides as follows:

> 5. If, after the election campaign period ends under rule 2, 3 or 4, the candidate incurs expenses relating to a recount or to a proceeding under section 81 (compliance audit) or 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,
>
> i. the day the total of A and B equal the total of C and D, where,
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> A = any amount released to the candidate under subsection 79 (7),
>
> B= any further contributions,
>
> C = the expenses incurred after the election campaign period recommences,
>
> D = the amount of the candidate's deficit, if any, before the election campaign period recommenced,
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> ii. the day he or she is nominated in a subsequent election for an office on the council or local board in respect of which the expenses referred to in subparagraph i were incurred,
>
> iii. the day the candidate notifies the clerk in writing that he or she will not accept further contributions,
>
> iv. the following June 30, in the case of a regular election, and
>
> v. the end of the six-month period following the 60th day after voting day, in the case of a by-election.

Enclosed please find a copy of my correspondence to the City Clerk for the City of Toronto, Ms. Ulli Watkiss, dated August 19, 2011, notifying the City Clerk, pursuant to this Rule that Mr. Cusimano had incurred additional expenses specifically in respect of the Compliance Audit, and that, accordingly, his campaign period is deemed to have recommenced and to have run continuously from the date of his nomination until a future date that could not then be ascertained.

For reasons that will be set out more clearly below, it is my opinion and submission that the recommenced campaign period continued, pursuant to Subrule iv of Rule 5, until the following June 30, which in this case must refer to the June 30 following the giving of this notice, and hence, more specifically, until June 30, 2012.

In the interest of complete disclosure, however, I must also advise you of correspondence received from the City Solicitor for the City of Toronto, Anna Kinastowski dated August 26, 2012 (copy enclosed), maintaining her interpretation of the provision as only extending the campaign period until June 30, 2011. With the greatest of respect to Ms. Kinastowski, I must submit that the interpretation she has given therein is incorrect, and that, in fact, all of the contributions referred to in your Report in Paragraphs 2.7 - 2.9 and 3.5 - 3.24 were properly accepted during the extended campaign period, and are not subject to any requirement that the funds be returned.

In order to understand the nature of the difference of interpretation between myself and Ms. Kinastowski, a detailed analysis of Section 68 is required.

Section 68(1) specifically defines a candidate's election campaign period. Rule 1 makes it clear that the election campaign period begins when the candidate files a nomination for office, and Rule 2 sets as the ordinary end of a campaign period in the case of a regular election, December 31 of the year of that election. Rule 3 does not apply to the present circumstance.

Rule 4 is the provision that permits a candidate to extend the campaign period if (s)he has a deficit at the time the election campaign period would otherwise end and so notifies the Clerk. In this case, the campaign period is extended and is deemed to have run continuously from the date of nomination until the earliest of a number of dates, the only one of relevance to this discussion being "the following June 30, in the case of a regular election".

Accordingly, as plainly recognized in your Report, the campaign period most certainly continued until at least June 30, 2011.

Rule 5, however, allows for what must be seen to be a further extension. Its opening words provide that it is triggered in cases where the election campaign period ends under Rule 2, 3 or 4. Since an election campaign period under Rule 4 can end as late as June 30 of the year following the election (June 30, 2011) it would amount to an absurdity to conclude that this provision does not, as Ms. Kinastowski suggests, permit an extension on its own terms beyond that date.

The additional conditions that trigger Rule 5 are of a candidate incurring expenses relating to a recount or to a proceeding under Section 81 (a Compliance Audit) or Section 83 (Controverted Elections), and the candidate's notification of the Clerk in writing. In this case, Mr. Cusimano incurred expenses relating to all of these contingencies, a recount, a compliance audit and a controverted election. As evidenced by my correspondence to the Clerk of August 19, the Clerk was notified of this in writing. Accordingly, the campaign period is deemed to have <u>recommenced</u> and to have run continuously from the date of nomination until the earliest of several dates. As of today none of the listed events have taken place.

If I understand Ms. Kinastowski's interpretation correctly, Subrule iv of Rule 5 in her view continues to refer to the June 30 that follows the date of a regular election. With all due

respect, such an interpretation would have the effect of completely negating what I would suggest to you to be the intention of Rule 5, which is to permit a candidate to recommence his or her campaign period when these types of expenses are incurred.

Moreover, and particularly with respect to the Compliance Audit, the deadline for filing a compliance audit application for the regular campaign period ending December 31 is, pursuant to Subsection 81(3) and Section 78, was June 23, 2011, a mere seven days prior to the June 30 "deadline". Moreover in cases where a candidate filed a supplementary report, the deadline for filing was the last Friday in September, and the deadline for an application under Section 81 was 90 days after that, a date that is plainly well past June 30, 2011.

Accordingly, it is my submission that the interpretation that Ms. Kinastowski would give to the provision is patently absurd, particularly when applied to compliance audits. Rule 5 would on the one hand grant an opportunity to recommence the campaign period to a candidate who is subject to a compliance audit, but the "June 30, 2011" interpretation would at the exact same time take away that opportunity where expenses are incurred after that early date, even on a compliance audit application that could not possibly be made until after that date has passed.

As high an authority as the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27* made reference to the "well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". Accordingly, it is respectfully submitted that the Legislature could not possibly have intended the absurd result that Ms. Kinastowski asserted in her letter.

Moreover, this interpretation would create a gross unfairness and inequity between candidates who conclude the regular and supplementary campaign periods with a surplus and those who do not.

Pursuant to subsection 76(2) of the Act, a candidate may not incur an expense outside the campaign period. The costs of recounts, controverted elections and compliance audits are all, pursuant to subsection 67(2), defined as expenses within the meaning of the Act. It necessarily follows then, that a candidate may not incur recount, controverted election and compliance audit expenses outside of the campaign period. In the absence of the interpretation I argue to be correct, the only relief from this prohibition would be that provided under section 79.1 of the Act, which allows a candidate to incur expenses outside the campaign period **only** where the candidate had a surplus. A candidate who did not have such a surplus would remain barred from incurring such expenses.

The leading Canadian text on the interpretation of statutes, in a section on the notion of absurdity, addressed "irrational distinctions as follows:

> "A proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or

> for no reason at all. This is one of the most frequently recognized forms of absurdity."[1]

Accordingly, it is submitted that it would be absurd to interpret the Act in a way that would permit only those candidates who ran a surplus to spend money to advance their interests in these three contexts, while withholding that opportunity from candidates who balanced their books or ran deficits. There is simply no rational basis for the differential treatment. The interpretation of section 68(1), Rule 5 advanced herein provides for a level playing field, so that all affected candidates may incur such necessary and reasonable expenses.

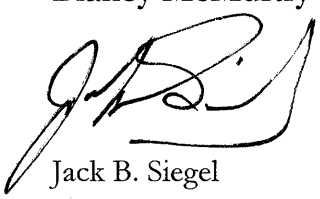
The City Solicitor's approach, plainly, cannot reflect the intention of the Legislature.

Accordingly, I would respectfully submit to you that in light of my correspondence to the City Clerk of August 19, 2011, the campaign period has in fact continued without interruption since the date of Mr. Cusimano's nomination in 2010, and will continue until June 30, 2012, as I understand that none of the other Rule 5 conditions for terminating the campaign period have otherwise been met.

As a result, I would suggest to you, and again with the greatest of respect, that the contributions received subsequent to June 30, 2011 were in no way inappropriate, and that their acceptance and deposit into the campaign account could not possibly constitute a contravention of Subsection 68(1)(4)(i) of the Act. Rather, it is Rule 5 of Subsection 68(1) that applies. Accordingly, Subsection 69(1)(m) of the Act does not require that these contributions be returned, or that the deficit be so adjusted as you suggest in your Report.

Thank you very much for your anticipated thoughtful consideration of the points raised herein. I am hopeful that they will result in a supplementary report, and I look forward in any event to seeing you at the Compliance Audit Committee meeting on Friday, June 8.

Blaney McMurtry LLP



Jack B. Siegel

JBS/ks

Encls.

c.: Gus Cusimano (via email)
Compliance Audit Committee, c/o Kelly McCarthy (fax 416-392-1879)
Ulli Watkiss (fax 416-392-2980)
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[1] *Sullivan on the Construciton of Statutes* (5th ed.) LexisNexis Canada, 2008, at page 310