EA1.2

ONTARIO COURT OF JUSTICE

IN THE MATTER OF an Application for a Compliance Audit of Peter Li Preti's Election Campaign Finances pursuant to Section 81 of the Municipal Elections Act, 1996 S.O. 1996, c.32, Sched.

BETWEEN:

PETER LIPRETI

Appellant

and

COMPLIANCE AUDIT COMMITTEE OF THE CITY OF TORONTO, HOWARD MOSCOE and ADAM CHALEFF-FREUDENTHALER

Respondent

REASONS FOR JUDGMENT

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THE FACTS

Dr. Peter Li Preti ran for Council in Toronto in the 2010 election. On March 25, 2011, he filed his sworn financial statement for the campaign with the City of Toronto, as required by the *Municipal Elections Act*. On June 22, 2011, Adam Chaleff-Freudenthaler filed an application for a compliance audit of Dr. Li-Preti's election finances, indicating that Dr. Li Preti accepted twenty five campaign contributions from corporations or other entities which were not entitled to make contributions. On June 23, 2011, Howard Moscoe filed a separate application for a compliance audit of Dr. Li Preti's election finances indicating that Dr. Li Preti accepted fourteen campaign contributions from corporations – contributions already identified in the Chaleff-Freudenthaler application as contravening the *Act*. Based on the evidence, it appears that Dr. Li Preti accepted campaign contributions in the form of cheques drawn on the accounts of the following corporations: Vitas Properties Inc., Bar-Cool Ltd., 2001016 Ontario Inc., ParMax Realty Inc., Cattolica Flowers Inc., ITA Tax Accounting Professional Inc., Alta Moda Furniture Ltd., Ram Inc., X-Adjusters Inc., Triple A Excavating Ltd., Trinity Development Group Inc., Tee Pee Excavating and Grading Inc., Roman Metal Fabricating Ltd., Primo Mechanical Inc., Kentech Automation Inc., Bondfield Construction Company Ltd., and Miller Paving. There may have been other transactions of interest, but these are sufficient to particularize the complaints for the purpose of this appeal.

On June 23, 2011, the City sent a letter to Dr. Li Preti notifying him of the two applications and enclosing copies. On July 7, 2011, the City's letter came to the attention of Dr. Li Preti. On July 11, 2011, the City sent a letter to Dr. Li Preti informing him that the Moscoe application would be considered by the Committee on July 18, 2011, at 1:30 in the afternoon. The letter stated: "As the Candidate you are requested to respond to the Application in writing to the Clerk a minimum of two days prior to the Committee meeting." The letter further indicated that persons present for the application who had registered with the Clerk, including the Candidate and the Applicant, could speak to the item for up to five minutes. The letter cautioned that the Committee might proceed in the absence of either party. On July 12, 2011, the City sent a similar letter to

Dr. Li Preti informing him that the Chaleff-Freudenthaler application would be considered by the Committee on July 20, 2011. On July 13, 2011, Mr. Chaleff-Freudenthaler sent an e-mail to the Committee asking that his application be joined to the Moscoe application and considered on the date scheduled for the latter – which would be July 18, 2011. This e-mail was not copied to Dr. Li Preti. On July 14, 2011, Dr. Li Preti refunded the contribution of $200.00 which had been made to his campaign by Miller Paving. On July 15, 2011, the City sent an e-mail to Dr. Li Preti reminding him that the Committee would be considering the request for a compliance audit of his campaign finances on July 18, 2011. On July 16, 2011, Dr. Li Preti responded to the City saying that he assumed the notice was for July 20, 2011. On July 17, 2011, the City responded to Dr. Li Preti pointing out that there were two applications; one had been scheduled for July 18, 2011, and one for July 20, 2011, and that the City subsequently received a request to combine them and consider both on July 20, 2011. Later on July 17, 2011, Dr. Li Preti responded to the City's last e-mail by saying he would send a representative to the meeting on July 18, 2011, but that he thought it was "very unfair that I need to address a committee within 2 days on the same issue and will formally request that the issue be adjourned until the 20th."

On July 18, 2011, the Agenda for the Compliance Audit Committee meeting was released. The agenda listed six Applications for Compliance Audits, including Mr. Moscoe's application concerning Dr. Li Preti. Contrary to what was indicated on the published Agenda, there was no video record kept of the Committee meeting on July 18, 2011. The Committee only keeps cursory minutes of its meetings – some particulars of the item considered, a brief summary of what happened, identification of the speakers heard and materials received and a record of decisions made. However, for the purpose of this appeal, additional information has been provided as to what occurred at each of the two meetings.

On July 18, 2011, Mr. Chaleff-Freudenthaler moved to have both Applications heard on July 20th, 2011. Mr. Moscoe indicated that he had no objection to having the consideration of his Application continued on July 20th, 2011, but he was not available to attend on that date. He proceeded to make his submissions. Once Mr. Moscoe was finished, a representative of Dr. Li Preti read his prepared statement to the Committee. It began with Dr. Li Preti's apology for not attending the meeting. He went on to indicate that he had determined that the entities identified in the Applications were all sole proprietorships or family run businesses – which, according to his understanding, were permitted to contribute to candidates. He further indicated that he had statements indicating that each of the contributions was intended as a personal contribution – not a corporate or business contribution. He requested that the Committee allow him until August 10th to provide confirmatory evidence. His representative attempted to file the statement and available supporting documents with the Committee, but was told they would prefer to receive everything as a complete package. The Committee then agreed to complete its consideration of the Moscoe Application on July 20, 2011, when it considered the Chaleff-Freudenthaler Application.

At the meeting of July 20th, 2011, the Committee dealt with both applications together. It appears that after some initial dispute, Dr. Li Preti was able to file copies of his statement and supporting documentation. In any event, he explained his understanding about sole proprietorships and family run businesses and how these entities fell into that category and that they were, therefore, permitted to contribute. He was challenged on this interpretation of the law by the Committee and he concluded his response by indicating that he had been told that each of the contributions in question was intended as a personal contribution and that he wasn't required to do a corporate search or look up the definition of a corporation. At one point in his submissions, Dr. Li Preti referenced the time and was told he had one minute left and he appeared to summarize his position. According to one observer, Dr. Li Preti spoke for a total of eight minutes before being presented with questions from the Committee. Mr. Chaleff-Freudenthaler then spoke to his Application and Dr. Li Preti was invited to respond, which he did, concluding with the comment "OK, then I have no other submissions".

The Committee then considered both the Moscoe and the Chaleff-Freudenthaler Applications. It appears there was some very brief discussion between the members and they ordered a compliance audit.

THE APPEALS

Although there were two separate Applications, the appeals were dealt with in a single hearing because each raised the same issues. Dr. Li Preti launched a two prong attack – against both the process and the decision itself. With respect to the process, his position is that if he had been given more information and time to prepare he would have been able to establish that there was no reasonable basis for believing that he contravened the *Municipal Elections Act*. More particularly, he argues that he was not given sufficient notice of the applications or sufficient time to prepare to respond and denied a reasonable opportunity to make meaningful submissions to the Committee. He says the Committee acted improperly on July 18, 2011, by proceeding with the Moscoe Application in his absence; by failing to grant his request for adjournment; and by failing to provide him with a copy of the Minutes of the meeting and its decision to continue the application on July 20, 2011. He says that the Committee acted improperly on July 20, 2011, by creating confusion as to which Application was proceeding first; failing to allow him at least five minutes to address each Application; allowing Mr. Chaleff-Freudenthaler to file written submissions without giving him a copy of same; asking him to comment on Mr. Chaleff-Freudenthaler's written submission without having given him a copy; and not providing written reasons for its decision. He also alleges that it was improper of the Committee to not take at least two days to consider his written submissions and that it acted with undue haste in making its decision in the course of the meeting on July 20, 2011, without retiring and without giving due consideration to all of the relevant information. He says the Committee should have adjourned the hearing for the period he suggested, to permit him the opportunity to gather further documentary evidence. He argues that the record of the proceedings on July 18 and 20, 2011, was inadequate for the purpose of permitting the Committee to exercise its authority in an appropriate way; that the Committee should have required the Applicants to file sworn affidavits setting out the factual basis for their belief that there were contraventions of the *Act.* He says that the procedural defects were so profound and pervasive that a new hearing is required.

If the appeal against process is unsuccessful, Dr. Li Preti argues that the decision must be overturned because it was incorrect. He argues that he put forward reliable information which established that the contributions in question did not contravene the *Act.* In the single instance where it was not clear whether the contributor was entitled to make a contribution, the money was returned as required. Therefore, Dr. Li Preti says the Committee was wrong to find there were reasonable grounds to believe he contravened the *Act* and the compliance audit should not have been ordered.

THE APPEAL AGAINST PROCESS

In general terms, Dr. Li Preti's position is that the Committee failed in its duty of fairness and violated principles of fundamental justice by denying him a reasonable opportunity to respond to the allegations that he contravened the *Act,* before ordering a compliance audit. The basic difficulty with his position is that it assumes that because the Committee was bound by a duty of fairness, it was required to conform to a normative due process standard which would include the right to notice, disclosure and an opportunity to make full answer and defence in a contested hearing before a neutral adjudicator. This ignores the fact that the jurisprudence, which confirms that a decision making agency like the Compliance Audit Committee is bound by a duty of fairness, also establishes that the content of the duty of fairness is dependent upon the circumstances of each case. The norm is not a model or particular form of process. The norm is fairness and the duty is variable, as has been stated by the SCC in numerous cases, including *R. v. Rodgers* [2006] 1 SCR 554. The Rodgers case is an instructive example because the SCC was dealing with the provisions of the *Criminal Code* authorizing Courts to make ex parte orders compelling a person to provide DNA samples for the DNA data bank. This is a judicial process where the subject's rights as protected by sections 7 and 8 of the Charter and principles of fundamental justice were clearly engaged. There is no question that Courts making DNA orders are bound by the duty of fairness and principles of fundamental justice. But the SCC concluded that the duty of fairness in this situation did not mean that the subject was entitled to notice of the hearing, let alone an opportunity to participate. Obviously this does not mean that in other situations giving the subject notice and an opportunity to respond are not required. But it is a particularly dramatic illustration of the fact that even when the decision impacts on constitutionally protected rights and freedoms, the content of the duty of fairness may be quite restricted.

The most effective way to determine what the duty of fairness requires in a particular process is to look to the rights and interests of the subject which are threatened by the decision. This exposes another fundamental problem with Dr. Li Preti's position, because the OCA determined in *Jackson v. Vaughan* [2011] OJ 588 that ordering a compliance audit did not engage principles of fundamental justice in any way that required significant procedural protections because no protected rights or interests were at risk. The OCA's reasons focused on sections 7 and 8 of the *Charter* – section 7 being the most broadly defined constitutional protection against being deprived of the right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. The Court concluded that a candidate was not entitled to the benefit of these constitutional protections because a compliance audit was simply a regulatory examination of campaign financing records which a person choosing to stand for municipal office was obligated to maintain and produce for inspection. The Court found that the candidate "had no reasonable expectation of confidentiality concerning any of the matters required to be reported" and, therefore, there was no protected right or interest which would be affected by the decision to order an audit to confirm the candidate's compliance with his statutory obligations. This finding does not mean that the agency ordering a compliance audit is not bound by a duty of fairness, but it is a further indication that the required procedural protections are quite modest. The OCA also dismissed the argument that the process was flawed because the legislation failed to articulate the factors that should be taken into consideration in ordering a compliance audit and appeared to delegate authority to the auditor to determine whether prosecution should be instituted. The OCA dismissed the delegation argument and held that the statute contained sufficient guidance because there was “little discretion in deciding whether to order a compliance audit once reasonable grounds have been found to exist”. In effect, the OCA found that the decision was largely an administrative decision based on a review of the documents filed – with no need to seek or receive other information or conduct any kind of hearing. While the results of the audit might lead to the institution of legal proceedings, the rights and interests of the candidate were protected because by that stage of the process “the candidate has full natural justice protection and Charter rights”.

Although it shouldn’t be necessary, a more detailed explanation of why the duty of fairness was met in this case requires consideration of the factors identified by the SCC in *Baker v. Canada*, [1999] 2 SCR 817 and other similar decisions. The first factor is based on comparisons or analogies between the process in question and judicial proceedings – on the understanding that the closer the analogy, the greater the level of due process protection. I adopted this approach in discussing the SCC decision in *R. v. Rodgers*, but the argument by analogy works on an even more basic level because the decision to investigate a candidate’s campaign financing is similar to the decision to initiate a police investigation, where there is reason to believe the subject is implicated in a criminal offence. In the criminal context, the decision to investigate triggers a highly intrusive process which could result in criminal prosecution, putting the subject’s liberty and security in serious jeopardy. But, the decision to investigate is not considered to be anything like a judicial decision. Even though the process could result in a profound threat to the subject’s rights and interests, the procedural protections afforded to the subject at the point the decision to investigate is made, are minimal to the extent of being virtually non-existent.

A stronger argument by analogy could be made between the issuance of search warrants as an investigative tool and the ordering of a compliance audit, but with similar results. Just as in the case of a compliance audit order, a search warrant requires prior authorization and must be supported by reasonable grounds. In the warrant process a judicial hearing is required. The presiding justice is bound by the principles of natural justice and the duty of fairness and the decision is often the subject of judicial review as to whether or not the warrant ought to have issued. But the argument by analogy does not assist Dr. Li Preti. Despite the fact that the search warrant process is a judicial process, the duty of fairness does not include any requirement that the suspect be notified of the application or provided an opportunity to make submissions at the hearing. So why should it be any different with respect to ordering a compliance audit – particularly given the fact that, unlike the case with a search warrant, no protected rights or interests of the subject are threatened?

The second factor identified by the SCC requires the reviewing Court to consider the decision in the context of the procedure required by the authorizing statute. In this case, the *Municipal Elections Act* established the basic statutory framework for campaign financing – imposing duties and obligations on the candidate about fund raising, expenditures and the maintenance of records. The *Act* provides the means to scrutinize a candidate's financial statements and establishes an enforcement scheme which depends upon an elector making a complaint about apparent contraventions of the *Act*. The complaint triggers the possibility of an audit which may eventually lead to the institution of legal proceedings. There is nothing in the scheme established by the Act which suggests that the candidate must be given notice of the complaint or that a hearing would be required at this initial stage of the process. As noted by the OCA in *Jackson v. Vaughan*, the legislation anticipates that the Committee will make an expeditious decision on the basis of the information in the Application. Granted, the legislation enables Municipal Councils to insert further procedural steps and protections – including the requirement of giving the parties notice of the meeting where the Application will be considered and the candidate the right to file a written response to the allegations with the Committee prior to the meeting, and to establish rules for the conduct of Committee meetings which enhance transparency and the opportunity for electors to speak to the matter. But the process as established by the Act and enhanced by the By-laws of the City bears little resemblance to a judicial or quasi-judicial proceeding. The single material point of comparison may be the requirement that the candidate respond to the application in writing – which resembles the process of exchanging pleadings in civil proceedings. Otherwise the legislation does not grant the candidate special status as a party or a right of participation which is not shared by other interested members of the public who attend the meeting. The Committee's proceedings are conducted as a public meeting where any elector can speak and the Committee members can ask questions and make statements. The decision is made only if a Committee member makes a motion and a vote taken. It is very much more a political process as opposed to a quasi-judicial process. The emphasis is on transparency and public participation and the duty of fairness is satisfied as long as information is made available and no one is unreasonably denied the opportunity to speak.

This second factor also requires that the reviewing court pay particular attention to "the role of the particular decision within the statutory scheme", in the sense that greater procedural protections may be required "when the decision is determinative of the issue and further requests cannot be submitted." This is a point that has already been touched upon, but it bears repeating. The decision to order a compliance audit is just a preliminary step in a fairly extensive process. Ordering the compliance audit is not determinative of the candidate's rights in any sense, other than as a necessary precondition to the actual investigation. If an audit is directed, the auditors will review the candidate's campaign financing records and conduct further inquiries as required – with the opportunity for the candidate to provide further information. The auditors produce a report of their findings which must be given to the candidate, the applicant, the Committee and the municipal council. The report will then come before the Committee at a meeting for consideration and the candidate will have a further opportunity to make submissions about whether legal proceedings are warranted. If the Committee decides to institute legal proceedings, then the candidate becomes engaged in a formal process, subject to due process and procedural protections, which may culminate in a judicial hearing and all that is entailed therein.

In argument an attempt was made to liken the decision to order a compliance audit with decisions by Human Rights Commissions to appoint a Board of Inquiry. Reference was made to the case of *FWTAO v. Ontario Human Rights Commission* [1988] OJ 2068, where the Court indicated that if a person may be "in some such way adversely affected by the investigation and report, then he should be told the case made against him and afforded a fair opportunity of answering it" as if that established a relevant procedural standard. But the appointment of a Board of Inquiry comes at a later stage in the statutory scheme established to deal with human rights complaints. The decision is made after the completion of the investigation, when the agency is considering whether to institute a prosecution. The comparable stage in the process of enforcing the *Municipal Elections Act* is the Committee's consideration of the results of the compliance audit, to determine whether legal proceedings should be instituted – not the ordering of the compliance audit, which is analogous to the investigation conducted by the human rights investigators. In any event, even in regard to the stage where the agency is considering whether to appoint a board of inquiry, the courts have been cautious about reading much more into the duty of fairness beyond giving the subject notice and an opportunity to make submissions.

The third factor identified by the SCC relates to the importance of the decision to the affected person. As has been noted, the extent of the procedural protections required in a particular situation depends in large measure upon the threat the decision poses to the liberty and security of the subject's person and in this situation there is no judicial support for a finding that the candidate has any rights or interests which require protection. The argument has been made with reference to cases where the subject's rights or interest in employment have been threatened – a body of case law which builds on the SCC decision in *Knight v. Indian Head School Division No. 19* [1990] 1 SCR 653. Specific reference was made to the case of *Tanaka v. Certified General Accountants Assoc.* [1996] NWT 15, which involved an investigation into the subject's accounting practice and the decision to proceed with a disciplinary hearing. The Court agreed that the decision to initiate a disciplinary hearing, even in the absence of a finding, would have an important impact on the subject's ability to carry on her livelihood and the subject should have been allowed an opportunity to make submissions. Dr. Li Preti argues that the decision to conduct a compliance audit may have an adverse impact on his political or personal reputation which is akin to the kind of impact the initiation of disciplinary proceedings may have upon an accountant. But once again, the superficial analogy quickly breaks down. The decision to investigate is not akin to the decision to initiate a disciplinary process and the interest a candidate has in protecting his political or personal reputation is not akin to the right of a citizen to protect her right to pursue her livelihood. In any event, unlike Ms. Tanaka, Dr. Li Preti was not denied the opportunity to provide information to the Committee prior to its decision and the process anticipates that he will have further opportunities to raise issues with the investigators and make further submissions to the Committee if the case proceeds.

The fourth factor identified by the SCC in considering the content of the duty of fairness concerns "the legitimate expectations of the person challenging the decision" – particularly expectations encouraged by the "regular practices of administrative decision-makers" and other similar considerations. In this regard, Dr. Li Preti expressed his expectation that he would have been given the opportunity to assemble evidence, confront his accusers and rebut the case against him at a time scheduled to accommodate his needs. He also offers his understanding of how the Committee was constrained by the fact that he did not comply with the requirement that he file a written response at least two days before the hearing and then chose to be absent from the meeting of July 18, 2011. He attempts to support his position with reference to decisions dealing with the requirements of due process and fairness in the context of a judicial or quasi-judicial hearing where the issue in question was being determined. As has been repeatedly pointed out, that is not what we are dealing in the present case. The legitimate expectations of a candidate who is the subject of an application for a compliance audit are established by reference to the practices and procedures of the Compliance Audit Committee and in all relevant particulars, the Committee complied with its practices and procedures in this case. To the extent that Dr. Li Preti's expectations were disappointed, it was because those expectations were unrealistic or illegitimate.

In this case, Dr. Li Preti was given at least a week's notice of the date, time and place of each meeting. Three days before the first meeting, Dr. Li Preti was sent an e-mail reminding him that the Committee would be considering the request for a compliance audit of his campaign finances on July 18, 2011. He received further communication clarifying that the two Applications were scheduled for different dates. Dr. Li Preti had a representative attend the first meeting and he was aware that the decision on the Moscoe Application was deferred to the second meeting – when he would be present. On these facts, and in the context of the statutory scheme, it is clear that Dr. Li Preti was given more than reasonable notice of each meeting. His further complaint about being denied an opportunity to make full answer and defence speaks to his misunderstanding of what was required at this preliminary stage of the process. He had complete disclosure of both Applications and a reasonable opportunity to file a written response. The fact that he did not file his written response as required doesn't affect the analysis. Given the nature of the decision the Committee was required to make, the opportunity to file a brief written response was more than sufficient to satisfy the duty of fairness.

Dr. Li Preti's complaints about the conduct of the meetings are even more difficult to take seriously. He did not file a written response as required, nor did he attend the meeting on July 18, 2011. But his representative read his written statement to the Committee in its entirety. To the extent that Dr. Li Preti apparently thinks he should have given the Committee more or different information, it is difficult to see how that failing can be attributed to the Committee. Dr. Li Preti complains that his representative was not permitted to file a copy of the statement along with the supporting documentation – but the opportunity to make submissions does not mean that the subject is entitled to dictate the form of the submissions. He cites *Edmonton Police Assn. v. Edmonton* (2007) 283 DLR (4th) 695, where the Court held that it was a breach of the duty of fairness for a medical review panel to determine a claim for benefits without receiving the written statement of the subject – but that case involved a decision made on the basis of a documentary record, where the information from the subject was not provided to the panel at all. Dr. Li Preti further complains that the Committee acted unfairly by allowing Mr. Moscoe to speak to the matter at the meeting of July 18, 2011, in Dr. Li Preti's absence. But, even if we assume the meeting was intended to be similar to a judicial hearing, which it was not, if a party to litigation fails to file responding material as required by the rules of practice and then chooses to be absent from the hearing, the Court is entitled to proceed and make such orders as are required. It happens all the time and it is absurd for Dr. Li Preti to produce a case like *Lesniowski v. H.B. Group Insurance Management Ltd.,* [2003] OJ 6263 and extract a passage out of context about the supposed "right of the parties to face their accusers and look them straight in the eye"- as if that means that a party can frustrate a proceeding simply by refusing to attend. Similarly, Dr. Li Preti's complaint that the Committee acted unfairly in not making a video record for his review, so that he could prepare a rebuttal to anything that might have been said, is absurd.

The Committee accommodated Dr. Li Preti by deferring its decision on the Moscoe Application to the meeting of July 20th, 2011, when he would be present. Given the similarity between the Applications, it made sense to deal with them at the same time and in being given the opportunity to speak to the Chaleff-Freudenthaler Application, Dr. Li Preti was effectively given a further opportunity to make (or repeat) his submissions with respect to the Moscoe Application. But he argues that he was treated unfairly because he was not given two separate periods of five minutes to speak to each Application, for a total of ten minutes. It is hard to know how to respond to such a submission. Whether the time should be divided into separate allotments or whether combining two matters means that each speaker would be limited to five minutes or allowed up to ten minutes, is not the point. In the context of the rules for running Committee meetings, the limit on speakers was simply a way of indicating they were expected to be as concise and relevant as possible. The obligation of the Committee was to provide electors with a reasonable opportunity to express their views, not to act as a time keeper in some kind of verbal contest. The Committee was required to control its own meeting and it had the power to cut off pointless speakers at any point or to permit others to exceed the time limits – as it deemed appropriate. This is exactly how we expect a properly managed court to handle a contested hearing. No one would suggest that because the Court of Appeal allows ten minutes for argument, counsel have a right to talk to the limit. Time limits are simply a guide – the issue is whether the party is given a reasonable opportunity to present their case. This is exactly what happened in this matter, because the Committee allowed Dr. Li Preti more than sufficient time to express his position. The reminder about the time limit appears to have encouraged him to wrap it up – not to cut it off. Members of the Committee then asked several pointed questions, which provided Dr. Li Preti with a further opportunity to explicate his position with reference to supporting evidence. He was then given an opportunity to make further submissions once Mr. Chaleff-Freudenthaler spoke and, by all appearances, said everything he wanted to say. He was clearly not satisfied with the outcome, but it wasn't for want of being given a chance to put his case to the Committee. In all material respects the Committee more than met its duty of fairness and there is no substance to Dr. Li Preti's attack on the process.

THE APPEAL OF THE ORDER

As noted at the outset, Dr. Li Preti's sworn financial statements established that he accepted contributions from entities which appear to be corporations and that, with the exception of the contribution from Miller Paving, none of these contributions were returned to the contributor. Nonetheless, Dr. Li Preti argues that the Committee was wrong in ordering the compliance audit because he put forward evidence which he believes refutes the allegation that the contributions contravened the Act. He told the Committee that as a municipal councillor he was a member of the committee that developed the rules for campaign financing and, as far as he recalled, there was agreement that family run businesses and sole proprietorships would be allowed to contribute. He produced statements from persons apparently associated with many of the individual corporations which contributed to his campaign, indicating that the corporations were sole proprietorships or family run businesses and, in many cases, averring that the contribution was intended as a personal contribution. He indicated that he had satisfied himself that this was the case with respect to all of the suspect contributions and could produce evidence that they were intended as personal contributions, if given the opportunity. With respect to the contribution from Miller Paving, where he was unable to clarify the status of the contributor or the contribution, he returned the money, which he says rectified any problem. Therefore, he says there was no basis for the Committee to conclude that there were reasonable grounds for believing he contravened the *Act* and it should not have ordered a compliance audit.

With respect to the function of this Court in determining whether the Committee acted appropriately in ordering a compliance audit, there was argument over whether the standard of review was reasonableness or correctness. It appears that the prevailing consensus is that the Compliance Audit Committee is a specialized tribunal which should be shown deference in the areas demonstrated to be within its area of expertise – which suggests the standard of review is reasonableness. But this review is not focused on matters which involve specialized knowledge of campaign financing or municipal politics. Rather, the function of a Court reviewing the making of a compliance audit order is to determine on an objective basis whether there were reasonable grounds to believe that a contravention of the law had occurred. This is an extricable legal issue that the jurisprudence indicates should be determined on the basis of correctness because it is a matter within the expertise of the Courts. At the same time, the jurisprudence establishes that the issue is whether the grounds were enough that the order could have been made – not whether the reviewing court agrees that the order should have been made. The “could vs. should” distinction often creates some difficulty, but not in a case like this because the OCA has already determined that the order must be made if there are reasonable grounds. As a matter of law, the Committee had no discretion once the threshold of reasonable grounds was met and no authority to make the order in the absence of reasonable grounds. On the review, the only way the order could be overturned is on the basis of a finding that the evidence did not amount to reasonable grounds.

In the case of *Defrancesca v. Vaughan* [2008] OJ 5733, Justice Chisvin explained how the function of the judge reviewing the compliance order differs from what may be required at later stages of the process because ordering the audit “is only a step to begin the investigative process and nothing more… it is not a determination that the candidate has in any way actually violated the statute". The results of the audit may indicate that what reasonably appeared to be a contravention of the *Act* was not, but that is the function of an investigation, it is "not the function of the council nor the court at this stage of the proceedings." Subsequently in *Jackson v. Vaughan* the OCA pointed out that "it is not for the auditor to determine whether an apparent contravention is a real contravention. That determination is made by the judge of the Ontario Court of Justice hearing the prosecution." As discussed above, this division of functions speaks to the content of the duty of fairness at each stage of the process. It also speaks to the nature of the decision that is the subject of review. The function of the Committee in considering whether to order a compliance audit is not to anticipate the results of the audit or to determine whether there has been a contravention of the Act. It is to determine whether there are reasonable grounds to order the investigation – and the function of the reviewing Court is similarly constrained. As it was put in the recent case of *Furh v. Perth* (2011) MPLR (4th) 139, "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."

Reasonable grounds exist where the reviewing Court finds, on an objective assessment of the totality of the circumstances, that there are compelling and credible facts indicating that a candidate contravened the Act. In the case of *Lyras v. Heaps* [2008] OJ 4243, Justice Lane explained the nature of the task by drawing on the distinction between the reasonable grounds standard and 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. Lee (2006) 210 C.C.C. (3d) 181 (BCCA) leaved to appeal to SCC refused, [2006] S.C.C.A. No. 280; Mugesera v. Canada (Minister of Citizenship and Immigration) (2005) 197 C.C.C. (3d) 233 (SCC) 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 27 C.C.C. (3d) 97 (SCC).* 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 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*.

This is a good example of a judge struggling to explain a basic concept which is routinely applied in almost every case. It is difficult, not because the concept is difficult to understand or apply, but because it requires a measure of experience in the law and a willingness to apply basic common sense. The standards of proof we work with include reasonable suspicion, articulable cause, reasonable grounds, balance of probabilities and proof beyond a reasonable doubt. Each requires a constellation of objectively discernable facts – but as we move through the continuum we look for more or stronger elements, more clearly delineated connections and a more definitive pattern – culminating with a strong, virtually seamless pattern clearly depicting the disputed thing beyond any reasonable doubt. At the reasonable grounds stage all that is required are credible and compelling facts indicating that a contravention of the Act has occurred. Some of the connections may be obscure and the pattern may be somewhat indistinct, but provided there are strong primary elements indicating a contravention of the Act, the Committee had no choice but to order an investigation. This necessarily means that the process cannot be forestalled because there are competing facts or alternate explanations. The standard of reasonable grounds is higher than reasonable suspicion or articulable cause, but it is far from a standard of proof – whether on a balance of probabilities or beyond a reasonable doubt.

Dr. Li Preti's appeal against the compliance audit order could be dismissed simply on the basis of the compelling and credible evidence that he received a campaign contribution from Miller Paving and failed to return the money as required by the *Act*. Even if it were accepted that Dr. Li Preti was blind to the probability that the entity which made this apparently unsolicited contribution was the Miller Paving Group, a corporation well known as one of the largest road construction companies in Canada, it is clear that he made no effort to establish whether he was entitled to receive the contribution until after it was identified in the Applications as a contravention of the Act. It was only at that point that he even acknowledged that there might be a problem. But the *Act* requires candidates to have a system to verify the nature of each contribution and return monies to entities not entitled to contribute in what the jurisprudence calls “a relatively simple process, not involving much delay”.

With respect to the balance of the allegations, compelling and credible facts were disclosed in the sworn financial records filed by Dr. Li Preti which established that his campaign received contributions from various entities he identified as corporations. The statements made by Dr. Li Preti to the Committee indicate that he thought it was all right to accept these contributions if they were made by corporations which were sole proprietorships or “family run”. This position was clearly based on ignorance of the law, and the extent to which it dominated Dr. Li Preti’s submissions and was reflected, in identical terms, in the supporting documentation he filed, simply adds to the concern that Dr. Li Preti had no real understanding of his legal obligations in the first place. The other aspect of his submission – that what were recorded in his records as corporate contributions were subsequently claimed as personal contributions by the contributors – may provide the basis for a defence. But that doesn’t undermine the reasonable grounds based on the credible and compelling evidence originally disclosed in Dr. Li Preti’s sworn financial statements. It was not the function of the Committee to investigate the possibility that what appeared to be corporate contributions could be retroactively converted to personal contributions; or to authorize the candidate to conduct the investigation; or to resolve conflicts in the positions being asserted; or to determine whether the candidate has a valid defence to the allegations. It was simply the function of the Committee to consider the totality of the circumstances and determine whether there were reasonable grounds to order a compliance audit of Dr. Li Preti’s campaign financing. In the circumstances of this case, it is inconceivable that the Committee could have reached any other conclusion but that a compliance audit was required.

For these reasons the appeal is dismissed.

Counsel are invited to file written submissions as to costs, including detailed Bills of Costs, by February 15, 2013.