CITY OF TORONTO COMPLIANCE AUDIT COMMITTEE

IN THE MATTER OF an Application under s. 88.33(1) of the *Municipal Elections Act, 1996* (the "Act");

B E T W E E N:

ADAM CHALEFF

Applicant

- and -

JIM KARYGIANNIS

Respondent

BOOK OF AUTHORITIES OF THE APPLICANT, ADAM CHALEFF

June 4, 2019

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I N D E X

Tab 1

CITATION: Lancaster v. Compliance Audit Committee et al., 2013 ONSC 7631
St. Catharines Court File Number 53579/12
December 11, 2013

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ELEANOR LANCASTER	)	Luigi De Lisio,
	)	for the appellant
Appellant	)	
— and —	)	
	)	
	)	
COMPLIANCE AUDIT COMMITTEE OF THE CORPORATION OF THE CITY OF ST. CATHARINES, MATTHEW HARRIS, MATHEW SISCOE, LENARD STACK and BRIAN DORSEY	)	Christopher C. Cooper, for the respondent, Compliance Audit Committee of the Corporation of the City of St. Catharines
	)	
Respondents	)	Thomas A. Richardson and J. Patrick Maloney, for the respondents, Matthew Harris, Mathew Siscoe and Lenard Stack
	)	
	)	Brian Dorsey, respondent, self-represented

J.W. Quinn J.: —

I. INTRODUCTION

[1] In March of 2011, an article appeared in the St. Catharines Standard newspaper about a land developer who "spread thousands of dollars in donations among several city election candidates last fall." It caught the eye of the appellant, Eleanor Lancaster ("Lancaster"), a long-time participant (rather than spectator) in

the life of her community and recipient of the Queen's Diamond Jubilee Medal for her contributions and achievements.

[2] Lancaster looked into the matter further and made applications for compliance audits of the campaign finances of six candidates in the 2010 municipal election. Two of the applications were rejected as having been filed late. The other four applications also were rejected, but after a hearing. Lancaster appealed unsuccessfully to the Ontario Court of Justice. Then she appealed to this court. In June of 2012, I heard, and subsequently dismissed, that appeal.[1]

[3] This proceeding is before me now in respect of costs.

[4] Determining costs is usually one of the less demanding of judicial tasks. Far more often than not, a losing litigant pays a portion of the legal bill of the winning litigant. Disputes are frequently focused on the amount of the costs, with the court relegated to fine-tuning (or tinkering with, depending upon your perspective) the dollars to be paid. Here, however, there is a serious issue as to entitlement. Is this proceeding public-interest litigation and is Lancaster a public-interest litigant? If so, are the victorious respondents thereby disentitled to costs?

[5] On behalf of the individual respondents it is argued that they were targeted by Lancaster because of their support for a notorious local land-development project opposed by Lancaster and, as such, they say, she was pursuing a private, not a public, interest in this litigation. Her motive, therefore, is challenged.

[6] The remaining respondent, the Compliance Audit Committee of the Corporation of the City of St. Catharines (the "Committee"), is not seeking costs.

II. BACKGROUND LEADING TO THE APPEALS

[7] Because of their importance to the public-interest issue, I will review the background facts in more detail than otherwise would be warranted.

1. The three primary legal principles behind the appeal to this court

[8] The appeal to this court largely revolved around three legal principles governing the campaign finances of candidates in municipal elections: (1)

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[1] Found at 2012 ONSC 5629 (CanLII).

Contributions from a contributor shall not exceed $750 to any one candidate; (2) A candidate must complete and file a Financial Statement – Auditor's Report, in the prescribed form, reflecting his or her election campaign finances; and, (3) Corporations that are associated with one another under s. 256 of the *Income Tax Act (Canada)* are deemed to be a single corporation and, thus, one contributor.

2. The 2010 election and the contribution limit

(a) *2010 municipal election*

[9] On October 25, 2010, there was a municipal election in the City of St. Catharines. The individual respondents were candidates, with three of them being elected: Matthew Harris ("Harris"); Mathew Siscoe ("Siscoe"); and, Lenard Stack ("Stack"). The respondent, Brian Dorsey ("Dorsey"), was unsuccessful.

(b) *contribution limit*

[10] Section 71(1) of the *Municipal Elections Act, 1996,* S.O. 1996, c. 32, Sched. ("*Act*"), states that "a contributor shall not make contributions exceeding a total of $750 to any one candidate in an election."

[11] It has been said that "one very important component of the *Act* is to control the election expenses of the candidates" in municipal elections: see *Braid v. Georgian Bay (Township),* [2011] O.J. No. 2818 (S.C.J.), at para. 12.

[12] One way of controlling election expenses is to control revenue and that is accomplished somewhat by limiting campaign contributions. Supposedly, this has the effect of "levelling . . . the playing field to prevent a candidate backed by deep pockets[2] from outspending his or her opponents and thus potentially skewing the results of the election . . . [and of ensuring] that elections cannot be 'bought' ": see *Braid v. Georgian Bay (Township), supra,* at paras. 12 and 22.

3. The Financial Statement

(a) *requirement to file Financial Statement – Auditor's Report*

[13] Section 78(1) of the *Act* requires all candidates (even if unsuccessful in the election) to file a Financial Statement – Auditor's Report, "in the prescribed form,

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[2] It is difficult to imagine that democracy would be damaged by a political contribution of $751.00.

reflecting the candidate's election campaign finances . . ." The prescribed form is Form 4.

[14] The Financial Statement – Auditor's Report ("Form 4") is to be filed "with the clerk with whom the nomination was filed" on or before the last Friday in March following the election: see s. 77(a) and s. 78(1)(a) of the *Act.* The filing date here was Friday, March 25, 2011.

[15] The individual respondents each filed a Form 4 with the Clerk of the City of St. Catharines (who acted as the election returning officer) and they did so in a timely manner.

(b) *Form 4*

[16] Form 4 is generated by the Ontario Ministry of Municipal Affairs and Housing. It is eight pages in length and consists of boxes, schedules and parts.

[17] First, we have: Box A ("Name of Candidate and Office"); Box B ("Summary of Campaign Income and Expenses"); Box C ("Statement of Campaign Period Income and Expenses"); Box D ("Statement of Assets and Liabilities as at . . ." (date to be inserted)[3]; Box E ("Statement of Determination of Surplus or Deficit and Disposition of Surplus"); Box F ("Declaration").

[18] The "Declaration" reads,

> I _____ a candidate in the municipality of _____ hereby declare that to the best of my knowledge and belief that these financial statements and attached supporting schedules are true and correct.
>
> _____
> signature

and it must be signed before the City Clerk or a Commissioner of Oaths.

[19] Four schedules are found in Form 4:

- Schedule 1 is titled "Contributions" and it has two parts: "Part 1 – Contribution"; and, "Part II – List of Contributions from Each Single Contributor Totalling More than $100." Part II has three tables: "Table 1:

[3] It is a small point, but the Form 4 filed on behalf of Harris was the only one where a date was inserted.

Monetary contributions from individuals other than candidate or spouse"; "Table 2: Monetary contributions from unions or corporations"; "Table 3: Contributions in goods or services."

- Schedule 2 – "Fund-Raising Function," has three parts: "Part 1 – Ticket Revenue"; "Part II – Other Revenue Deemed a Contribution"; "Part III – Other Revenue Not Deemed a Contribution"; "Part IV – Expenses Related to Fund-Raising Function."
- Schedule 3 has the title "Inventory of Campaign Goods and Materials (From Previous Campaign) Used in Candidate's Campaign."
- Schedule 4 is headed "Inventory of Campaign Goods and Materials at the End of Campaign."

[20] The final section of Form 4 is "Auditor's Report." It is to be completed where a candidate has received contributions or incurred expenses in excess of $10,000.

(c) *penalties involving Form 4*

[21] One would be unwise to dismiss Form 4 as bureaucratic fodder undeserving of careful attention. The importance of the requirement to file a proper Form 4 is apparent from the penalty provisions of the *Act*.

[22] If prosecuted under s. 92(5), a candidate who files a Form 4 "that is incorrect or otherwise does not comply with [s. 78(1)]" must forfeit "any office to which he or she was elected . . .": see s. 80(2)(a) of the *Act.*

[23] Forfeiture also results where a candidate "fails to file [a Form 4] . . . by the relevant date": see s. 80(1)(a) and s. 80(2)(a) of the *Act.*

4. Lancaster seeks compliance audits

(a) *Lancaster "twigged" by newspaper article*

[24] On March 25, 2011, an article by journalist Matthew Van Dongen appeared in the St. Catharines Standard newspaper. I will set out some of it:

> Dan Raseta knows how to pick a winner.

> Raseta, one of the local developers behind the planned Port Place condo tower, spread thousands of dollars in donations among several city election candidates last fall.
>
> All but three, regional candidates Kelly Edgar and Ted Mouradian and Grantham Ward candidate Brian Dorsey, finished in the winner's circle.
>
> 'I guess that's probably luck of the draw,' said Raseta on Friday, the deadline for municipal candidates to file their expenses for last fall's election. 'The candidates who got our support, they're the ones we felt best represented our community.'

[25] The article went on to explain the monetary restrictions on campaign donations (and did so, incidentally, in part, incorrectly), then continued:

> Raseta and his wife, Janice, donated as individuals to various candidates. Donating companies featuring Raseta or his wife as a director include Port Dalhousie Management Corp., Copper Cliff Properties Inc., York-Bancroft Corp. and Lakewood Beach Properties Ltd.

[26] The article identified other developers or businesses that made "multiple donations to Garden City candidates" and went on to say:

> Raseta's personal and associated business donations appear to be the most generous and frequent, however, adding up to more than $13,000.
>
> Raseta sees no issue with donating through various companies.
>
> 'It's not unfair, because those are the rules,' he said.[4] 'We're very passionate about our community, so this is our way of participating in the democratic process . . .'

[27] In circumstances that I will later explain, Lancaster was cross-examined on an affidavit she had filed in this court. On being questioned regarding when she first reviewed the provisions of the *Act,* she mentioned the above newspaper article and testified, at p. 9, Q. 41 of the transcript of her cross-examination:

> A. . . . and that led me to take a closer look at this *Act* and see exactly what it said.

[28] Further questions and answers followed:

> Q. 49 So this article, as I understand you to describe it just now, indicated that Mr. Raseta was involved in certain contributions to various campaigns. Is that correct?
>
> A. Mm-hmm, that's correct.

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[4] Raseta learned a few days later that those, in fact, were not the rules.

Q. 50 And that he seemed to have picked winners?

A. That's correct.

Q. 51 And that twigged your interest, did it?

A. It did indeed.

(b) *Lancaster applies for audits*

[29] Pursuant to s. 81(1) of the *Act,* an elector may apply for a compliance audit:

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

[30] On June 23, 2011, Lancaster applied to the Committee for audits of the election campaign finances of Harris, Siscoe, Stack and Dorsey. Her applications (one for each of the individual respondents) stated:[5]

> . . . I have reasonable grounds to believe that these candidates, and some of their corporate contributors, have contravened some of the campaign finance provisions of the [*Act*].

[31] The applications went on to detail ". . . obvious over-contributions by related or associated corporations" and to catalogue various shortcomings in the preparation of the Form 4s.

[32] I should point out that the only direct consequence or "penalty" that flows from an application under s. 81(1) is an audit. The results of the audit may trigger other sanctions found in the *Act*.

5. Individual respondents asked to return excess contributions

[33] On June 29, 2011, John A. Crossingham, a lawyer for three corporations which had contributed $750 each to Stack's campaign – York Bancroft Corporation, Port Dalhousie Management Corporation and Lakewood Beach Properties Ltd. – wrote to Stack saying, in part:[6]

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[5] Recall that Lancaster had filed applications in respect of two other candidates, but they were rejected as having been filed late.

[6] I was not expressly told what prompted this letter, however, it would seem to be a safe guess that Raseta had learned of the filing of the audit applications (in which he figured prominently) and he contacted his lawyer.

> . . . While the corporations are not obviously related, i.e. they do not have similar names, they are associated within the meaning of the *Income Tax Act*. Associated corporations are limited to one $750 contribution for the group.
>
> The [*Municipal Elections Act*] requires, in section 69(1)(m), that you, as 'a candidate shall ensure that a contribution of money made or received in contravention of the *Act*, is to be returned to the contributor as soon as possible after the candidate becomes aware of the contravention' . . . We are, therefore, requesting that repayment cheques for $750 each, payable to Lakewood Beach Properties Ltd. and York Bancroft Corporation, be sent to Crossingham, Brady . . .

[34] Similar letters were forwarded to, and received by, Harris, Siscoe and Dorsey, all of whom (along with Stack) promptly returned the excess contributions.

[35] The letter from Mr. Crossingham, a senior counsel with considerable expertise in matters of municipal law, included in his letter (correctly, it will be seen) the opinion that if the excess contributions were returned to the contributor "as soon as possible" after learning that they contravene the *Act,* "you are then absolved from any repercussions."

6. Hearing before the Committee

(a) *composition of the Committee*

[36] The Committee is a specialized tribunal created by the Corporation of the City of St. Catharines under the authority of the *Act,* with the sole responsibility of hearing applications "relative to possible contravention of the election campaign finance rules": see *Terms of Reference for Niagara Compliance Audit Committee* (undated) ("*Terms of Reference*").

[37] The Committee created its own rules of procedure, as directed by s. 81.1(4) of the *Act*.

[38] A compliance audit committee must have "not fewer than three and not more than seven members": see s. 81.1(2) of the *Act.*

[39] Paragraph 8 of its *Terms of Reference* stipulates that the Committee is to be composed of members "from the following stakeholder groups: accounting and audit . . . with experience in preparing or auditing the financial statements of municipal candidates; . . . academic . . . with expertise in political science or local

government administration; . . . legal profession with experience in municipal law; . . . professionals who in the course of their duties are required to adhere to codes or standards of their profession which may be enforced by disciplinary tribunals . . .; and . . . other individuals with knowledge of the campaign financing rules of the [*Act*]."

[40] Section 81.1(2) of the *Act* expressly forbids certain persons from sitting on a compliance audit committee: "employees or officers of the municipality . . .; . . . members of the council . . .; . . . or any persons who are candidates in the election for which . . . [a compliance audit] committee is established."

[41] The Committee consisted of three members: (1) a professional engineer with experience in accounting and audits who was president of a charitable organization and of a consulting company; (2) a Bachelor of Commerce graduate with experience in audit and compliance matters in the insurance industry; and, (3) a Certified General Accountant who worked in the audit division of Canada Revenue Agency.

[42] Mr. Richardson, lead counsel for Harris, Siscoe and Stack, accurately pointed out on the appeal: "The development of the law on compliance audit committees has changed significantly [since 2009]. In particular, the provincial legislature has removed the ability of a politically minded municipal council to [hear and decide applications for compliance audits] and has placed the decision-making in the hands of an impartial tribunal with expertise in auditing of financial statements in the municipal context."

(b) *Committee considered the applications*

[43] The Committee considered the four applications at a public meeting held on July 19, 2011.

[44] Section 81(5) of the *Act* says only that a compliance audit committee "shall consider" the applications and decide whether they "should be granted or rejected." The *Act* is silent as to how this is accomplished. However, s. 7.2 of the *Terms of Reference* stipulates that the Committee is "to hear and determine all applications." And, the *Procedures for the Niagara Compliance Audit Committee* (undated) provide that candidates "may respond to the application in writing": see s. 5.7.

Furthermore, when considering an application, s. 11.7 states that: "the applicant . . . may address the Committee; the Committee may . . . ask questions of the applicant; . . . the candidate . . . may address the Committee [and] may respond to the content of the applicant's address to the Committee; the Committee may . . . ask questions of the candidate . . ."

[45] On July 19, 2011, the Committee entertained representations (oral and written) from Lancaster (the applicant) and from Harris, Siscoe, Stack and Dorsey (the candidates).

[46] The Committee heard and considered the four applications separately:

1. The Harris application

[47] Lancaster pointed out to the Committee that the Form 4 from Harris (prepared by a Chartered Accountant) listed seven corporate contributions and included this information in respect of two of them:

Schedule 1 – Contributions

Part II – List of Contributions from Each Single Contributor Totalling More than $100
Table 2: Monetary contributions from unions or corporations

Name	Address	President or Business Manager	Cheque Signatory	Amount
York Bancroft Corp.	125 Carlton Street, St. Catharines	Dan Raseta	Dan Raseta	$750.00
Copper Cliff Properties	125 Carlton Street, St. Catharines	Dan Raseta	Dan Raseta	$750.00

[48] Lancaster contended that these two contributions obviously came from related or associated corporations (they have a common Address, President or Business Manager and Cheque Signatory).

[49] Corporations are subject to the same contribution limits as individuals; and s. 72 of the *Act* states:

> 72. For the purposes of sections 66 to 82, corporations that are associated with one another under section 256 of the *Income Tax Act (Canada)* shall be deemed to be a single corporation.[7]

Therefore, it is a violation of the *Act* for associated corporations to collectively contribute in excess of $750 to one candidate.

[50] The minutes of the Committee for July 19, 2011 read:

> . . . Harris . . . stated that the Form 4 Financial Statement needs more clarity for candidates completing the form. He advised that as soon as he was aware that he received an over-contribution, he repaid the monies . . .[8]

2. The Siscoe application

[51] The Form 4 completed by Siscoe showed three corporate contributions:

Schedule 1 – Contributions
Part II – List of Contributions from Each Single Contributor Totalling More than $100
Table 2: Monetary contributions from unions or corporations

Name	Address	President or Business Manager	Cheque Signatory	Amount
Copper Cliff Properties Inc.	125 Carlton St., Box 29059, St. Catharines		Dan Raseta	$500.00
Port Dalhousie Management Corp.	125 Carlton St., Box 29059, St. Catharines		Dan Raseta	$750.00
York Bancroft Corp.	125 Carlton St., Box 29059, St. Catharines		Janice Raseta	$500.00

[52] It was submitted to the Committee by Lancaster that the above entries list contributions from associated corporations (the Address is the same and the individuals named under Cheque Signatory are husband and wife) and their

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[7] Section 256 of the *Income Tax Act (Canada)* contains five definitions of associated corporations, but (and I am grossly oversimplifying here) the gist of them is that one corporation is associated with another where one controls, directly or indirectly, the other or where they are controlled, directly or indirectly, by the same person or group of persons who are related or hold a certain shareholder percentage.

[8] However, Harris became aware of the over-contribution not from any act of due diligence on his part but because of the compliance audit sought of him by Lancaster and the "lawyer's letter" to Harris that her application triggered. It is hardly a badge of ethical merit to return, when demanded, improperly received funds (just ask a member of the Senate of Canada). Here, even a rudimentary understanding of the concept of "associated corporations" under the *Income Tax Act (Canada)* would have alerted Harris to the impropriety of accepting corporate donations from two corporations with the same "Address," the same "President or Business Manager" and the same "Cheque Signatory."

contributions total more than the allowable limit of $750. Also, the column for President or Business Manager is blank.

[53] The minutes of the Committee recorded this response from Siscoe:

> . . . Siscoe . . . advised the Committee that he did accept cheques but promptly repaid them when he was made aware he should not have accepted them. He stated that he did due diligence[9] and read his provincial candidate's guide, but is a first-time candidate and the guide is vague on this issue.[10] He . . . advised he understood what the limit was and he kept a record of the cheques he received, the majority of which were from friends. He also consulted with staff of the [City] Clerk's Department and other councillors and was told that it was ok to accept the corporate donations . . .

3. The Stack application

[54] In respect of the Stack application, Table 2 of Form 4 was blank (and, indeed, had a line drawn through it). Table 1 listed a mixture of individual and corporate contributions:

Schedule 1 – Contributions
Part II – List of Contributions from Each Single Contributor Totalling More than $100
Table 1: Monetary contributions from individuals other than candidate or spouse

Name	Address	Amount
Tom Price	St. Catharines ON	$500.00
Port Dalhousie Management Corp.	St. Catharines ON	$750.00
Queenston Quarry Reclamation	R.R. 3 N.O.T.L	$750.00
Roseann Cormrie	St. Catharines ON	$500.00
Horizon Joint Venture	St. Catharines ON	$750.00
David Roberts	St. Catharines ON	$500.00
York Bancroft Corp.	St. Catharines ON	$750.00
Baumgarti & Associates Ltd.	St. Catharines ON	$200.00
Lakewood Beach Properties Ltd.	St. Catharines ON	$750.00

[9] The comments that I made in footnote 8 apply equally here. I do not understand how Siscoe can say that he "did his due diligence" when three companies that donated to his campaign all show, not only the same street address, but the same postal box. One does not need a specialized knowledge of the *Income Tax Act (Canada)* to suspect that these might be "associated corporations."

[10] If Siscoe was referring to the *Ontario Municipal Elections 2010 Guide*, it is more than vague: it is unhelpful.

[55] Lancaster complained to the Committee that, with six of the above contributors being corporations, the failure to complete Table 2 meant that information as to the President or Business Manager and the Cheque Signatory was missing from Form 4. Port Dalhousie Management Corp., York Bancroft Corp. and Lakewood Beach Properties Ltd. were associated corporations and their contributions collectively exceeded the permissible limit.

[56] According to the minutes of the Committee, Stack made the following representations:

> . . . Stack . . . advised the Committee that the errors he made on his financial statement were unintentional and the product of naivety and inexperience. When he was advised of the over-contributions, he reimbursed the monies[11] . . . after he filed his papers, he realized the error he made in listing the contributors on the form and tried to correct the fact, however, the [City] Clerk's staff told him he could not file a second form.[12] He stated that he believed the [City] Clerk's staff should have caught the error when he was filing the papers . . .

[57] In an affidavit filed for the hearing of the appeal in the Ontario Court of Justice,[13] Stack deposed, at paragraphs 15 and 25:

> 15. Before accepting the donations, an individual from my campaign team called the City Clerk's Department. We were advised that there should be no concerns over the donations provided from each corporation so long as each corporation filed a separate tax return . . .[14]
>
> 25. I submitted my [Form 4] to the City Clerk's Department more than one week prior to the legislated deadline. At the time that I submitted my [Form 4] . . . [the Acting Deputy Clerk] reviewed my report and said that everything appeared to be in order.

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[11] Again, my comments in footnotes 8 and 9 apply to Stack. A basic component of due diligence is to perform corporate searches for all donating corporations. Such a search would have revealed that Port Dalhousie Management Corp., York Bancroft Corp. and Lakewood Beach Properties Ltd. were "associated corporations." Wilful blindness is not a defence to accepting improper campaign contributions. Furthermore, including corporate contributions in Table 1 of Schedule 1 rather than Table 2, for example, betrays an utter misunderstanding of Form 4 and its purpose.

[12] As long as the time limit under s. 77(a) has not expired, a candidate should be permitted to file an amended Form 4 and if the *Act* does not permit such a filing it should.

[13] The minutes of the Committee are not (and are not meant to be) a comprehensive transcription of everything that was said on July 19, 2011. I was told that this affidavit (and the others filed with the Ontario Court of Justice) only contained information that had been before the Committee.

[14] Bad advice. Very bad.

4. The Dorsey application

[58] In the Dorsey application, Lancaster advised the Committee that Table 2 of Form 4 was not filled out and that the four contributors in Table 1 were corporations:

Schedule 1 – Contributions
Part II – List of Contributions from Each Single Contributor Totalling More than $100
Table 1: Monetary contributions from individuals other than candidate or spouse

Name	Address	Amount
(illegible) Development	19 Timber Lane St. Cath.	$100.00
Horizon J.V.	19 Timber Lane St. Cath.	$100.00
Lakewood Beach Properties	10 Canal Street St. Cath.	$750.00
York Bankcroft (sic)	P.O. Box 29059 Carlton Street St. Cath.	$750.00

[59] With Table 2 not having been completed, there were no particulars as to the President or Business Manager or the Cheque Signatory; and, Lancaster submitted, Lakewood Beach Properties and York Bankcroft (sic) are associated corporations.

[60] The minutes of the Committee stated that Dorsey was unaware that he had violated the *Act* until he received notice of the audit application by Lancaster. The minutes go on to mention:

> . . . On June 29, 2011, [Dorsey] received an e-mail from Crossingham, Brady and on June 30, 2011 he received an e-mail from Dan Raseta requesting the return of funds that had been an over-contribution. He stated that he promptly returned the funds on June 30, 2011.[15] He indicated that when he accepted cheques from contributors he compared the signatures on cheques already received and he did, in fact, reject some cheques. [Dorsey] stated that the error he made completing the financial statement was unintentional.

(c) *powers of a compliance audit committee*

[61] Where a compliance audit committee decides to grant the application of an elector, "it shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances": see s. 81(7) of the *Act.* Thereafter, the auditor is required to submit a report to that committee.

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[15] My comments in footnotes 8, 9 and 11 are applicable to Dorsey, as well.

[62] If the report concludes that the candidate appears to have contravened a provision of the *Act* in respect of election campaign finances, the compliance audit committee may "commence a legal proceeding against the candidate for the apparent contravention": see s. 81(14)(a) of the *Act*. In addition, the compliance audit committee may "make a finding as to whether there were reasonable grounds for the application": see s. 81(14)(b) of the *Act*. The municipal council "is entitled to recover the auditor's costs from the [elector]" where reasonable grounds are missing: see s. 81(15) of the *Act*.

(d) *disposition by Committee*

[63] The Committee agreed that the four applications by Lancaster correctly identified excess corporate contributions. However, the minutes of July 19, 2011 showed that, because those contributions "have been returned," the chairperson, in each instance, made "a motion to reject the application."

[64] On the issue of associated corporations, the chairperson, according to the minutes, stated that "the rule of associated corporations is not a new rule and is not a valid excuse."[16] She continued: ". . . taxpayers should not have to pay for an audit that would reveal that overpayments were made and the monies have already been returned . . ."

[65] The Committee was complimentary of Lancaster, saying, at one point, that she "has identified problems that exist with the system and this time is not wasted" and, later, that she "has done a great service to the electors of St. Catharines."

[66] In dismissing the four applications, the conclusion in respect of each included the following:

> . . . the Committee is not satisfied that reasonable grounds have been demonstrated that the candidate may have contravened the provisions of the *Municipal Elections Act*.

[67] In the end, the Committee commented, "it doesn't take a compliance audit to identify over-contributions."

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[16] Although the wording here is a touch awkward, I assume it was meant that there is no excuse for a candidate being unaware of the concept of "associated corporations" and of the prohibition against collective corporate contributions exceeding $750. No mention was made of any sanction or action to be taken against Harris, Siscoe, Stack and Dorsey who, in the opinion of the Committee, did not have a valid excuse for accepting the over-contributions.

[68] The Committee seemed not to have paid much attention to the shortcomings in the completion of the Form 4s (focusing on the over-contributions).

III. APPEAL TO ONTARIO COURT OF JUSTICE

[69] Section 81(6) of the *Act* permits an appeal from the decision of the Committee to the Ontario Court of Justice and that court may make any decision the Committee could have made.

[70] Lancaster launched such an appeal. It was heard by way of judicial review on November 24, 2011 and dismissed, in writing, on February 9, 2012.[17]

[71] The notice of appeal named the Committee as the only respondent,[18] but it also was served on Harris, Siscoe, Stack and Dorsey (on both appeals, Dorsey was self-represented and the other three had the same counsel). The status of the individual respondents became important during the costs submissions and, as counsel were in disagreement on that status, I asked for a copy of the transcript of the proceedings in the Ontario Court of Justice wherein the issue concerning the status of the individual respondents was addressed.

[72] In the transcript for August 26, 2011, the first appearance date, the court stated, at page 6, line 24:

> It is my intention in this case that, as well as the City of St. Catharines, each of the councillors named in this application will have standing with respect to the hearing of the appeal.

[73] The court inquired of Mr. De Lisio, counsel for Lancaster:

> I take it there's no objection to that, Mr. De Lisio?

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[17] The *Act* does not provide for a hearing *de novo*. The Ontario Court of Justice was not authorized to examine this matter anew. All of the information before the Ontario Court of Justice was available to the Committee and so the task of that court was to decide if such information reasonably supported the decision of the Committee; and the material before me was the same as in the Ontario Court of Justice.

[18] No one raised a concern about the role of the Committee as a party in an appeal of a decision of the Committee. The role adopted, without opposition and with my acquiescence, was one where counsel for the Committee supported the position argued by Mr. Richardson, lead counsel for the individual respondents, and abstained from delivering a factum or other materials and from making submissions. The Committee was not a "party" in the usual meaning of that term and, therefore, must suffer a reduced level of participation in the appeal. That level was not fully articulated. Despite my concern that the Committee should not be dealing with the merits of the appeal in any manner, in the circumstances, I left this issue alone, except to say that the fact counsel for the Committee supported the position of Mr. Richardson did not, in law, add weight to that position.

To which Mr. De Lisio replied:

> None whatsoever.

[74] Further, at page 7, line 7, the court said:

> I'm treating the councillors as respondents, then, in this particular matter.

[75] The status of Harris, Siscoe, Stack and Dorsey will become important later. But it is clear that they were not added as parties at their request; they did not object, but they did not request.

[76] At paras. 6-15 of its well-written decision, the Ontario Court of Justice determined that the standard of review on the appeal was reasonableness, not correctness, and that the Committee was "entitled to deference," commenting that the Committee "clearly does possess the necessary expertise to decide the initial application and is free from political influence."[19]

[77] As to the standard of reasonableness, the Ontario Court of Justice referred to a passage from *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, at para. 47:

> . . . certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions . . . In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[78] Although s. 81(1) of the *Act* entitles an elector who "believes on reasonable grounds that a candidate has contravened a provision of this *Act* relating to election campaign finances" to apply for a compliance audit, the Ontario Court of Justice held, at para. 18, that the subjective belief of the elector "applies only to the commencement of this process" and that the test to be used by the Committee "was whether the Committee believed on reasonable grounds that a candidate had contravened" the *Act.* In doing so, the court relied upon this passage from *Lyras v. Heaps,* [2008] O.J. No. 4243 (O.C.J.), at para. 23:

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[19] A view which seemed to be unchallenged.

> . . . even if the appellant [elector] 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.

[79] In defining "reasonable grounds," the Ontario Court of Justice again cited *Lyras v. Heaps, supra,* at para. 25:

> . . . the standard to be applied is that of an objective belief based on compelling and credible information which raises the 'reasonable probability' of a breach of the statute. The standard of 'a *prima facie* case' in either its permissive or presumptive sense is too high a standard.

[80] On the issue of contributions from associated corporations, the Ontario Court of Justice stated that while it was illegal for a contributor to make contributions to one candidate exceeding a total of $750 (s. 71(1) of the *Act*) and also illegal for associated corporations to do likewise (s. 72 of the *Act*) it was not a breach of the *Act* for a candidate to receive such contributions. The only obligation on the candidate was to return a contravening contribution "to the contributor as soon as possible after the candidate becomes aware of the contravention" (s. 69(1)(m) of the *Act*).

[81] The court held, at para. 40, that because "each candidate had returned the excess money contributed in contravention of the *Act* as soon as possible after the candidate had become aware of the contravention . . . the only reasonable conclusion that the Committee could have reached was that there were not reasonable grounds to believe that [Harris, Siscoe, Stack and Dorsey] had contravened the *Act*."

[82] Regarding the issue of corporate contributions erroneously shown as contributions from individuals and the related issue of failing to list the President or Business Manager and Cheque Signatory for corporate contributions, the Ontario Court of Justice rejected a strict liability approach to the completion of Form 4 and seems to have concluded that it was reasonable for the Committee to have viewed unintentional errors as not being contraventions of the *Act.* Reference was made to *Braid v. Georgian Bay (Township), supra,* at paras. 28 and 29:

> [28] In my opinion this dichotomy between a strict liability for complete failure to file and a more lenient approach where the document is filed but incorrect in some way, is entirely consistent with the aims of the *Act*. Failure to file leaves the public no ability to examine the expenses of a candidate. Such a failure leaves the interested person . . . with no starting point from which to begin an examination. It strikes at the very heart of the *Act's* purpose.
>
> [29] Filing a document that is flawed in some way is quite a different proposition. In contractual language there has been substantial compliance. Even a flawed financial statement provides a starting point for an examination of the candidate's expenses. The direction to the Court in subsection 92(6), that the draconian penalty of forfeiture does not apply where a candidate has made a mistake while acting in good faith, is a recognition that mistakes happen . . .

[83] The Ontario Court of Justice concluded that the decision of the Committee passed the test of reasonableness and, in February of 2012, dismissed the appeal.

IV. APPEAL TO THE SUPERIOR COURT OF JUSTICE

[84] In March of 2012, Lancaster appealed to the Superior Court of Justice.

1. Motion to quash the appeal

[85] One month later, counsel for Harris, Siscoe and Stack brought a motion to quash the appeal. As I understand it, the motion was the subject of a contested adjournment request by Mr. De Lisio and ultimately was adjourned by Sloan J. The respondents never pursued the motion and, by participating in the appeal, are deemed to have waived the complaint raised in the motion and to have abandoned the motion.[20]

2. The grounds of appeal to the Superior Court of Justice

[86] The notice of appeal to this court contained six grounds, the first two of which dealt with the standard of review adopted by the Ontario Court of Justice. I was informed during argument that Mr. De Lisio, counsel for Lancaster, concurred with Mr. Richardson, lead counsel for Harris, Siscoe and Stack, that the standard

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[20] I offer the unsolicited opinion that Harris, Siscoe and Stack would not be entitled to costs for any legal services rendered by their counsel in connection with this abandoned motion. In fact, it is likely that Lancaster would receive her costs of that motion. Rule 37.09(3) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, provides: "Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise."

properly used by the Ontario Court of Justice was that of reasonableness.[21] Therefore, those two grounds of appeal were abandoned.

[87] The third ground of appeal alleged that the Ontario Court of Justice erred in:

> (c) finding that the test to be applied by the Committee was whether the Committee believed on reasonable grounds that a candidate had contravened a provision of the *Act* relating to election campaign finances and when that test was to be applied;

[88] Mr. De Lisio submitted, on behalf of Lancaster, that the test for ordering an audit was whether the elector who applied for a compliance audit believed on reasonable grounds that a candidate had contravened the *Act*. I disagreed. In my opinion, the belief of the elector was relevant only to the extent that it justified making the application in the first instance.[22] Thereafter, what was important was whether the Committee, after considering the application in accordance with s. 81(5), shared that belief. The basis for the belief of the elector, as amplified at the hearing before the Committee, determined whether reasonable grounds existed.

[89] I held that it was correct in law for the Ontario Court of Justice to have concluded as it did on the third ground.

[90] Yet, a finding of reasonableness did not automatically mean that an audit was warranted. In other words, even where the Committee was satisfied that the *Act* had been breached, or probably breached, it was not compelled, after considering all of the circumstances, to appoint an auditor (and it was upon this principle that the appeal ultimately foundered).

[91] The fourth ground of appeal stated that the Ontario Court of Justice erred in:

> (d) finding that section 17.1 (sic) of the *Act* in deciding (sic) there was no contravention of the *Act* by receiving campaign contributions in excess of $750 from associated corporations;

[92] Doing the best that I could with the awkward opening words of the fourth ground – "section 17.1" certainly seemed to be a typographical error and presumably should have read "section 71(1)" – I gathered it was intended to allege that the court erred when it determined that receipt of contributions in excess of $750 from associated corporations did not amount to a contravention of the *Act*.

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[21] Counsel were in agreement that my function was to determine whether the Ontario Court of Justice was correct in law in concluding that the disposition by the Committee was reasonable. Therefore, I was required to keep my eye on both standards of review.

[22] Which becomes crucial when the costs of the auditor are being contemplated under s. 81(15) of the *Act*.

[93] Receiving a contribution that contravenes the *Act* is not illegal. The illegality arises when, in the words of s. 69(1)(m) of the *Act,* a candidate fails to return the contribution "as soon as possible after the candidate becomes aware of the contravention." I would add (although it was unnecessary to do so for the purposes of this case) that the duty to return the contribution crystallized when the candidate *should have become aware* of the contravention. So, the essence of the illegality is not in receiving contravening contributions, but in keeping them.[23]

[94] I found that the wording of s. 69(1)(m) was clear and unambiguous. One could not read into the language of that provision anything beyond the ordinary and natural meaning of the words used; and there was nothing elsewhere in the *Act* to contradict or even cloud that meaning.

[95] I saw no error in the handling of the fourth ground by the Ontario Court of Justice.

[96] I would add that I agreed with Mr. De Lisio in his argument that candidates must undertake corporate searches "of all non-individual contributors" or "make inquiries" of those contributors where "there exists a compelling reason to do so": see *Chapman v. Hamilton (City),* [2005] O.J. No. 1943, at para. 51. Here, compelling reasons were present. The need for inquiry was obvious.[24]

[97] The fifth ground of appeal alleged that the Ontario Court of Justice erred in:

> (e) finding that the obligation of a candidate is simply to return a contribution of money made in contravention of the *Act* as soon as possible after the candidate becomes aware of the contravention and that if he does, the candidate is not contravening the *Act*;

[98] The fifth ground was largely an extension or restatement of the fourth ground. Receiving illegal campaign contributions cannot sensibly be construed to contravene any provision of the *Act*. As others have correctly commented, if this were not so, a contributor could sabotage the election of a candidate merely by making an illegal donation. Consequently, the only obligation upon a candidate is

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[23] One might rightly query whether a donation by cheque – only contributions of $25 or less may be in cash: see s. 70(8) – is "received" when physically received or only when deposited in a bank account. To avoid that problem, candidates should scrutinize all cheques and perform their due diligence before depositing the cheques. Other questions arise as to the implications where the cheques are received and deposited by a campaign worker and not by the candidate personally. But I digress.

[24] I think that any one of the corporate circumstances in this case was sufficient, on its own, to call for inquiry or investigation: (1) common President or Business Manager; (2) common Cheque Signatory; (3) common Address; and, (4) family relationship evident from (1) and/or (2).

to return the contravening contribution as soon as possible. Had the excess campaign contributions here not been returned, the *Act* would have been breached and an audit appropriate.

[99] The final ground of appeal stated that the Ontario Court of Justice erred in:

> (f) finding that the contravention of the *Act* by councillors Stack and Dorsey and Siscoe did not constitute a contravention of the *Act*.

[100] This ground was curiously worded. However, I understood Lancaster to be alleging that the *Act* was contravened and, after some prodding, it came out during oral argument that the section said to be breached was s. 78(1). There was merit to this ground.

[101] The duty imposed by s. 78(1) to file a Form 4 includes the implied requirement that the document be filled out completely, correctly and in accordance with the *Act*; otherwise, s. 78(1) would have little meaning.

[102] Both the Committee and the Ontario Court of Justice conflated the issues of contravention and intention. Contraventions of the *Act* should be determined on the basis of strict liability, irrespective of intention.[25] Absence of intention will be reflected in the consequences of the contravention. To conflate contravention and intention invites ignorance as a defence to breaching the *Act*. Ignorance of the *Act* is not a defence; neither is relying on the ignorance of others.

[103] Importantly, even where there is a breach of the *Act,* the Committee had the authority to decline appointing an auditor. The Committee was doing more than considering if the *Act* had been breached; it was deciding whether an audit was warranted.

[104] It was unreasonable for the Committee to have concluded that Siscoe, Stack and Dorsey did not contravene the *Act* and it was an error in law for the Ontario Court of Justice to have held likewise. To find that the *Act* was not breached is to understate the importance of Form 4 and the scrupulous care that should be exercised in its completion. I found that the omissions in the Form 4s of Siscoe, Stack and Dorsey were contraventions of the *Act*.

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[25] I respectfully disagreed with the contrary viewpoint expressed in *Braid v. Georgian Bay (Township), supra.,* at paras. 28 and 29.

3. My findings on the appeal

(a) *receiving contributions from associated corporations not a contravention*

[105] It was undisputed that Harris, Siscoe, Stack and Dorsey accepted illegal campaign contributions from associated corporations. Similarly, it was undisputed that they returned those contributions as soon as possible after learning of the illegality. Thus, they fully complied with the *Act*. In law, nothing more was required of them. There was no contravention of the *Act* and, obviously, it followed that it was reasonable for the Committee to have made that finding and to have declined to appoint an auditor and it was correct for the Ontario Court of Justice to have agreed with that result.[26]

(b) *improper completion of Form 4*

[106] An error or omission in the completion of Form 4 will amount to a contravention of the *Act*.[27] The nature and magnitude of the error or omission will determine the seriousness of the contravention.

[107] The only notable aspect of the Harris Form 4 was that two associated corporations were listed in Table 2. As this information was factually accurate, it cannot be said that his Form 4 was incorrect. Therefore, Harris did not contravene the *Act* when his Form 4 was completed.

[108] Siscoe, Stack and Dorsey did not properly fill out or complete the Form 4 that each filed. Their errors and omissions were glaring: (1) Siscoe left entirely blank the column for President or Business Manager in Table 2. This was a significant omission and amounted to a breach of the *Act* (his listing of associated corporations, by itself, was not a breach because it was factually accurate); (2) Although Stack received corporate contributions, he did not record them in Table 2. This means that crucial particulars regarding the President or Business Manager and Cheque Signatory were missing so as to constitute a contravention of the *Act* (the fact that corporate contributions were wrongly set out in Table 1 was not a

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[26] In my Reasons on the appeal, I offered the thought that it would be helpful if Form 4 were amended to contain some guidance as to the definition of "associated corporations." The definition would not be (and likely could not be) exhaustive. But here, even the most rudimentary definition would have alerted Harris, Siscoe, Stack and Dorsey to the likelihood that they were confronted with "associated corporations."

[27] Paragraph 89 of my Reasons on the appeal reads: "A significant error or omission in the completion of Form 4 will amount to a contravention of the *Act*. The word "significant" should not be there.

contravention because, again, the information in the entries was not *per se* inaccurate); (3) Dorsey also did not fill out Table 2 and, instead, included his corporate contributions in Table 1. My comments in respect of Stack apply to Dorsey.

[109] It was unreasonable of the Committee not to have concluded that the *Act* had been breached by Siscoe, Stack and Dorsey and it was an error in law for the Ontario Court of Justice to have upheld that conclusion.

(c) *breach of Act does not necessarily lead to an audit*

[110] The Committee was not bound to appoint an auditor in the face of a breach or contravention of the *Act*. The Committee was entitled to look at all of the circumstances to determine whether an audit was necessary. The uncontradicted (but untested) information received by the Committee was that the omissions in the Form 4s were unintentional.[28]

[111] There was not a flicker of further information to be obtained from an audit. To have directed an audit, would have amounted to a speculative expedition and ended up revealing what already was known.

[112] Therefore, it was reasonable for the Committee to have declined to appoint an auditor and correct for the Ontario Court of Justice to have concurred.

(d) *appeal result*

[113] Although it was unreasonable and an error for the Committee and the Ontario Court of Justice, respectively, to have found that the *Act* had not been breached, I concluded that it was correspondingly reasonable and correct not to proceed with an audit. The appeal, therefore, was dismissed.

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[28] Mr. Richardson submitted that, in the Ontario Court of Justice, Lancaster, through her counsel, had the opportunity to cross-examine the individual respondents, but did not do so and, consequently, there being no contradictory evidence, the truth of the statements and explanations of Harris, Siscoe, Stack and Dorsey were unchallenged. However, if the hearing in the Ontario Court of Justice is not meant to be *de novo,* should that court entertain any evidence that was not part of the hearing before the Committee?

V. HOW WE GOT FROM THERE TO HERE

1. The procedural timeline

[114] Before going further, it might be useful to briefly review the procedural timeline to this point.

[115] Following the dismissal of the audit applications by the Committee in July of 2011, the first appearance in the Ontario Court of Justice was the next month. The appeal in that court was heard in November and a decision was rendered in February of 2012.

[116] The appeal to this court was launched in March of 2012. Counsel for Harris, Siscoe and Stack brought a motion to quash the appeal in May. It was adjourned and is now deemed to have been abandoned. I heard the appeal in June. My decision, dismissing the appeal, was rendered on October 9th.

[117] Counsel and the parties appeared before me in December of 2012 when I heard oral argument regarding costs. The plan was that I would render my decision on costs at that time. However, in the course of his oral submissions, Mr. De Lisio raised the issue of whether Lancaster was a public-interest litigant. I was not content to allow such an important issue to be addressed orally. Consequently, I directed both sides to serve and file written submissions. We adjourned for that purpose.

[118] In the period January-March of 2013, I received those written submissions. The material submitted on behalf of Harris, Siscoe and Stack included what will soon be described as "the Maloney affidavit." The responding submissions from Mr. De Lisio included what I will be calling "the Lancaster affidavit." The Maloney affidavit alleged that Lancaster was not a public-interest litigant but that she was pursuing a private interest. The Lancaster affidavit denied the allegation. I sent word to counsel that, in the circumstances, the public-interest issue could not be resolved without further evidence.

[119] Counsel opted to proceed with a cross-examination on the Lancaster affidavit. This hijacked the appeal for most of a year. The cross-examination took place in July of 2013. Thereafter, further written submissions were served in October and the file was returned to my chambers for attention once again.

2. The affidavits

(a) *the Maloney affidavit*

[120] Lancaster and the individual respondents filed affidavits at the time of the hearing before the Committee and those affidavits were part of the appeal book in the Superior Court of Justice. However, to my surprise, Mr. Maloney, co-counsel for Harris, Siscoe and Stack, delivered an affidavit in the course of the January-March 2013 written submissions that I mentioned above. His affidavit ("the Maloney affidavit"), sworn February 20, 2013, was included as part of a volume of material titled "Costs Submissions of the Respondents Matthew Harris, Mathew Siscoe and Lenard Stack."

[121] The Maloney affidavit (which did not come to my attention until after Mr. De Lisio filed his responding submissions) opened with this statement: "Our clients wish to provide this affidavit in response to the positions raised by [Lancaster] in her costs submissions." The "positions" referred to included the contention by Lancaster that she is a public-interest litigant and, as such, should not be required to pay costs.

[122] In other words, the Maloney affidavit was responding, with evidence, to the submissions made by Mr. De Lisio on behalf of Lancaster. The Maloney affidavit is improper for three reasons: (1) it is from counsel and counsel cannot also be a witness; (2) it required leave of the court to be filed (which would have necessitated providing Mr. De Lisio with the opportunity to make submissions on the matter); and, (3) it shields Harris, Siscoe and Stack (if affidavit evidence is to be permitted, they are the ones who should be the deponents).

[123] The Maloney affidavit, briefly put, suggests a motive for the audit applications, contending that Lancaster "targeted" the individual respondents. The motive relates to a residential development project in the Port Dalhousie section of St. Catharines. The project was (perhaps, still is) notoriously controversial in the community. Those citizens opposed to the development formed a group known as "P.R.O.U.D." (an acronym for "Port Realizing Our Unique Distinction"). The residential development project was being championed by "P.D.V.C." (otherwise

known as "Port Dalhousie Vitalization Corp."). The most controversial aspect of the development was a planned 17-storey tower.[29]

[124] The City of St. Catharines approved this project. That decision was appealed to the Ontario Municipal Board ("OMB") by several parties, including P.R.O.U.D. The appeal was unsuccessful and the OMB approved the various planning requirements for the project.

[125] One of the members of P.D.V.C. is Dan Raseta, also a principal in York Bancroft Corporation, Copper Cliff Properties Inc., Port Dalhousie Management Corporation and Lakewood Beach Properties Ltd. If those names sound familiar, it is because they are seen repeatedly in the Form 4s of the individual respondents.

[126] The Maloney affidavit cannot play a part in the proof of motive alleged against Lancaster. But it is relevant in my costs decision. An allegation of impropriety is accompanied by a risk. Failure to prove the impropriety may have its own costs consequences. This is what occurred here.

(b) *the Lancaster affidavit*

[127] In his subsequent written submissions, Mr. De Lisio correctly complained about the Maloney affidavit, describing it as "inappropriate." Included with those submissions was an affidavit from Lancaster, sworn March 4, 2013, intended to refute the allegation of motive. This is what I referred to above as the "Lancaster affidavit."

[128] Lancaster denied targeting the individual respondents and deposed that she has always focused on issues, not on personalities, stating that her "target on the appeal has been the decision of the Audit Committee."

[129] My recitation of the background facts is completed. I will now move on to the issue of costs, the reason for this exercise.

[29] This, in a community where previously the highest structure had been a triple-scoop cone of ice cream.

VI. COSTS ANALYSIS

1. Statutory provisions regarding costs

(a) *jurisdiction*

[130] The jurisdiction of this court to award costs is found in s. 131(1) of the C*ourts of Justice Act,* R.S.O. 1990, c. C.43:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

(b) *Rule 57.01(1)*

[131] Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194, lists some of the factors for the court to consider when exercising its jurisdiction under s. 131 of the *Courts of Justice Act*:

> 57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,

> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
>
> (i) any other matter relevant to the question of costs.

(c) *Rule 57.01(3)*

[132] Rule 57.01(3) states:

> 57.01(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

(d) *Rule 57.01(4)*

[133] And Rule 57.01(4) reads:

> 57.01(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,
>
> (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
>
> (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
>
> (c) to award all or part of the costs on a substantial indemnity basis;
>
> (d) to award costs in an amount that represents full indemnity; or
>
> (e) to award costs to a party acting in person.

2. Amount not in issue, except for Dorsey

[134] The Committee is not seeking costs and counsel for the Committee did not participate in the cross-examination-and-post-cross-examination-of-Lancaster stage of the costs hearing.

[135] Mr. De Lisio, on behalf of Lancaster, does not quarrel with the rates charged or the hours spent by counsel for Harris, Siscoe and Stack as particularized in the Costs Outline filed, wherein the total claimed, on a partial-indemnity basis, is $9,105.46 (inclusive of HST and disbursements). However, the Costs Outline only covers the period up to February of 2013 and does not include costs associated with the cross-examination of Lancaster in July and the subsequent supplementary written submissions.

[136] Regarding Dorsey, Mr. De Lisio submits that, as a retiree and a self-represented litigant, his costs should be restricted to disbursements (exclusive of mileage, which was not particularized in his material).

[137] Dorsey is asking for costs of $6,155.69, including disbursements. That amount is excessive. Before his retirement, he was employed with Canadian Tire as an automotive specialist earning an hourly wage of $20.00. Dorsey has calculated his costs on an hourly basis using that rate. His explanation for charging the same rate in his new career as a "lawyer" that he was paid at the peak of his employment career? He said, "This has been harder than my past job . . ." Costs are not intended to fund a legal education.

[138] Dorsey conducted himself in a dignified, gentlemanly and respectful manner throughout. He had polish. But he did not add much to the resolution of the main issues. From what I observed, he took his cues from the positions adopted by various counsel and then hitched a ride on their arguments. He threw himself into the appeal with gusto, but gusto was not needed.[30]

[139] If it were necessary for me to quantify costs for Dorsey (and, in the circumstances, it is not), I would fix them in the range of $500.00 plus documented disbursements.

3. Entitlement

[140] The issue of costs comes down to a consideration of entitlement. Mr. De Lisio argues that the individual respondents are not entitled to costs for one or more of three reasons:

- the result of the appeal;
- Harris, Siscoe, Stack and Dorsey "were added as intervenors on their own initiative";
- Lancaster is a public-interest litigant.

[141] I will address each of these three arguments.

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[30] I cannot avoid observing that if Dorsey had devoted as much time to scrutinizing his campaign contributions and to the completion of Form 4, as he did to this appeal, he would not have been the subject of an audit application in the first place.

4. The result of the appeal

[142] Ours is a result-based legal system. The individual respondents were successful on the appeal and, typically, they should enjoy an award of costs. However, Mr. De Lisio takes a more nuanced view of the result. He submits that the decision rendered by this court:

> (a) clarified and provided guidance to the public and the authorities with respect to the [*Act*] at paragraphs 78, 83-85, 88 and 93 and in footnotes 25 and 26 of the Reasons;
>
> (b) over-ruled a finding of the Ontario Court of Justice and provided guidance in the law at paragraphs 89 and 91 of the Reasons.

[143] Mr. De Lisio further submits: "The case was novel and the issues of public importance. The legislation itself was relatively new, having been passed in 2010 to govern activities in financing municipal elections." I will put the "public importance" submission aside until I deal with public-interest litigation later in these Reasons and, for now, will discuss only the novelty argument.

[144] The law relating to costs and novel cases is well settled. "An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or where there were no previous authoritative rulings by courts": see Orkin, *The Law of Costs*, 2nd ed. (1994), at pp. 2-33 to 2-34. Like many legal principles, this one is more easily stated than applied.

[145] On behalf of Harris, Siscoe and Stack, it is argued that this case was not novel, the legislation was not new and there was earlier jurisprudence that addressed the issues raised by Lancaster. This argument conflicts with a statement made by counsel for the Committee, at the conclusion of the oral submissions in the appeal to this court, when he requested a decision as soon as possible, explaining that there were interested parties elsewhere in Ontario awaiting the result. This would seem to bespeak the existence of some gaps in the jurisprudence which, it was hoped, this case would fill. Also, one should recall the observation made by the chairperson of the Committee who, in the course of hearing the audit applications, said that Lancaster "has identified problems that exist with the

system" and, later, added that Lancaster "has done a great service to the electors of St. Catharines."

[146] This case certainly did not have the benefit of very much guidance from other court decisions. Deciding the issues that were raised was a lonely experience. On the issue of whether the completion of Form 4 should be subjected to a strict liability approach, there was one decision and I, in the result, disagreed with that decision. Consequently, the appeal made new law to that extent (whether it made correct law will be for time and others to determine).

[147] Because of the conclusion I have reached below on the public-interest and other issues, it is unnecessary for me to definitively determine the point that I am discussing and I will dwell on it no further, except to say, absent the public-interest issue and the allegation that Lancaster targeted the individual respondents, my inclination would have been to award the individual respondents only a portion of their partial-indemnity costs to reflect the novelty argument advanced by Mr. De Lisio. I do not consider this area of the law to be at all well-settled.

5. Were the individual respondents intervenors?

[148] An intervenor is "someone who, with leave of the court, voluntarily interposes in a proceeding": see Daphne Dukelow and Betsy Nuse, *The Dictionary of Canadian Law* (Scarborough, Ontario: Thomson Professional Publishing, 1991).

[149] Intervenors may, "with leave of a judge or at the invitation of the presiding judge . . . and, without becoming a party to the proceeding, intervene as a friend of the court [*amicus curiae*] for the purpose of rendering assistance to the court by way of argument": see Rule 13.02 of the *Rules of Civil Procedure*.

[150] As well, "a person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims . . . an interest in the subject matter of the proceeding . . . [or] that the person may be adversely affected by a judgment in the proceeding . . .": see Rule 13.01(1).

[151] "The general rule is that an intervenor should bear its own costs": see *Stoney Tribal Council v. Pancanadian Petroleum Ltd.*, [2000] A.J. No. 674 (Alta. C.A.) at para. 2 and *Toronto Police Association v. Toronto (Metropolitan) Police Services Board,* [2000] O.J. No. 2236 (Div. Ct.) at para. 7.

[152] A similar sentiment is expressed in this passage from *Friction Division Products, Inc. v. E.I. Du Pont de Nemours & Co. Inc. et al.* (1985), 51 O.R. (2d) 244 (H.C.J.) at p. 250:

> There will be no order as to the costs of Du Pont Canada Inc. as it intervened in the proceedings at its own request and for the protection of its own interests and was not brought into the proceedings by the applicant.

[153] I have already mentioned that, upon my review of the August 26, 2011 transcript, being the first appearance date in the Ontario Court of Justice, I determined that Harris, Siscoe, Stack and Dorsey were added as parties to the appeal. This was done on the motion of the court. They are not intervenors.[31]

6. Public-interest litigation

[154] I now arrive at the heart of the costs analysis. It is submitted by Mr. De Lisio "that there should be no costs awarded as against Lancaster as she commenced public-interest litigation." Is this public-interest litigation? Is she a public-interest litigant?

(a) *general definition*

[155] In *Incredible Electronics Inc. et al. v. Attorney General of Canada,* 2006 CanLII 17939 (ON SC), Perell J. conducted a meticulous review of the law relating to public-interest litigation, which he defined, at para. 59, as "litigation that involves the resolution of a legal question of importance to the public as opposed to private-interest litigation which . . . involves the resolution of a legal question of importance mainly only to the parties."

(b) *no authoritative definition*

[156] In *Incredible Electronics Inc. et al., supra,* at para. 101, Perell J. observed, "I have not found any case that defines authoritatively who is a public-interest litigant . . ."

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[31] I remain puzzled by the "configuration" of both appeals. I am surprised that the Committee is a party. I would have expected the only respondents to be the councillors against whom the audits were sought.

(c) *"special treatment"*

[157] There is "ample support for the proposition that the nature of public-interest litigation requires special treatment": see *Incredible Electronics Inc. et al., supra,* at para. 80.

[158] "[C]osts in public interest litigation require special treatment": see *Incredible Electronics Inc. et al., supra,* at para. 81, citing *British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 S.C.R. 371.

[159] Nevertheless, costs in public-interest litigation "are to be awarded on a principled basis": see *Harris v. Canada (T.D.)*, [2002] 2 F.C. 484 (F.C.T.D.) at para. 217.

[160] If Lancaster is a public-interest litigant, should she be spared liability for costs as a form of "special treatment"?

(d) *the litigation must be of public importance*

[161] "A public-interest litigant, at a minimum, must . . . take a side the resolution of which is important to the public": see *Incredible Electronics Inc. et al., supra,* at para. 91. In other words, the issues to be determined must be "of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues": see *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra,* at para. 38, per LaBel J.

[162] I repeat the point made by counsel for the Committee, at the conclusion of the oral argument of the appeal in this court, when he requested a decision as soon as possible as there were interested parties elsewhere in Ontario awaiting the result. Also, as a measure of the public importance of the matters raised by Lancaster, we have the observation of the chairperson of the Committee who, in the course of hearing the audit applications, said that Lancaster "has identified problems that exist with the system" and, later, added that Lancaster "has done a great service to the electors of St. Catharines."

[163] I am satisfied that the audit applications and the appeal to this court involved matters of public importance. That point is beyond sensible debate.

[164] Quite apart from the issue of over-contributions from associated corporations, there is, in my opinion, a particular public benefit to be achieved through the litigation of Form 4 deficiencies. If councillors throughout Ontario treat Form 4 as casually as St. Catharines councillors, the document might as well be abolished.

(e) *must have little to gain financially*

[165] In addition to an interest in a matter of public importance, a public-interest litigant should have "little to gain financially from participating in the litigation": see *Incredible Electronics Inc. et al., supra,* at paras. 94-95.

[166] It is not suggested that Lancaster had anything to gain financially from this litigation.

(f) *unselfish motives*

[167] A public-interest litigant must "manifest unselfish motives": see *Incredible Electronics Inc. et al., supra,* at para. 95.

[168] The allegation by the individual respondents that Lancaster targeted them because of their support for a particular development project to which she was opposed would, if true, negate the existence of unselfish motives.

(g) *why should a non-government party subsidize unsuccessful opponent?*

[169] In *Incredible Electronics Inc. et al., supra,* at para. 106, Perell J. addressed the tension surrounding the public-interest issue where the victorious litigants are non-government entities:

> The effect of the order is that if the other parties are successful then, nevertheless, for the good of the public, they are denied the costs that usually are the spoil of the victor. There is some sense to this outcome when the victorious litigant is a government, a public authority, or a regulator. They are already within the public sector and can be expected to act for the public good. *However, it is not self-evident why a victorious private interest litigant from the private sector should be compelled to subsidize its opponent*. (Emphasis added)

[170] I respectfully disagree with the apparent hesitancy reflected in the last sentence of the above excerpt. If the litigation raises an issue of public importance and if the loser in that litigation is a public-interest litigant, those facts should

trump the usual costs considerations to which a private-interest victorious litigant would otherwise be entitled. In other words, the litigation equivalent of *caveat emptor* should apply to any private-interest party involved in public-interest litigation.

[171] Even if one were to accede to the above hesitancy, it is to be remembered that the individual respondents were drawn into the audit applications by their own public conduct. And, is it not of importance that they are politicians who should be expected to act for the public good? Are they really private-interest litigants from the private sector?

(h) *the outcome and public interest*

[172] On the issue of public interest and outcome: "One must not confuse success in the *lis* and the public interest. The public interest is served simply by the litigation itself": see *St. James Preservation Society v. Toronto (City),* 2006 CarswellOnt 4103 (S.C.J.) at para. 25.

(i) *some other factors to consider*

[173] Several cases[32] have approvingly referred to the following passage from *St. James Preservation Society v. Toronto (City),*[33] *supra,* at para. 17:

> . . . My review of this jurisprudence suggests that the following factors should be considered in determining whether an unsuccessful litigant should be excused from paying costs because it was acting in the public interest:
>
> (1) The nature of the unsuccessful litigant.
>
> (2) The nature of the successful litigant.
>
> (3) The nature of the dispute (the "*lis*") – was it in the public interest?
>
> (4) Has the litigation had any adverse impact on the public interest?
>
> (5) The financial consequences to the parties.

[174] In the case before me, factors (1) and (2) already are known. I have dealt with factor (3). I will now address the remaining two factors from this list.

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[32] For example, *The Friends of the Greenspace Alliance v. Ottawa (City),* 2011 CanLII (ON SC) at para. 15 and *Guelph (City) v. Wellington-Dufferin-Guelph Health Unit,* 2011 CanLII 7523 (ON SC) at para. 20.

[33] The result was overturned on appeal at [2007] 227 O.A.C. 149.

(j) *any adverse impact on the public interest?*

[175] This appeal did not have an adverse impact on the public interest. Quite the opposite is true. The audit applications and the appeal to this court revealed a widespread, haphazard treatment of campaign finances by candidates. The individual respondents place chest-thumping weight in the fact that they returned the over-contributions when told to do so. Yet, but for the vigilance of Lancaster, they would have kept the money. They boldly ignore the finding of the Committee that there was *no excuse* for not knowing the associated-corporations rule (and they were never tested on their protestations of being unaware of that rule).

[176] Much is made of the fact that the conduct of the individual respondents and the errors with the Form 4s were said to be unintentional. If the lack of intention is the product of self-induced ignorance and carelessness, this hardly qualifies as redemption.

(k) *the financial consequences to the parties*

[177] The "financial situation [of the proposed public-interest litigant] and their tolerance for financial obligations and financial risk . . . may be a relevant [factor] but not determinative . . . of whether a litigant qualifies as a public-interest litigant . . . [and] the financial and other circumstances of the public interest litigant should be disclosed to the court in order for it to determine whether the public-interest litigant ought to be given special treatment": see *Incredible Electronics Inc. et al., supra,* at para. 100.

[178] "[W]hile impecuniosity is a relevant consideration, it is not an essential attribute of a public interest litigant . . . what is more important is the benefit that the public will derive from the litigant's participation in the proceeding": see *Guelph (City) v. Wellington-Dufferin-Guelph Health Unit,* 2011 CanLII 7523 (ON SC) at para. 30, citing *Incredible Electronics Inc. et al., supra,* at para. 100.

[179] In my view, the financial circumstances of a public-interest litigant are not of much relevance. Public-interest litigation is not the purview of the poor. The rationale behind the special treatment afforded such litigation is not solely to allow David to fight Goliath; it is to encourage litigious forays into matters of public importance by those holding no personal interest in doing so.

[180] There is no evidence of the financial consequences to the individual respondents should they not receive a costs award on this appeal. All I have are submissions and submissions are not evidence.

[181] There is evidence that, on Saturday, July 7, 2012, a fundraiser was held for Lancaster. Approximately $7,000 was raised to assist with her legal expenses. The advertisement for the event was titled "Integrity in Politics Fundraiser."[34]

[182] If I were required to do so (and I am not), I could not ascertain the relative abilities of the parties to pay costs or the impact on any of them of a no-costs order.

7. Did Lancaster "target" the individual respondents?

[183] Did Lancaster "target" the individual respondents as they allege? If she did, was she thereby pursuing a private interest? Were her motives unselfish?

[184] The cross-examination of Lancaster produced a transcript of 57 pages in length. She was questioned by counsel for Harris, Siscoe and Stack and by Dorsey. Lancaster was probed on why she selected certain candidates for an audit and not others. It seems that there were many other candidates who completed their Form 4s incorrectly. Dorsey suggested that he found a further nine culprits. (The 2010 election involved 12 races for City Council and six for Regional Council.)

[185] When pressed at several points in the cross-examination as to why she did not seek audits of more than six candidates, she testified, in answer to Q. 70:

> A. Well, I had quite enough on my plate . . .

[186] And in answer to Q. 89:

> A. Mr. Richardson, there's a limit to what I can do myself . . . I needed to be assured that I was right in what I was doing, and I could not take on any more . . .

[187] At Q. 154 she was asked about a specific candidate and answered:

> A. I was not selective. I did not have the time[35] to go through all of that filing to find out where that money came from . . .

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[34] The literature advertising the event did not say that it was an Anti-Port Dalhousie Development Fundraiser or an Anti-Tower Fundraiser. The advertisements were entirely consistent with the motive for the audit applications as professed by Lancaster.

[188] Dorsey asked this question:

> Q. 264 . . . do you believe a public litigant should select all violators?
>
> A. If you had nothing else in the world to do, you could certainly review everyone . . .

[189] Upon my study of the transcript and after considering all of the surrounding circumstances in this case, I am not persuaded that Lancaster "targeted" the individual respondents as alleged.

[190] The audit applications and the appeal to this court were brought in good faith and not out of any personal interest.

8. Is Lancaster a public-interest litigant?

[191] Having found that this case is public-interest litigation and having concluded that the allegation of improper motive has not been proved, I am comfortably satisfied that, from the outset, the only interest that propelled Lancaster was the public interest. It is patently obvious that many municipal candidates are ignoring the concept of associated corporations and that many do not take seriously their obligation to correctly complete Form 4. The proceedings brought by Lancaster will be a reminder to anyone running in the next municipal election that more is required from a candidate than a list of promises and a fetching smile. She has performed a valuable public service, the effect of which will improve financial accountability in future elections (and enhance integrity in politics, as her fundraiser proclaimed).

9. Rule 57.01(1) factors

[192] A review of the factors in Rule 57.01(1) is ritualistic when considering costs, even where only a few are applicable.

(a) *Rule 57.01(1)(0.a), (0.b), (a), (b), (c) and (d)*

[193] There is no dispute with the experience of counsel for Harris, Siscoe and Stack or with their rates charged or hours spent (Rule 57.01(1)(0.a)). Rules 57.01(0.b), (a) and (b) are not relevant in the circumstances of this case. The

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[35] As it was, two of her audit applications were rejected because they were not filed in time.

proceeding had some, but not much, complexity to it (Rule 57.01(1)(c)). The issues certainly were important (Rule 57.01(1)(d)).

(b) *Rule 57.01(1)(e) and (f)*

[194] In raising and pursuing the "targeted" issue, the individual respondents lengthened this proceeding. No one can lay claim to having significantly shortened the proceeding (Rule 57.01(1)(e)). Although counsel for Harris, Siscoe and Stack complained about the propriety of Lancaster having abandoned several grounds for appeal, I think such conduct is to be commended, not criticized (especially when the parties complaining brought, and then abandoned, a motion to quash the appeal) (Rule 57.01(1)(e) and Rule 57.01(1)(f))).

(c) *Rule 57.01(g) and (h)*

[195] Neither side improperly denied or refused to admit anything of significance that should have been admitted (Rule 57.01(1)(g)). Although the individual respondents did not admit that Lancaster was a public-interest litigant. I do not see anything improper in taking that position. They are entitled to make their allegation and to test it, as long as they are prepared to risk the associated costs consequences of failure in their effort. Rule 57.01(1)(h) is not relevant.

(d) *Rule 57.01(1)(i)*

[196] Rule 57.01(1)(i) allows the court to consider "any other matter relevant to the question of costs."

[197] The allegation that Lancaster targeted the individual respondents was an attack on her character. It was a suggestion of *mala fides*. Furthermore, it added approximately one year to this appeal along with additional legal expenses. With the attack having failed, Lancaster would, customarily, not be required to pay costs in respect of same. In fact, she might be entitled to an award of costs in her favour for the cross-examination (and, on the substantial-indemnity scale, in light of the serious nature of the unproved allegation). At the very least, the failure of the "targeted" allegation leaves the individual respondents open to the argument that their global success on this appeal is divided.

[198] Prior to the emergence of the "targeted" allegation, I was leaning toward awarding costs to Harris. In my view, he probably should have been let out of the proceedings at least following the appeal in the Ontario Court of Justice. However, his participation in the failed attack on Lancaster has a zeroing effect on his costs.

VII. CONCLUSION

[199] This appeal is public-interest litigation. It touches upon financial integrity in political campaigns and, accordingly, involves matters of public importance. Lancaster is a public-interest litigant and is entitled to, and deserving of, a no-costs order. Municipal elections will never be the same in St. Catharines.

[200] The claim by the individual respondents for a costs order is dismissed. All of the parties in this appeal shall bear their own costs.

_____

The Honourable Mr. Justice J.W. Quinn

RELEASED: December 11, 2013

CITATION: Lancaster v. Compliance Audit et al., 2013 ONSC 7631

COURT FILE NO.: 53579/12

DATE: December 11, 2013

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

ELEANOR LANCASTER

Appellant

- and -

COMPLIANCE AUDIT COMMITTEE OF THE CORPORATION OF THE CITY OF ST. CATHARINES, MATTHEW HARRIS, MATHEW SISCOE, LENARD STACK and BRIAN DORSEY

Respondents

REASONS ON COSTS

J.W. Quinn J.

Released: December 11, 2013

Tab 2

COURT FILE No.: Toronto – Old City Hall
Citation: *Lyras v. Heaps*, 2008 ONCJ 524

ONTARIO COURT OF JUSTICE

B E T W E E N :

JOHN LYRAS **Applicant (Appellant in Appeal)**

— AND —

ADRIAN HEAPS and COMPLIANCE AUDIT COMMITTEE OF THE CITY OF TORONTO **Respondents (Respondents in Appeal)**

Ronald J. Walker, Charles A. Toth ..... counsel for the appellant John Lyras
Paula Boutis ……..... counsel for the respondent Adrian Heaps
Kalli Y. Chapman ..... counsel for the respondent Compliance Audit Committee of the City of Toronto

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REASONS FOR JUDGMENT

LANE, J.:

This is an appeal pursuant to section 81 (3.3) of the *Municipal Elections Act, l996*, S.O. l996, c. 32, Sched. (the "MEA") from the decision of the Compliance Audit Committee of the City of Toronto (the "Committee") dated July 16, 2007. The Committee rejected Mr. Lyras' application for a compliance audit of the election campaign finances of Adrian Heaps, now Municipal Councillor for Ward 35, incurred during the 2006 Toronto municipal elections. The appellant seeks an order setting aside the decision of the Committee and requiring a compliance audit of Mr. Heaps' election campaign finances.

The Legislative Framework

This appeal is based on the statutory provisions set out in Section 81(1) to (4) of the MEA. An elector who believes on reasonable grounds that a candidate has contravened a provision of the MEA relating to election campaign finances may apply in writing for a compliance audit of those finances. Within thirty days of receiving the application, the council or local board must consider the application and decide whether it should be granted or rejected. Under s. (3.1), the council may establish a committee and delegate its powers and functions with respect to applications received in relation to an election for which it was

established. The committee to which these powers are delegated shall not include employees or officers of the municipality, or members of the council. Under s. 3.3, the decision of the council or of the committee may be appealed to the Ontario Court of Justice within 15 days after the decision is made, and "the court may make any decision the council…committee could have made." If it is decided to grant the application, the council shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

Issues:

In this appeal, the following issues are to be addressed:

1) What is the appropriate standard for review on this appeal? Is the decision of the Compliance Audit Committee entitled to deference such that a standard of reasonableness should apply? Or should this court undertake its own analysis of the issues and apply a correctness standard?
2) What is the test of "reasonable grounds" under the MEA?
3) On the material before the Committee, were there reasonable grounds to believe that Mr. Heaps has contravened any provision of the MEA? Mr. Lyras alleges that Mr. Heaps filed a Financial Statement and Auditor's Report which was defective in that he failed to::
    i. account for the value of a professional webmaster and website design services;
    ii. disclose all of the telephone expenses incurred during the campaign;
    iii. accurately disclose the cost of a flyer which was produced and distributed during the campaign, and
    iv. account for the market value of his campaign office rental expense.

The Facts

On or about November 16, 2006, Mr. Heaps was elected as Municipal Councillor for Ward 35 (Scarborough Southwest) in the City of Toronto. On or about March 29, 2007, Mr. Heaps filed a Financial Statement with Elections and Registry Services of the City Clerk's Office. According to his Financial Statement, Mr. Heaps spending limit for the campaign period March 20, 2006 to January 2, 2007 was $25,957.30. He reported total campaign expenses which were subject to the spending limits of $24,354.04. He reported additional campaign expenses of $4,193.49 which were not subject to any spending limits and which are not in issue on this appeal.

Mr. Lyras assisted Michelle Berardinetti in her campaign for election as Municipal Councillor in the same ward. He also works in the office of Ms. Berardinetti's husband who is the M.P.P. for Scarborough Southwest. On June 29, 2007, he applied to the Clerk of the City of Toronto for a compliance audit of Mr. Heaps' election campaign finances pursuant to s. 81 of the MEA. He alleged that Mr. Heaps incurred total campaign expenses in excess of his reported limit, that his Financial Statement failed to disclose the full extent of his

campaign finances and that his expenses exceeding his spending limit, and that he failed to account for goods and services which were purchased for less than fair market value.

On July 16, 2007, the Committee which was comprised of a three member panel, heard representations on behalf of Mr. Lyras and Mr. Heaps, and reviewed the materials which were filed in support of their positions. On motion by Mr. Love, the Committee rejected Mr. Lyras' application by a vote of 2 to 1, Ms. MacLean voting in the negative. There were no reasons given for why the committee members voted as they did.

1) The Standard of Review?

The Supreme Court of Canada in its recent decision of *Dunsmuir v. New Brunswick, 2008 SCC9 (CanLII)* determined that there ought to be only two standards of judicial review: correctness and reasonableness. When applying the correctness standard, a reviewing court will not show deference to the decision makers' reasoning process but will undertake its own analysis of the question, decide whether it agrees with the decision under appeal and, if not, will substitute its own view and provide the correct answer. A court conducting a review for reasonableness will inquire into the qualities that make a decision reasonable, including the existence of justification, transparency and intelligibility in the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible on the facts and the law. This deferential standard involves respect for the need for particular expertise and experiences in decision making, and the legislative choice to leave some matters in the hands of administrative decision makers.

The majority of the Supreme Court directed that an appellate court must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision maker in a particular category of question. Only if this inquiry proves unfruitful, should a court analyze the factors making it possible to identify the proper standard of review. Those factors tending to deference include: the existence of a privative clause; whether the question is one of fact, discretion or policy, or whether the legal issue is intimately intertwined with and cannot be separated from the factual issue; where a decision maker is interpreting the statute closely connected with its function with which it will have particular familiarity; or where the decision maker has developed particular expertise in the application of the common law to its own statute. Questions of central importance to the legal system as a whole, outside the specialized area of administrative expertise, questions regarding jurisdiction or the constitution, will always attract a correctness standard.

Binnie J. indicated that "contextualizing" the reasonableness standard will require a reviewing court to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute, and the extent of the discretion conferred. He stressed the need for careful consideration of the reasons given for the decision.

Justices Deschamps, Charron and Rothstein re-emphasized the significance of the nature of the questions at issue: whether questions of law, questions of fact or questions of mixed law and fact. Questions of fact always attract deference, particularly if there is a privative clause. If the body oversteps its delegated powers, is asked to interpret laws outside its area of expertise, or the legislature has provided for a statutory right of review, deference is not owed to the decision maker. When considering a question of mixed fact and law, a reviewing court should show the same deference as an appeal court would show a lower court.

The jurisprudence dealing with the standard of review applicable to appeals from decisions about compliance audits under the MEA is mixed. The appellant relies on decisions of my brothers Culver and Duncan in *Chapman v. Hamilton (City), [2005] O.J. No. 1943* and *Savage v. Niagara Falls (City), [2005] O.J. No. 5694* respectively. In *Chapman*, Culver J. found that there was no privative clause, nor any specialized skill and knowledge exercised by the Council in making its decision. He concluded that political considerations that are the particular responsibility of the local Council have no place in the analysis of whether an elector has reasonable grounds to believe that a candidate has contravened the provisions of the MEA. He also found that the Council debate on the issue indicated that the councillors were unwilling to judge their peers and wanted the court to make the ultimate decision which, in his view, amounted "to a failure or refusal to meaningfully exercise jurisdiction." (para. 37) In *Savage*, Duncan J.agreed with Culver J. that the MEA grants the appellate court the widest possible power of review on appeal. He also noted that the decision before him was made in camera, with no record and no reasons given. In his view, "it is implicit…in a deferential or more limited approach, that the reviewing court must have some record of the reasons or the process that brought about the decision. Where that is completely lacking, there is nothing to show deference to." (para 8)

Sheppard J. in *Sean Harrison v. the Toronto District School Board and Michael Coteau, unreported decision of the O.C.J. released June 19, 2008,* had occasion to consider a decision not to grant a compliance audit made by the Compliance Audit Committee delegated to perform that function by the Toronto District School Board. He found that the Committee consisted of two chartered accountants and a lawyer in the municipal field, all of whom "have extensive knowledge of the election campaign finance provisions of the Municipal Elections Act, l996." As "the Committee was appointed by a non expert School Board and the City because of their expertise," he found that far greater deference was owed to their decision than to that of the political bodies in *Chapman* and *Savage*. He also found, however, that on either the correctness standard or the less demanding deferential standard, the hard copy documents making up the applicant's initial complaint in that case "simply do not support the complaint."

The Committee which made the decision under appeal before this court is exactly the same Committee whose decision came before Justice Sheppard. In this case, however, they were acting under s. 81(3.1) of the MEA as the committee delegated to make the decision by the Council itself.

The Compliance Audit Committee for the 2006 Municipal Election was established by the Toronto City Council pursuant to recommendations considered June 27-29th, 2006 and September 25-27th, 2006. The express intention was to establish an independent, quasi-judicial committee which would have "demonstrated knowledge and understanding of municipal election campaign financing rules, proven analytical and decision-making skills, and experience working on a committee, task force or similar setting." After a selection process, three members were chosen for the committee: two chartered accountants who had been members of the Toronto Election Finance Review Task Force, and a lawyer with municipal law experience who had been on various committees of the Canadian Bar Association.

On April 17, 2007, the Committee adopted Rules of Procedure which, among other things, provide that meetings shall be based on an agenda, open to the public, with an opportunity for the applicant and the candidate to address the Committee, answer questions and view any documents submitted to the Committee, and setting out rules for debate. Decisions are to be made by vote in the form of a motion, and recorded in the minutes of the Committee.

The Minutes indicate that, at their meeting of July 16, 2007, the Committee considered three applications for a compliance audit relating to the expenses of three different politicians. The Committee granted the first application, denied Mr. Lyras' application on a vote of two to one, and unanimously denied the third application. The Minutes also indicate the materials that were before the Committee for review, and that the Committee unanimously agreed to extend the usual speaking time for both the applicant and Mr. Heaps to address the Committee.

I agree with Justice Sheppard that the professional expertise of the specialized Compliance Audit Committee appointed by the Toronto City Council distinguishes this case from those of *Chapman* and *Savage*. The members of the Committee have "demonstrated knowledge of municipal election campaign finance rules" and were appointed with the precise purpose of deciding when applications for compliance audits were appropriate. Their function is to screen applications for such audits, so that only those which show "reasonable grounds" that a contravention occurred will proceed. This function is a narrow one, the span of their authority is limited to the MEA, and the issues they have to decide are questions of mixed law and fact. Applicants and candidate respondents have full opportunity to present their positions and relevant materials to the Committee in both oral and written submissions, and to answer any questions put by Committee members. Although the Committee does not issue reasons for its vote, the process of considering the application is an open and transparent one. The Committee does not deliberate in private and, like other municipal committees, their decision is made by motion on the record. In these circumstances, I have concluded that considerable deference must be shown to the decision of the Committee.

In my view, the fact that the Committee does not give reasons for its decision is not a factor which should weigh heavily given the context and their function. When judicial or quasi-judicial officers are acting in a "gatekeeper" function, not giving reasons is not an unusual practice. I note that a justice of peace or judge does not normally give written

reasons for issuing or denying a search warrant, nor does the Supreme Court of Canada give reasons for refusing leave to appeal.

The MEA, however, does not include a privative clause and expressly allows this Court on an appeal relating to election financing to "make any decision the council…or committee could have made." In my view, this statutory authority permits this court to review the decision of the Committee for its reasonableness, particularly as it may relate to questions of mixed fact and law which arise from the allegations before the Committee. Should this court identify any questions of law alone which could potentially arise from these allegations, this Court can also make determinations of general application on a correctness standard. As the Committee was not structured as a "tribunal" with a duty to provide reasons for its decisions, it becomes the residual role of this appeal court to articulate the law where those with greater expertise on the MEA itself are not in a position to do so.

2) The meaning of "reasonable grounds"?

The meaning of "reasonable grounds" under the MEA is one such question of law. The appellant submits that "reasonable grounds" should be defined as "credibly based probability… …not to be equated with proof before a reasonable doubt or a prima facie case." This is the standard of persuasion articulated by Justice Hill in *R. v. Sanchez and Sanchez 93 C.C.C. (3d) 357* with respect to the issuance of a search warrant and adopted by Culver J. in *Chapman, supra at para. 41-42.* The respondent submits that a more appropriate standard is the standard of "reasonable grounds" as determined by the jurisprudence relating to applications for judicial recount under s. 47(1) of the MEA: *Devine v. Scarborough (City) Clerk, 27 M.P.L.R.(2nd) 18 (MacDonnell Prov. J.) and Harris v. Ottawa (City), 27 M.P.L.R. (2d) 36 (Blishen Prov. J.).* In *Harris,* the court held at paras 17 and 18 that the test for "sufficiency and reasonableness of the grounds" is "certainly a lower test than the usual civil burden of proof on a balance of probabilities….but must simply provide a prima facie case."

There is no dispute that "mere suspicion, conjecture, hypotheses or 'fishing expeditions,'" and that which is "speculative and remote" fall short of the minimally acceptable standard. The question is whether the test for "reasonable grounds" is "credibly based probability" or "a prima facie case."

In *Savage supra*, Duncan J. at para 10 thought that the "reasonable grounds" requirement had been met where the applicant raised issues which "an auditor might very well choose to investigate." In *Sanchez (adopted in Chapman, supra*), Hill J. defined "reasonable grounds" as "a practical, non-technical and common sense probability as to the existence of the facts and the inferences asserted."

I note that, in this case, the two chartered accountants on the Committee made up the majority who did not think the grounds for a compliance audit had been made out. If the test were as set out in *Savage,* their decision warrants considerable deference. It also strikes me that even if the appellant had what he considered reasonable grounds to ask for an audit, the Committee has considerably more information at their disposal. Having heard all the 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.

. 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 (B.C.C.A.) leaved to appeal to S.C.C. refused 212 C.C.C. (3d) vi; Mugesera v. Canada (Minister of Citizenship and Immigration) (2005) 197 C.C.C. (3d) 233 (S.C.C.) at para. 114.* A "prima facie case" connotes a case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction: *R. v. Mezzo 27 C.C.C. (2d) 97 (S.C.C.).* Black's Law Dictionary 6th ed at p. 1190 also indicates that "Prima facie evidence refers not only to evidence which would reasonably allow the conclusion which the plaintiff seeks, but also to evidence which would compel such a conclusion if the defendant produced no rebuttal evidence." As MacDonnell, Prov. Div. J. noted in *R. v. Skorput (1992) 72 C.C.C. (3d) 294 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*.

In my view, where the statute requires "a belief on reasonable grounds," the jurisprudence applicable in other contexts indicates that the standard to be applied is that of an objective belief based on compelling and credible information which raises the "reasonable probability" of a breach of the statute. The standard of "a prima facie case" in either its permissive or presumptive sense is too high a standard.

3) Application of this standard to the decision of the Compliance Audit Committee?

Having determined the test for "reasonable grounds" in law and having decided that this court ought to show considerable deference to the expertise of the Compliance Audit Committee in its determinations of fact and law, I now consider whether their majority conclusion rejecting the request for a compliance audit was reasonable. This requires that I examine the record of the proceedings and particularly the materials and representations which were before the Committee when their decision was made. I will address each of the contested issues in turn.

a) The value of a " professional webmaster" and website design services?

The novel issue in this appeal is the claim that Mr. Heaps failed to accurately disclose the cost of his campaign website. The only expense information filed by Mr. Heaps in respect to this website was an invoice in the amount of $120 for "3 months web hosting" issued by Peter Diplaros who is the Executive Editor of Corporate Knights, a company run by Mr. Heaps' son Toby Heaps. According to an excerpt from the Corporate Knights website, Peter Diplaros is "the webmaster and chief analyst for the fundlibrary.com" and "his favourite hobby is large-scale web site architecture and design." Given the quality and

comprehensiveness of the thirty-page website, Mr. Lyras asserted that "it was implausible that it was designed and created, as well as hosted for a three-month period, by a professional webmaster" with such experience for a cost of only $120. Mr. Lyras obtained two quotes for the design, creation and hosting of websites similar to that operated by Mr. Heaps during the campaign, one was for more than $5,965.00, the other for $2,800.00. In his view, even the lower of these costs would have caused Mr. Heaps to exceed his campaign spending limits.

Mr. Heaps replied that the cost of developing the website was not reported as it was not "paid for", but rather obtained through "voluntary unpaid labour," a specific exemption from the definition of "contribution" under section 66(2)2.i of the MEA . He indicated to the Committee that the work was done "on volunteer time," took approximately 10-14 hours, and was done by Peter Diplaros, himself, his wife, his son and others who contributed volunteer time to the content and upkeep of the site.

In his written submissions to the Committee in support of his application, counsel for Mr Lyras asserted that the "voluntary unpaid labour" provision of the MEA does not apply to the contribution of services by those who are in the business of providing such services, i.e. that the MEA distinguishes between voluntary unpaid labour and the contribution of professional services. He also submitted that "allowing candidates to evade the application of the election spending limits to professional services obtained on a no-charge basis would result in inequality and unfairness among candidates."

There is no dispute that the cost of producing a website is not distinguishable from the cost of producing other campaign literature or advertising. Mr. Heaps submits, however, that to the extent that a brochure, website or other advertising is produced by "voluntary unpaid labour," these are not "contributions" under the MEA and need not be declared as such. Unless something is a "contribution," then the rules for the valuation of the goods and services dealt with in s. 66(3) of the MEA do not apply.

I agree with counsel for the Committee that Mr Lyras has misinterpreted and misapplied the provisions of the MEA. Section 66(2)1.iii specifies that "if goods and services used in a … campaign are <u>purchased</u> for less than their market value, the difference between the amount paid and the market value" are considered a "contribution." Section 66(2)2.i provides that "the value of services provided by voluntary unpaid labour"…''are <u>not</u> contributions." Section 66(3) describing how to value goods and services only applies to "goods and services provided <u>as a contribution</u>." (my underlining)

Under the MEA, the level of expertise that a volunteer has in the area in which they elect to provide volunteer services is an irrelevant consideration in the definition of what is a "contribution." It is also clear that the rules about valuing "contributions of goods and services" add nothing to the specific statutory definitions of what is or is not a "contribution." The MEA is very clear that "the value of services provided by voluntary unpaid labour" need not be considered a contribution, and makes no distinction between free professional services and free services for other campaign assistance.

Mr Lyras also submitted that the contribution of services to design and create a website is a contribution of "political advertising" within the meaning of section 66(2)2iv of the MEA, and that the existence of the specific exemption for "the value of political advertising provided without charge on a broadcasting…under the Broadcasting Act (Canada)" implies that other forms of "political advertising" such as a website are not exempt from the reporting requirements. In my view, this is a further misreading of the MEA. This specific exemption relates to the value of the time provided for using the broadcast medium to distribute the message. The cost of developing the message is akin to all other advertising used in the campaign and is reportable, except in so far as any of the services used to produce it were provided by "voluntary unpaid labour."

The clear statutory exemption for "voluntary unpaid labour" is a policy decision of the Legislature which reflects the realities of political life, including the range of competencies volunteers bring to political campaigns and the difficulties of tracking and putting a value on volunteer services. Any inequality in the application of the rules to particular candidates is balanced by an exemption to the definition of "contribution" which encourages public participation in the electoral process. The Legislature has chosen to encourage "services provided by voluntary unpaid labour" in election campaigns and it is not the role of the Committee or the Court to question that policy decision.

The only remaining issue is whether there was any "compelling and credible information" before the Committee that objectively raised a "reasonable possibility" that Mr. Heaps failed to report the cost of developing and maintaining his website. Mr. Heaps' evidence was that the services used to create and maintain the website were provided by voluntary unpaid labour, including that provided by Peter Diplaros. There is no "compelling and credible information" from Mr. Lyras to the contrary. What he put before the Committee is nothing more than speculation and conjecture. That Mr. Diplaros works for Corporate Knights, does some "webmaster" services as part of one of his jobs, and likes to construct complex websites as a hobby is not evidence that he did not donate his time to create the original website. The quality of the website is irrelevant, as is the fact that other candidates may have paid for similar services, or that the services may have had substantial market value if purchased on the market.

In my view, it is the role of the Committee to make findings of credibility on the information and representations before them. In this case, the majority finding that Mr. Lyras had no reasonable grounds for his complaint about the costs of the website is a reasonable determination. I also find that their understanding of the applicable law was correct.

b) All telephone expenses?

Mr. Lyras submitted that Mr. Heaps failed to account for the cost of two telephone numbers which were listed on his campaign website and his campaign literature and which he asserts were utilized during the course of the campaign. Mr. Heaps responded that he was not required to account for the expenses of his home telephone number and his son's cellular

telephone number which was "on a plan" and "was utilized for a total of 14 incoming calls from media." On the evidence before the Compliance Audit Committee, Mr. Heaps did account for the cost of the main telephone line used in his campaign and indicated that the use of these private telephone lines for the campaign was negligible.

The decision that an audit of the costs of these lines was unnecessary is reasonable, given the privacy interests at stake and the unrealistically onerous (if not impossible) burden of determining different types of usage of what are essentially private lines. In my view, the legislative intent is not to extend the ambit of the MEA to the privacy of the home telephone lines of candidates for public office and their families. To hold otherwise would only lead to fishing expeditions which could well deter persons from seeking public office. If correctness were the standard of review this court was to apply, I would also say that this decision is correct

c) The cost of a flyer?

Mr Lyras submitted that Mr. Heaps did not accurately disclose the cost of an 11 inch by 17 inch flyer that was produced and distributed during the campaign. More specifically, he asserted that the receipt filed for obtaining 15,000 copies of this flyer from Meade Graphics Inc. for a cost of $2,494.32 was some $351 below the quote Mr. Lyras later obtained from Arco Graphics (operating at the same location) for printing a similar product, which quote did not include a graphic charge estimated at an additional $300-$500.

Mr. Heaps replied that he contracted only with Meade Graphics and the invoice he submitted was the total amount he was charged for the brochure. There was also evidence before the committee that Meade Graphics and Arco are not related companies, and that Meade used Arco "as a supplier for smaller projects." As against this concrete evidence of the invoice and a letter from the owner of Meade Graphics, a higher quote obtained by the appellant from an unrelated company after the fact is no more than speculation and conjecture, hardly compelling and credible information which raises the reasonable possibility that Mr. Heaps underreported the actual cost of the brochure. Again, I find the decision of the Committee reasonable and correct.

d) The true market value of his campaign office rental expenses?

Mr. Lyras asserted that the campaign office rental expenses claimed by Mr. Heaps did not reflect the market value of this expense, and suggested that a non-arms length corporation may have paid a portion of his rental expenses or entered into a space sharing arrangement to reduce his rental expenses without this benefit having been declared. In support of these submissions, he asserted that Mr. Heaps rented a property at 3280 Danforth Avenue in Scarborough which the owner after the election indicated would be rented for $1200 per month. Mr. Heaps claimed a total rental cost of $1600, or $800 per month. Mr Lyras also pointed to a handwritten notation on the rental receipt submitted by Mr. Heaps which indicated that "$1000 paid by Corporate Knights Inc. for use of office space."

indicated that Mr. Heaps' eldest son Toby Heaps was the president, and sole director of Corporate Knights.

There was ample evidence before the Committee to rebut all these allegations. There was evidence that Toby Heaps acted as an agent for the campaign to find the rental property and that he paid a deposit which Mr. Heaps subsequently reimbursed. There was evidence that he negotiated the rental of the premises from one of the co-owners and that Corporate Knights neither shared the space, nor subsidized the rental cost. The fact that Mr. Lyras obtained a higher quote for rental of the premises after the election is irrelevant to the rental actually paid by Mr. Heaps. There is evidence that this higher quote was based on a potential long-term lease with upgrades to the basement, washroom and the exterior paid for by the owners, whereas Mr. Heaps' campaign rented the premises on an "as is" condition. In actual fact, the premises were never leased to anyone other than Mr. Heaps' campaign and, as of July 2007, were listed for sale. In the circumstances, the only rental value of the premises was that paid and declared by Mr. Heaps for the two months of the campaign.

Against this evidence put before the Committee by Mr. Heaps, the allegations of Mr. Lyras were nothing more than speculation and conjecture. On either a reasonableness or correctness standard, there were no "reasonable grounds" to order a compliance audit on this issue.

Decision

For the reasons indicated above, the appeal is dismissed. Counsel can make further submissions as to costs upon application to the trial coordinator at the Old City Hall for a hearing date.

_____

Justice Marion E. Lane

October 17, 2008.

Tab 3

COURT FILE No.: Halton, 3158/11
DATE: 2012·06·29
Citation: *Gunn v. The Halton District School Board (Compliance Audit Committee)*, 2012 ONCJ 684

ONTARIO COURT OF JUSTICE

B E T W E E N :

Wendy GUNN
Applicant

— AND —

The Halton District School Board
The Halton District School Board Compliance Audit Committee
Kathryn Bateman-Olmstead
Respondents

Before Justice Richard J. LeDressay
Heard on May 14, 2012
Reasons for Judgment released on June 29, 2012

Novalea Jarvis ..... for the applicant, Wendy Gunn
Michael Kerr and C. O'Donohue ..... for the respondent Halton District School Board and for the respondent Halton District School Board Compliance Audit Committee
Raivo Uukkivi .....for the respondent Kathryn Bateman-Olmstead

LeDRESSAY, J.:

THE ISSUE:

[1] On May 10, 2011, the Halton District School Board Compliance Audit Committee considered the application submitted by the applicant, Wendy Gunn, pursuant to s. 81(1) of the *Municipal Elections Act*, R.S.O. 1996, Ch. 32. The applicant had indicated in her application that she believed on reasonable grounds that a candidate, Kathryn Bateman-Olmstead,

had contravened a provision of the *Municipal Elections Act* relating to election campaign finances. Specifically, the applicant alleged that statements made by the candidate, Kathryn Bateman-Olmstead, in her Form 4 Financial Statement, filed in accordance with the provisions of the *Municipal Elections Act,* were false, misleading and untrue. The applicant had therefore applied for a compliance audit of the candidate's campaign finances.

[2] The decision of the Halton District School Board Compliance Audit Committee was that it did not agree with the applicant that there were reasonable grounds that the candidate, Kathryn Bateman-Olmstead, had contravened a provision of the *Municipal Elections Act* and so a compliance audit was not ordered by them.

[3] The applicant in this case has therefore appealed the decision of the Halton District School Board Compliance Audit Committee to the Ontario Court of Justice pursuant to s. 81(6) of the *Municipal Elections Act*.

THE PROCESS AND EVIDENTIARY CONSIDERATIONS:

[4] On April 16, 2012 a ruling was made by this court with respect to this matter indicating that because of the particular circumstances of this case the appeal would be heard by way of a *de novo* hearing in the Ontario Court of Justice. The parameters of the hearing were established as follows. The applicant, Wendy Gunn, was permitted to have the material that was in her original application that had previously been considered by the Halton District School Board Compliance Audit Committee as well as the additional affidavit material that she had filed on the appeal prior to the evidentiary and process issues being argued on March 30, 2012 be considered on the appeal itself. The respondent, Kathryn Bateman-Olmstead,

was provided an opportunity to respond, if she chose to do so, to the allegations made by the applicant to the Halton District School Board Compliance Audit Committee and to the applicant's material which had been filed on the appeal. Ms. Bateman-Olmstead did, in fact, file responding material with respect to this matter.

[5] In order to be clear, the evidentiary basis being taken into consideration on this application is as follows:

- The affidavit of Wendy Gunn, sworn June 15, 2011, which is part of the original application record on the appeal.
- The affidavit of Catherine Duncan, sworn June 15, 2011, which is also part of the original application record on the appeal.
- The affidavit of Sharon Baroni, sworn June 15, 2011, which is also part of the original application record on the appeal.
- The affidavit of Wendy Gunn, sworn June 26, 2011.
- The affidavit of Cathie Best, sworn September 29, 2011.
- The affidavit of Wendy Gunn, sworn September 28, 2011.
- The affidavit of Wendy Gunn, sworn December 29, 2011.
- The affidavit of Kathryn Bateman-Olmstead, sworn April 30, 2012.
- The affidavit of Don Vrooman, sworn May 10, 2012.
- The affidavit of Carolyn Spinney, sworn May 2, 2012.
- The affidavit of Laura Lynn Klemenchuk dated April 26, 2012.
- The affidavit of John Gowing dated April 27, 2012.
- The affidavit of Barb Gowing dated April 27, 2012.

[6] In a separate oral ruling made at the start of proceedings on May 14, 2012, an evidentiary ruling was made that the court would not consider the further affidavit material filed on behalf of the applicant in response to the affidavit material presented by the respondent, Kathryn Bateman-Olmstead. I am specifically referring to the affidavit of the applicant, Wendy Gunn, dated May 8, 2012. That ruling was, in essence, for two reasons. First, the court had allowed this matter to proceed by way of a *de novo* hearing in the particular and

somewhat unusual circumstances of this case reasoning that it was important, in all the circumstances of this case as the process unfolded before the Halton District School Board Compliance Audit Committee, to allow the applicant to fully set out the basis of her belief that she had reasonable grounds that the candidate had violated the campaign finance provisions of the *Municipal Elections Act* and to allow the candidate an opportunity to respond. It was conceded at the hearing on March 30, 2012 that the applicant had completed her evidentiary basis for her belief in her reasonable grounds. As such, the candidate was provided with an opportunity to respond. There was no provision made for the applicant to further reply to the candidate's response. The process has to have a fair end point and in the court's view, it was reached once both the applicant and the candidate had a full opportunity to put forward the material that they wished the court to consider and then to make submissions based on the material submitted. Second, the parts of the applicant's additional affidavit, dated May 8, 2012, related to signs and websites could have been easily included in her initial material and to allow that material to be considered would result in unfairly splitting the applicant's case.

[7] In another oral ruling on May 14, 2012, the court also made clear to the parties that the narrow issue to be decided that day was whether the applicant had reasonable grounds to believe that the candidate, Kathryn Bateman-Olmstead, had violated the *Municipal Elections Act* related to campaign financing. A ruling was therefore made that the material in Kathryn Bateman-Olmstead's responding affidavit concerning the background of counter-allegations between the parties regarding the dispute each side had with the other side's respective political positions, which has clearly led to some animosity between the parties, was not relevant

and was not going to be considered by the court, nor was the applicant's response on this issue in her affidavit dated May 14, 2012.

THE FACTS:

[8] On September 3, 2010, Kathryn Bateman-Olmstead registered as a candidate for Trustee for the Halton District School Board, Ward 4. There were two other candidates for this position. The election was held on October 25, 2010 and Kathryn Bateman-Olmstead was elected Trustee with 3,568 votes.

[9] On March 18, 2011, Kathryn Bateman-Olmstead filed her Form 4 Financial Statement as required by the *Municipal Elections Act*. That financial statement is found in the original application record filed on this appeal. It is Exhibit B in the affidavit of Wendy Gunn dated June 15, 2011 and it is found at Tab B in the original application record.

[10] In the Form 4, the candidate indicated that her spending limit was $25,002.20. The total contributions received were $1,828.83. The only direct financial contribution was from the candidate herself in the amount of $1,315.83. There were no contributions listed from any other party. The balance of contributions of $513.00 was made up from signs contributed from past inventory.

[11] The campaign expenses listed in the Form 4 were $2,136.83. The candidate claimed the following expenses:

Advertising	0.00
Bank Charges	8.00
Brochures	720.38
Inventory Contributed	513.00
Nomination Filing Fee	100.00

Phone and/or Internet	212.38
Signs	383.07
Sign Deposit	200.00

[12] On April 15, 2011, the applicant Wendy Gunn applied for a compliance audit of the candidate Kathryn Bateman-Olmstead's election campaign finances pursuant to s. 81(1) of the *Municipal Elections Act*. In the initial written material that was filed by the applicant, she outlined three reasons for her reasonable grounds to believe that Kathryn Bateman-Olmstead had contravened a provision of the *Municipal Elections Act* relating to election campaign finances.

[13] First, the applicant submitted that Kathryn Bateman-Olmstead had indicated zero contributions from others in the 2010 election despite receiving $3,495 in contributions from others in the 2006 election. This, coupled with the fact that her campaign website indicated a statement saying, "Thank you for the financial support, campaign expenses add up," made it unlikely, in the applicant's view, that Kathryn Bateman-Olmstead did not receive any funds from other contributors for the 2010 election campaign.

[14] Second, a newspaper article was submitted indicating that Kathryn Bateman-Olmstead had solicited funds on her website before being registered as a candidate. The applicant, therefore, wanted the Halton District School Board Compliance Audit Committee to investigate whether Kathryn Bateman-Olmstead received donations outside of her election period.

[15] Third, the applicant submitted that, considering the number of signs that the applicant observed in the neighbourhood that the candidate, Kathryn Bateman-Olmstead, must

have spent more than the $383.07 which the candidate claimed she spent on signs in her Form 4, Financial Statement. This submission was supported by a documented example of pricing for election signs.

[16] The Halton District School Board Compliance Audit Committee met on May 10, 2011. The committee considered the material in the applicant's initial application as well as receiving some clarification and a response from the candidate, Kathryn Bateman-Olmstead, regarding the allegations in the application. The committee concluded that the candidate accurately and in good faith completed her Form 4 Financial Statement and declined to order an audit.

[17] The applicant then appealed this matter to the Ontario Court of Justice pursuant to s. 81(6) of the *Municipal Elections Act*. In the additional material filed and ruled admissible at this *de novo* hearing, the applicant provided some further detail to support the reasons provided in her initial application to the Halton District School Board Compliance Audit Committee and the applicant submitted a further new allegation with respect to Kathryn Bateman-Olmstead's campaign website. The additional allegation related to the fact that the candidate's website was neither noted as a contribution nor as an expense in her Form 4 Financial Statement.

[18] The applicant, Wendy Gunn, has indicated in her initial application to the Halton District School Board Compliance Audit Committee and in her additional affidavit material filed on appeal that she has reasonable grounds to believe that the candidate, Kathryn Bateman-Olmstead, has contravened the *Municipal Elections Act* relating to election finances. The applicant states that she believes that the statements made by Kathryn Bateman-

Olmstead in her Form 4 are false, misleading and untrue. In paragraph 28 of her affidavit dated June 15, 2011, the applicant states that she believes that Kathryn Bateman-Olmstead has contravened the following sections of the *Municipal Elections Act*: Section 69(1)(a-d), Section 69(f)(ii) and (iii), Section 69(g), Section 69(k), Section 70(1) and (2), Section 74(1), Section 76(1) and (2), Section 78, Section 89(h) and (m), Section 90 and Section 91.

[19] The applicant's belief that the candidate contravened these provisions of the *Municipal Elections Act* is based on the following submissions.

ALLEGED REASONABLE GROUNDS - RE CONTRIBUTIONS:

[20] The applicant asserts that the only contributions set out in the candidate's Form 4 Financial Statement are a contribution from the candidate in the amount of $1,315.83 and an amount regarding the signs contributed from past inventory. The applicant notes that the candidate claims that she received no contributions from any other individuals, unions or corporations and denies that she received any contributions in goods or services.

[21] The applicant asserts that her reasonable grounds to believe that Kathryn Bateman-Olmstead received contributions which are not listed in her Form 4 Financial Statement are the following.

[22] First, the candidate received 3,568 votes in the 2010 election. The applicant asserts that given the number of supporters and the fact that the candidate had a live website asking for donations, that it is inconceivable that no one donated to her campaign expenses, particularly considering that during the 2006 election, Kathryn Bateman-Olmstead had received $3,495 in contributions. The applicant asserts that this provides her with reasonable grounds

to believe that Kathryn Bateman-Olmstead received contributions from persons other than herself to her campaign.

[23] Second, Kathryn Bateman-Olmstead had a website that was active as of August 24, 2010. This website indicated "re-elect Kathryn Bateman-Olmstead, School Trustee, Oakville Ward 4." In addition, the website had a heading reading "Donate" and underneath that indicated that an election campaign is an expensive undertaking and "even a small donation to my campaign will help me communicate with voters via this website, signs, literature and advertising. To make a donation, please email Kathryn4kids@cogeco.ca or call me at 905-827-8271."

[24] Cathie Best in her affidavit indicates that on September 2, 2010, she received an email from the applicant Wendy Gunn at 4:54 p.m. relating to this website which promoted the candidacy of Kathryn Bateman-Olmstead. At that time Kathryn Bateman-Olmstead had not filed nomination papers relating to the 2010 municipal election. As a result, according to Ms. Best's affidavit, she contacted Kathryn Bateman-Olmstead and left a message for her on her home phone number advising her that the *Municipal Elections Act* prohibits an individual from incurring expenses under s. 76 of the *Municipal Elections Act* or accepting contributions under s. 70 of the *Municipal Elections Act* until the candidate has filed a nomination paper to be registered as a candidate for office in accordance with s. 33 of the *Municipal Elections Act*.

[25] In Kathryn Bateman-Olmstead's material, she concedes that while her website was active prior to her registering in the election campaign, that it was entirely an accident and that she believed that she was working on her campaign website in a way that it could not be

accessed by the public. She confirms in her affidavit material that she received the telephone message from Cathie Best on September 2nd and, as a result, she immediately contacted Mr. Vrooman for assistance in temporarily shutting down the website. The website was then shut down until she was officially registered as a candidate on September 3, 2010 when the website was again activated by her for the duration of the election campaign. The affidavit material of Donald Vrooman and Laura Lynn Klemenchuk support the affidavit of the candidate in that they confirm that her computer website skills were relatively limited.

[26] The applicant's response to the candidate's assertion regarding the unintentional activation of her campaign website is that the candidate, Kathryn Bateman-Olmstead, has participated in three websites and as such, is experienced in computer knowledge and that the posting on the website could not have been done accidentally. The applicant also asserts that the activation of the candidate's campaign website prior to September 3, 2010 when Kathryn Bateman-Olmstead registered as a candidate is, in and of itself, a violation of the *Municipal Elections Act*.

[27] Third, the applicant further asserted in her affidavit material that in addition to the solicitation of donations on the candidate's website that she accessed Kathryn Bateman-Olmstead's website, on or about October 26, 2010, and noted the following was posted on the website:

> Thank you for your financial support. Campaign expenses add up. Thanks again to those of you who stepped up and stepped out and to all of you for the many types of support you have provided!

[28] The applicant therefore asserts that the fact that Kathryn Bateman-Olmstead asked for donations on her website some 11 days prior to her officially registering as a candidate on

September 3, 2010 and that she asked for donations during the course of her election campaign on her website, coupled with the fact that in late October, she posted a thank you for the financial support, provides her with reasonable grounds to believe that Kathryn Bateman-Olmstead received contributions from persons other than herself to her campaign.

[29] Fourth, the applicant further asserts that since, to her knowledge, the candidate only has an income of $12,000 per annum and the candidate stated in her Form 4 Financial Statement that she contributed $1,315 of her own funds towards her campaign, this also provides reasonable grounds for her to believe that Kathryn Bateman-Olmstead received contributions which were not listed on her Form 4 Financial Statement.

[30] Fifth, the applicant asserts that a campaign website was prepared with the assistance of Michael Scorcia, who is a professional web designer. The applicant alleged that Mr. Scorcia did a similar website for a candidate by the name of Paul Marai and the value of the contribution on Mr. Marai's Form 4 Financial Statement was $700. The applicant alleges that Kathryn Bateman-Olmstead's Form 4 did not include this as a contribution from Michael Scorcia Designs or note it as an expense.

[31] The candidate, Kathryn Bateman-Olmstead, has responded to this allegation by indicating in her affidavit material that she sought assistance from Mr. Vrooman to build her own website with Word Press, which is a free web service available to anyone who signs up for it. She indicates in her affidavit material that she began establishing and creating a Word Press website but that she was struggling through this process. As a result, she responded to an unsolicited email from Mr. Scorcia which offered his web design services. The candidate indicates that she did not know Mr. Scorcia before that time. She asserts in her affidavit that

she was concerned about her low budget campaign and raised the issue of costs with Mr. Scorcia. He assured her that the cost would be reasonable because he would copy from the same format that he used for a website he had already created for Paul Marai. His offer, according to her affidavit material, seemed reasonable and appropriate to the candidate and they agreed on a final price for the work of $175. She attaches Mr. Scorcia's invoice to her affidavit material as Exhibit F. She indicates that his fees together with the domain name registration fees came to a total of $212.38, which is reported under Internet and Phone charges in her Form 4 Financial Statement.

[32] In summary, the affidavit of the candidate, Kathryn Bateman-Olmstead, clearly asserts that she did not receive any financial contributions towards her campaign from anyone other than herself and the details of the reasons why she decided not to accept any campaign contributions. It should be noted that the candidate was nowhere near either her contribution or expense maximums. She appears to have run a minimalist campaign according to all the material submitted to the court. The affidavit of Carolyn Spinney confirms that while she attempted to make a small financial contribution to the candidate's election campaign that the candidate refused to cash her cheque. The affidavits of Laura Lynn Klemenchuk, John Gowing and Barb Gowing indicate that they made financial contributions to the 2006 campaign but did not contribute financially to the 2010 campaign.

ALLEGED REASNABLE GROUNDS – RE EXPENSES:

[33] The applicant, in her initial application material, indicated that she questioned the validity of the expenses noted by the candidate, Kathryn Bateman-Olmstead, when the candidate claimed that her cost for signs was $383.07. The basis of her belief was that she had

an example of pricing for election signs which would have resulted in a much higher expense for signage and the candidate had an abundance of signs supporting her nomination. In her subsequent affidavit of June 15, 2011, the applicant further detailed that she believed that the candidate had over 250 signs. The applicant stated that the candidate had not inventoried some extremely large, approximately 36" by 24", signs which she had out during the campaign. The affidavits of Catherine Duncan and Sharon Baroni also indicate that they believed that the candidate had more signs displayed than she accounted for in her Form 4 Financial Statement.

[34] The candidate, in her affidavit, indicates that she had 190 signs for her election campaign. She further indicated that she inventoried signs she had left over from her 2006 election campaign and that there were a sufficient number of large signs so that no new signs needed to be purchased. She also indicated that she did purchase 100 small signs and wires for the election campaign and she asserts that after diligently shopping on the Internet, she found a price for those 100 signs from Signs101 Canada for $383.07. She indicates that she had no personal association with this company, did not know the owners and that this was a publicly offered price. She attached as Exhibit H to her affidavit material, which is the invoice dated October 4, 2010. This invoice supports her assertion concerning the purchase of these signs. In paragraph 34 of her affidavit material, she sets out how she calculated the amount of $513 which was the value she placed as an expense to her campaign as inventory contributed to candidate's campaign. Regarding her assertion in paragraph 34 concerning the calculation of the inventory value, the candidate asserts that the value of the signs was slightly overstated in order to be on the "safe side."

ANALYSIS:

[35] S. 81(1) of the *Municipal Elections Act* reads as follows:

> Compliance audit
>
> Application
>
> **81.** (1) An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances. 2009, c. 33, Sched. 21, s. 8 (44).

[36] S. 81(1) of the *Municipal Elections Act* is designed to achieve a proper balance between an elector's right to challenge an elected official in regard to his or her statutory obligations and the need to limit and ensure the legitimacy of the tax on elected officials. See *Audziss v. Santa*, [2003] 223 D.L.R. (4th) 257 (O.C.A.) at paragraph 28.

[37] In *Jackson v. Vaughan* (2009), 59 M.P.L.R. (4th) 55, Justice Lauwers of the Ontario Superior Court of Justice noted the following concerning the purpose of the election campaign funding rules at paragraphs 15 through 19:

> **15** Courts and commentators have discussed the purposes of election campaign funding rules. J. Patrick Boyer commented in *Local Elections in Canada: The Law Governing Elections of Municipal Councils, School Boards and Other Local Authorities* (Toronto: Butterworths, 1988) at 18:
>
> > Campaign costs have been mounting in recent years, and electors and elected people alike have become concerned that campaign financing be as open, fair, and as broadly based as possible. This represents nothing more than a recognition of the importance and pervasiveness of modern government and the attendant need to ensure that the campaigns of candidates reflect general rather than specific interests in society.
>
> **16** In *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, the Supreme Court noted at para. 72 that: "Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime be preserved."
>
> **17** In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the Court held at para. 47:

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

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

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

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

[38] In *Jackson v. Vaughan* (2009), *supra*, affirmed 2010 ONCA 118 (O.C.A.), the court indicated the following:

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

[39] In the Court of Appeal decision in *Jackson v. Vaughan, supra*, the Ontario Court of Appeal at paragraph 31 indicated that s. 81(1) is a threshold requirement only and the audit is intended to be comprehensive, even if the trigger is but a single apparent contravention.

[40] The court, in *Jackson v. Vaughan, supra,* noted the following at paragraph 51 re-

garding the minimal discretion to appoint an auditor if reasonable grounds are established:

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

[41] At paragraph 53, the court did indicate that there may be some minimal discretion when it comes to minor breaches regarding technical violations of the *Municipal Elections Act*. However the court also went on to indicate the following at para. 65 and 68:

> **65** I find that s. 81 (1) is a threshold requirement only. Once it is plain to a municipal council that there are reasonable grounds for the belief "that a candidate has contravened a provision of this Act relating to election campaign finances" under s. 81(1), then the result is "a compliance audit of the candidate's election campaign finances"; in other words, the audit is comprehensive and is not restricted to the matters referred to in the complaint. The trigger can be a single contravention, although in this case the applications for a compliance audit identified numerous possible contraventions.
>
> **68** I find that there are good reasons for this approach. In terms of the statutory structure, the role of the Ontario Court judge in an appeal under s. 81(3.3) of the *Act* is limited. The judge's responsibility is to deal with the issue of reasonable grounds. It is the responsibility of other actors in the statutory framework, not the Ontario Court judge at this stage, to conduct the audit, evaluate the results, authorize a prosecution, carry it out and try the case. Further, the MEA's provisions are interrelated, and the identification of a problem may suggest that there might be more awaiting discovery. For example, the failure to issue a campaign receipt may be related to an unauthorized expenditure; this is grist for the auditor's mill and is well beyond the purview of an Ontario Court judge on an appeal under s. 81(3.3).

[42] In the case of *Fuhr v. Perth South* (Township), [2011] O.J. No. 4251, Ontario Court of Justice McKerlie, J. indicated the following regarding the applicability of the doctrine of *de minimis non curat lex* in the context of the determination of reasonable grounds at paragraph 44:

> **44** As noted in the April 26, 2011 decision of the Compliance Audit Committee, the campaign period expenses incurred by the candidates were indeed "minimal". I also note that the sole contributors to the campaigns in question were the candidates themselves. However, while the doctrine of de minimis non curat lex ("the laws does not concern itself with trifles") may apply to a review of a decision whether to prosecute under s. 81(14), the issue at this stage of the review is simply

> whether the appellant had reasonable grounds to believe that the candidates contravened a provision of the Act relating to election campaign finances. [Reference: Jackson v. Vaughan (City), [2009] O.J. No. 1057 (Ont. S.C.) at paragraphs 101-102]

[43] In the case of *Lyras v. Heaps*, October 17, 2008, 51 M.P.L.R. (4th) 277 Justice Lane did a comprehensive review of the meaning of "reasonable grounds" in paragraphs 20 through 25 of her decision:

> **20** The meaning of "reasonable grounds" under the MEA is one such question of law. The appellant submits that "reasonable grounds" should be defined as "credibly based probability ..... not to be equated with proof before a reasonable doubt or a prima facie case." This is the standard of persuasion articulated by Justice Hill in *R. v. Sanchez and Sanchez 93 C.C.C. (3d) 357* with respect to the issuance of a search warrant and adopted by Culver J. in *Chapman, supra at para. 41-42.* The respondent submits that a more appropriate standard is the standard of "reasonable grounds" as determined by the jurisprudence relating to applications for judicial recount under s. 47(1) of the MEA: *Devine v. Scarborough (City) Clerk, 27 M.P.L.R.(2nd) 18 (MacDonnell Prov. J.) and Harris v. Ottawa (City), 27 M.P.L.R. (2d) 36 (Blishen Prov. J.).* In *Harris,* the court held at paras. 17 and 18 that the test for "sufficiency and reasonableness of the grounds" is "certainly a lower test than the usual civil burden of proof on a balance of probabilities .... but must simply provide a prima facie case."
>
> **21** There is no dispute that "mere suspicion, conjecture, hypotheses or fishing expeditions,'" and that which is "speculative and remote" fall short of the minimally acceptable standard. The question is whether the test for "reasonable grounds" is "credibly based probability" or "a prima facie case."
>
> **22** In *Savage supra*, Duncan J. at para. 10 thought that the "reasonable grounds" requirement had been met where the applicant raised issues which "an auditor might very well choose to investigate." In *Sanchez (adopted in Chapman, supra*), Hill J. defined "reasonable grounds" as "a practical, non-technical and common sense probability as to the existence of the facts and the inferences asserted."
>
> **23** I note that, in this case, the two chartered accountants on the Committee made up the majority who did not think the grounds for a compliance audit had been made out. If the test were as set out in *Savage*, their decision warrants considerable deference. It also strikes me that even if the appellant had what he considered reasonable grounds to ask for an audit, the Committee has considerably more information at their disposal. Having heard all the 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.
>
> **24** There is a distinction in law between "credibly based probability" and "a prima facie case." A belief is founded on "reasonable grounds" where there is an objective basis for the belief that is based on "compelling and credible information." The standard is "reasonable probability," not proof beyond a reasonable doubt or a prima facie case: *R. v. 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 (Minis-*

> *ter 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.*
>
> **25** In my view, where the statute requires "a belief on reasonable grounds," the jurisprudence applicable in other contexts indicates that the standard to be applied is that of an objective belief based on compelling and credible information which raises the "reasonable probability" of a breach of the statute. The standard of "a prima facie case" in either its permissive or presumptive sense is too high a standard.

[44] In the case of *Vaughan (City) v. Mastroguiseppe* [2008] ONCJ 763 (CanLII 2), Justice Favret of the Ontario Court of Justice in that case, at paragraph 61, indicated the following:

> **61** I accept, as did Mr. Justice Culver in Chapman, supra at paragraph 41, that the definition of reasonable grounds was stated at page 10 of R. v. Sanchez 93 C.C.C. (3d) 357 by Mr. Justice Hill as follows:
>
> > "Section 487(1) of the Criminal Code requires reasonable grounds as the standard of persuasion to support issuance of a search warrant. Judicially interpreted, the **standard is one of credibly based probability**"
> >
> > Mere suspicion, conjecture, hypotheses or "fishing expeditions" fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude it must be recognised that reasonable grounds is not to be equated with proof beyond a reasonable doubt on a prima facie case ... The appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and influences asserted"
>
> The above standard was applied by Justice Culver in Chapman, supra and is the standard to apply here.

[45] In *Vaughan (City) v. Defrancesca et al*, [2008] ONCJ 762 (CanLII2), Justice Chisvin at paragraph 8, defined the applicable test as follows:

> **8** The test then, is not if council believes there are reasonable grounds the *Act*

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

[46] Several important points emerge from the case law.

[47] First, the role of an Ontario Court Judge in an appeal under s. 81(3.3) of the *Municipal Elections Act* is limited. The judge's responsibility is to deal with the issue of reasonable grounds. It is the responsibility of other actors in the statutory framework, not the Ontario Court judge at this stage, to conduct the audit, evaluate the results, authorize a prosecution, carry it out and try the case. The doctrine of *de minimis non curat lex* is not to be considered at this stage of the proceedings.

[48] Second, it is the role of the committee and, in this case, the appeal court, as a result of the earlier ruling that this appeal would proceed by way of a de novo hearing, to do a limited weighing of the evidence and to make determinations regarding what weight should be accorded to the representations before it. Therefore, according to the *Lyras v. Heaps* decision, the committee and, in this case, the appeal court, proceeding by way of a *de novo* hearing, must consider the entire record and to a certain degree weigh the evidence.

[49] Third, when considering whether the applicant has a belief on reasonable grounds, the standard to be applied is that of an objective belief based on compelling and credible information which raises a reasonable probability of the breach of a statute. The standard is not proof beyond a reasonable doubt or a *prima facie* case however there is an objective component to the test. As noted the appropriate standard of reasonable or credibly based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.

[50] According to the applicant's affidavit material, she relies on four grounds for her reasonable belief that the candidate Kathryn Bateman-Olmstead received contributions from other persons which are not listed in her Form 4 Financial Statement. The first is the fact that the candidate received 3,568 votes and had a website asking for donations. The applicant submits that these facts, coupled with the fact that in 2006, Kathryn Bateman-Olmstead received $3,495 in contributions, makes it "inconceivable that no one donated to her campaign." Second, the candidate had a website that was operational some 10 days prior to her registering as a candidate on September 2, 2010 and the website was operational during the election campaign. The website requested donations to her campaign. Third, on or about October 26, 2010, the website had a posting thanking her team for financial support. Fourth, the candidate's income is noted at approximately $12,000 per annum and so the applicant asserts that her contributing the sum of $1,315 of her own funds toward her campaign also provides the applicant with reasonable grounds to believe that she received contributions from others. Fifth, the candidate, Kathryn Bateman-Olmstead, had a campaign website designed by Michael Scorcia. A similar campaign website for another candidate, Paul Marai,

was valued at $700 in his Form 4 Financial Statement.

[51] The candidate in her responding affidavit material has indicated that she did not receive any contributions from other parties and detailed her reasons for not doing so. There is no explanation in her affidavit material as to why she requested donations or indicated a thank you for financial support for contributions that were neither wanted nor accepted. The candidate explained her dealings with Michael Scorcia Designs and the fact that she paid $175 for his services and listed those under Internet charges. I note that there is no evidence that anyone actually contributed to the candidate's campaign and, in fact, the evidence of the candidate and the affidavit from one of her supporters, Carolyn Spinney, indicates that she did not accept any contributions from other persons. There are also affidavits from three people who made financial contributions to the candidate's 2006 election campaign but who did not make a financial contribution to the candidate's 2010 election campaign.

[52] The grounds relied upon by the applicant in points one and four listed above are nothing more than conjecture and speculation and clearly does not amount to reasonable grounds.

[53] The second and third points raised by the applicant regarding the website with the request for donations and a thank you to supporters near the end of the campaign has to be considered in light of the candidate's reasonable response that she did not accept any other contributions as well as her reasons for not doing so. The corroborative aspect of the evidence provided by Carolyn Spinney, Laura Lynn Klemenchuk, John Gowing and Barb Gowing must also be considered in this regard. There is also no evidence that the candidate accepted any donations and the minimalist nature of her campaign does not suggest otherwise.

There is no evidence of spending by her that was not in accordance with her election budget as depicted in her Form 4 Financial Statement. This evidence is insufficient to reach the standard of reasonable grounds considering that the test is that of an objective belief based on compelling and credible information which raises a reasonable probability of the breach of a statute.

[54] The fifth point raised by the applicant concerning the value of the website has been clearly explained by the candidate as to where that expense was noted on her Form 4 Financial Statement and it is backed up by a receipt in that regard. In addition, the fact that another candidate may have paid a different fee for a similar website is not determinative of the issue of reasonable grounds. As Justice Lane noted in *Lyras v. Heaps*, *supra* at page 9:

> ... The quality of the website is irrelevant, as is the fact that other candidates may have paid for similar services, or that the services may have had substantial market value if purchased on the market.

[55] Although not in her affidavit material the applicant added in submissions the allegation that if the phone and Internet charges are as specified by the candidate in her affidavit material regarding the charges listed there being for website services by Mr. Scorcia and internet domain name registration fees, then there are no charges for phone and ongoing Internet services. Considering the limited scale of the candidate Kathryn Bateman-Olmstead's campaign, the only rationale conclusion is that any phone or Internet usage was in fact her personal phone and Internet usage. I note that the candidate Paul Marai, whose Form 4 Financial Statement is included in the applicant's initial application record at Tab O, ran a considerably more expensive campaign in virtually all respects than the candidate Kathryn Bateman-Olmstead. I note that Mr. Marai has left blank phone and/or Internet charges, not-

withstanding that he apparently paid Mr. Scorcia $700 for Internet services which he claimed and put under the advertising section. The point is that I do not accept that the campaign finance provisions of the *Municipal Elections Act* were directed and intended to have a compliance audit in circumstances where a candidate for school trustee, who runs a relatively minimalist campaign, must parse out what percentage of their home phone and home Internet was used during the campaign.

[56] The applicant also asserts and it is common ground that the candidate had a website stating her intention to be re-elected as a school trustee, and requesting donations, which was active possibly as early as August 24, 2010, some 11 days before she officially registered as a candidate on September 3, 2010. There was no evidence to show that she received any campaign contributions during this period of time or during the election campaign itself. When she was notified by the town clerk, Cathie Best, that she should not accept donations or incur expenses prior to being officially registered as a candidate, she immediately took steps to shut down this website. I accept that this website had the re-election request and the request for donations on it and was active by accident and, when notified, the candidate immediately corrected the situation. There is no indication that any contributions were made or expenses incurred between August 24th and September 3, 2010. The Word Press website was in fact a free website. There is no specific provision that indicates that the website with the notation to re-elect the candidate and the request for donations was in and of itself a violation of the *Municipal Elections Act*. There are no reasonable and probable grounds established to support the submission that the provisions of the *Municipal Elections Act* regarding campaign finances related to the incurring of expenses or the acceptance of contributions outside the

campaign period were not complied with.

[57] The final reason that the applicant believes that the candidate's Form 4 Financial Statement is not accurate is that she believes that the candidate had over 250 signs and that her costs would have been more than $383.07 which she claimed in her Form 4 Financial Statement. The applicant couples the submission with the fact of what other persons have paid for signs The candidate has explained in detail with respect to the number of signs that she had for the election, how some of the signs came from inventory, how those signs were valued, and how additional signs were purchased, to make up a total of 190 signs.

[58] In *Lyras v. Heaps*, supra, the court dealt with the issue of an applicant obtaining a quote for material that was different than the amount claimed by the candidate.

> **39** Mr Lyras submitted that Mr. Heaps did not accurately disclose the cost of an 11 inch by 17 inch flyer that was produced and distributed during the campaign. More specifically, he asserted that the receipt filed for obtaining 15,000 copies of this flyer from Meade Graphics Inc. for a cost of $2,494.32 was some $351 below the quote Mr. Lyras later obtained from Arco Graphics (operating at the same location) for printing a similar product, which quote did not include a graphic charge estimated at an additional $300-$500.
>
> **40** Mr. Heaps replied that he contracted only with Meade Graphics and the invoice he submitted was the total amount he was charged for the brochure. There was also evidence before the committee that Meade Graphics and Arco are not related companies, and that Meade used Arco "as a supplier for smaller projects." As against this concrete evidence of the invoice and a letter from the owner of Meade Graphics, a higher quote obtained by the appellant from an unrelated company after the fact is no more than speculation and conjecture, hardly compelling and credible information which raises the reasonable possibility that Mr. Heaps underreported the actual cost of the brochure. Again, I find the decision of the Committee reasonable and correct.

[59] First, it should be noted that the applicant and the affidavits of Catherine Duncan and Sharon Baroni provide estimates only regarding the number of signs that the candidate used during the election campaign, whereas the candidate is very specific in her response regarding the number of signs she had. Second, as in the *Lyras* case the higher quote for the

production of signs obtained by the applicant is not compelling information which raises a reasonable possibility that the costs of the signs were under reported by the candidate.

[60] I note that the applicant had presented most of these grounds for her reasonable belief to the Halton District School Board Compliance Audit Committee and the Committee found that reasonable grounds did not exist for her to believe that there was a breach by the candidate of the *Municipal Elections Act* campaign finances. Some new information was provided when this matter was appealed and allowed by way of a de novo hearing, but the result is the same considering the test that has to be applied. Therefore, no compliance audit will be ordered regarding the Form 4 Financial Statement filed by the candidate Kathryn Bateman-Olmstead.

[61] Counsel may address the issue of costs, if they see fit, in court, by appointment made through the Halton Ontario Court of Justice Trial Co-ordinator.

Released: June 29, 2012

R. J. LeDressay

Signed: "Justice R.J. LeDressay"

Tab 4

CITATION: Kett v. The Corporation of the Township of Scugog, 2019 ONSC 942
OSHAWA COURT FILE NO.: CV-18-003317
DATE: 20190207

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Donald Kett, Betty Sommerville and Jennifer Black, Applicants

AND:

The Corporation of the Township of Scugog, Respondent

BEFORE: Justice J. Di Luca

COUNSEL: Donald Kett, In Person

Christopher Lee and Steven Ferri, Counsel, for the Respondent

HEARD: January 31, 2019

ENDORSEMENT

[1] The Applicant, Mr. Donald Kett, was a Regional Councillor candidate in the October 2018 municipal election in the Township of Scugog. He placed third out of four candidates, some 3,704 votes behind the winner.

[2] He seeks a court ordered recount and raises a litany of questions, purported concerns and possible issues about the process that was used to conduct the election. In his view, there is a cloud of suspicion and doubt that hangs over the election results.

[3] At the conclusion of oral argument, I indicated that the application was dismissed as I had not been satisfied that there were reasonable grounds to doubt the election results. I indicated that written reasons would follow and these are my reasons.

[4] I note at the outset that when this application was initially commenced two other failed candidates joined Mr. Kett in seeking a recount. Those failed candidates, Betty Sommerville and Jennifer Black, abandoned their applications prior to the hearing of the application.

Legal Framework

[5] The test for a court ordered recount is set out in Section 58 of the *Municipal Elections Act*. The relevant portions of the section provide as follows:

> 58 (1) A person who is entitled to vote in an election and has reasonable grounds for believing the election results to be in doubt may apply to the Superior Court of Justice for an order that the clerk hold a recount.

> **Order, notice**
>
> (3) If satisfied that there are sufficient grounds for it, the court shall make an order requiring the clerk to hold a recount of the votes cast for all or specified candidates, on a by-law, or for all or specified answers to a question, and shall give the clerk a copy of the order as soon as possible.
>
> **Problems re voting and vote-counting equipment**
>
> (6) A request for a recount due to problems related to voting and vote-counting equipment may be made only under this section.

[6] In *Goldie v. Brock (Township),* 2010 ONSC 6930, the court noted that the test under section 58(3) of the *Municipal Elections Act* has both subjective and objective components. The Applicant must subjectively believe that there are grounds to doubt the election result and that belief must be objectively reasonable. The objective component of the test requires compelling and credible information which raises a reasonable probability that the election results are in doubt; see *Lyras v. Heaps*, 2008 ONCJ 524 at para. 25, *R. v. Chehil,* 2013 SCC 49, and *R. v. MacKenzie,* 2013 SCC 50. Speculation, suspicion and conjecture fall short of this standard. Conversely, the Applicant is not required to demonstrate a *prima facie* case that the election result is in doubt.

[7] Where a recount is ordered, the recount is to be conducted in the same manner as the original count unless the court is of the opinion that the manner in which the original count was conducted caused or contributed to the doubtful result. In such a case, the court can direct the manner that the recount be done in a different manner; see s. 60(1) and (3) of the *Municipal Elections Act*.

[8] Where procedures are established to conduct an election, those procedures must adhere to the core principles that animate the *Municipal Elections Act*; see *DiBiase v. Vaughan (City)*, 2007 CarswellOnt 8775 at para. 15, *Cusimano v. Toronto*, 2011 ONSC 7271 (Div. Ct.) at para. 106-7, and *Montgomery v. Balkissoon* (1998), 38 O.R. (3d) 321 (Ont.C.A.). The principles include:

a. The secrecy and confidentiality of the voting process is paramount;

b. The election shall be fair and non-biased;

c. The election shall be accessible to the voters;

d. The integrity of the process shall be maintained throughout the election;

e. There is to be certainty that the results of the election reflect the votes cast and that proper majority vote governs; and,

f. Voters and candidates shall be treated fairly and consistently.

The 2018 Scugog Municipal Election

[9] The 2018 municipal election in Scugog was held using the alternative method of "vote by mail", with the votes tabulated by optical scanning equipment. This voting process was adopted by Scugog council under By-law 14-17. At the time the by-law was passed, Mr. Kett was a member of council. This was not the first time that "vote by mail" was used.

[10] As authorized by the by-law, John Paul Newman, the Municipal Clerk for Scugog, developed procedures for the election. The procedures were first compiled in December 2017 and then were amended on a number of occasions up to August 31, 2018. The Applicant was provided with copies of the procedures when he submitted his nomination form. These procedures were included in a candidate binder provided to each candidate.

[11] A third party service provider, DataFix, was retained to prepare and mail out voting kits based on the voters list. DataFix billed the Township for the mail out kits including postage.

[12] The voting kits contained a cover letter with instructions and a declaration form, a ballot, a return envelope and a secrecy envelope. Use of the kit required a voter to sign the declaration form and complete the ballot. The ballot would be placed in the secrecy envelope which would then be placed along with the declaration form into the return envelope. The return envelope could be either mailed to the Township or dropped off.

[13] From September 26 to October 21, 2018, the Clerk and the Elections Coordinator, or on one occasion the Election Assistant, would pick up the return envelopes from the post office at the Town hall. They would also retrieve the ballot box from a secure storage room vault. The Clerk was the only person who had the key and alarm code for the vault.

[14] The processing of the return envelopes entailed opening the envelopes and scanning the unique barcode that appeared on the Declaration form. If the barcode was valid, the corresponding secrecy envelope containing the ballot would be grouped in a batch of 25 and placed into the ballot box for counting on Election Day.

[15] After the processing was complete, the Clerk and the Elections Coordinator would seal the ballot box with a ziptie, place seals over the ballot return slots and sign the seals. Records were kept detailing the treatment of the return envelopes.

[16] The processing of the return envelopes was scrutinized every time by either Mr. Kett or his scrutineer.

[17] On certain days, the Clerk and the Election Coordinator would attend large retirement and care facilities with a ballot box. This was done to increase accessibility for voters living in these facilities. The ballot boxes for this purpose were sealed and scrutineers were advised that this was being done. There was no objection.

[18] On Election Day, the ballot counting procedures were commenced. This entailed two stations. At the first station, ballots were removed from the secrecy envelopes and placed flat into batches of 25. This process was open to scrutineers and candidates. There were no complaints or concerns raised about this process.

[19] At the second station, electronic voting tabulators were used to tabulate the votes reflected in the ballots. The batches of ballots were brought to the station by runners, who were in sight of scrutineers. The ballots were first put through one of two tabulators, each of which were hooked up to a laptop. The laptops and tabulators work in unison to scan and receive the information on the ballots. The equipment and software was provided by Dominion Voting Systems. The laptops and tabulators were not hooked up to the internet or to any external network.

[20] Prior to scanning the ballots, "zero reports" were run to ensure that the tabulators and laptops would start counting from zero. Each batch of ballots was then fed into the tabulators and scanned. A check was done to ensure that the number of ballots scanned matched the number of ballots in the batch. The results of the scanning would be saved on the laptop.

[21] If an error message identified a defective ballot, the ballot would be removed from the batch and placed in a folder to be sent to the defective ballot processing station. Details of any such steps would be recorded.

[22] The process was open to scrutineers. There were no complaints or questions at the time.

[23] The process at the defective ballot station involved examining the defective ballot and recreating the information on a blank ballot so it would be readable. The process of examining and rectifying defective ballots was observed by both scrutineers and candidates. Only one objection was received and it did not relate to the Applicant.

[24] Following completion of the defective ballot process, the laptop tabulated the election results and produced an election summary report.

[25] On the following day, the results were audited and verified. Data from 52 randomly selected ballots was found to match the scanned image of the selected ballots. As well, the number of return envelopes precisely matched the number of ballots processed.

The Complaints Raised by the Applicant

[26] In the Notice of Application, Mr. Kett raises the following complaints:

a. Scrutineers were not given full optics of procedures;

b. There were mechanical irregularities that affected the result of the election;

c. There were process irregularities that affected the result of the election;

d. There were issues regarding the security of the ballots during the election period; and,

e. The printing of the ballots at the Township office was unsecured and unaccountable.

[27] At the outset of hearing of this application, Mr. Kett sought leave to amend his application to allege that mechanical and procedural irregularities "may" have affected the election results.

[28] The Notice of Application seeks a manual recount only, though in his factum and oral submissions Mr. Kett indicates that he is also seeking disclosure of all security video recordings, receipts, transcripts, accounting, communication, ballots and any documentation related to the election. He also seeks an opportunity to inspect all audit trails and documentation of who used the electronic access controls to the secured areas where the ballots were stored. Lastly, he seeks an order requiring Dominion Voting Systems and DataFix to authenticate ballots returned during the election.

[29] In support of this application, Mr. Kett has sworn an affidavit. He has also provided a number of notarized though unsworn statements of purported witnesses to improprieties during the election period.

[30] A summary of the complaints contained in these notarized statements is as follows:

a. While canvassing homes that were listed on the voter's lists as not having voted, volunteers were informed by various home occupiers that they had indeed voted, suggesting that the voter's lists had not been properly updated.

b. A volunteer was not permitted to attend with the Clerk at the post office to retrieve mailed in ballots, nor was the volunteer permitted to accompany the ballots from the main floor boardroom to the secure basement storage area. That said, the volunteer was permitted to observe ballot processing.

c. A volunteer noted that other election material, including a ballot printing machine, undelivered ballots and voter declaration cards were not stored in the secure area along with the ballots.

d. The flow of information to volunteers/scrutineers left much to be desired. Many questions about the various processes in place were left unanswered or answered in an unclear or incomplete fashion.

e. It appears that the candidate who became mayor may have seen results on a screen prior to the official release of the election results.

f. The tabulators were tested before scrutineers attended and the scrutineers were not shown the "zero reports".

g. Ballots could be dropped off through a mail slot after office hours, but the municipal offices were open to anyone who had a key fob for access.

h. An IT person contracted to work for the Township was in the tabulator room without any apparent reason or explanation.

i. The Clerk did not post preliminary election results as had been done in the past.

j. The receipts from the tabulators were not provided to scrutineers.

[31] In his affidavit, Mr. Kett advances the following complaints:

a. Neither he nor his scrutineers were permitted to monitor retrieval of ballots from the post office, nor were they advised that ballot boxes would be brought to institutions and nursing homes.

b. The Clerk denied a request to review security videos taken inside the municipal offices. A request to inspect the secure area was also denied.

c. The Clerk did not provide a number of items including Canada Post receipts for the vote by mail kits, daily vote counts, logs tracking who entered the secure area and when, number of voters who had attempted to vote twice, numbers of voters added to the voter's list, et cetera.

d. A request to fill ballot boxes with exactly 1,000 ballots was denied, as was a request to place initials on ballot box seals.

[32] In his oral submissions, Mr. Kett amplified his complaints and raised a number of additional seemingly unanswered questions about the election process.

The Clerk's Response

[33] In his detailed affidavit, John Paul Newman, the Township Clerk, provided a response to the complaints raised by the Applicant. He also included copies of email correspondence between himself and the Applicant and others relating to queries about the election process.

[34] A summary of his response is as follows:

a. The ballots were retrieved and processed on 32 occasions prior to tabulation. At no time did any candidate or scrutineer present communicate any dissatisfaction with the process or procedures.

b. Mr. Kett asked questions about the process and was provided answers. On some issues, for example, the request to inspect the secure vault and the request for access to security videos, Mr. Kett was denied, as he was not entitled under the procedures to this degree of access simply on demand. As well, the secure vault

required that access had to be restricted. If all candidates and their scrutineers were given access to the vault, its security could not be guaranteed.

c. No request was made to permit scrutineers to monitor the transfer of the ballots from the post office to the Township office or to monitor the transfer of the ballots within the Township office to the secure vault.

d. There were no complaints raised during a ballot counting process walkthrough which was done for the candidates. The walkthrough was followed up by an email. No complaints followed the email.

e. Prior to vote tabulation, Mr. Newman ran a "zero report" on the tabulators. A second "zero report" was done in the presence of the scrutineers. No complaints were made at the time.

f. The tabulation process was done in the presence of the scrutineers. While they may have had some difficulty seeing the laptop screen, they raised no complaint.

g. Defective ballots were processed in view of the scrutineers. Only one concern was raised.

h. The IT person, Mr. Adam Dubecki, was provided with a USB key with the election results. He assisted in preparing a PowerPoint presentation to be presented in council chambers when the results were announced.

i. On the day following the election, Mr. Newman and the Election Coordinator completed a number of audit procedures and reports. The results revealed no issues.

j. Prior to the election, Mr. Newman conducted logic and accuracy tests on the equipment and found no issues.

k. While there were few complaints about the process in advance of the election, Mr. Kett asked for a recount on November 6, 2018, a few days after the election. He also requested access to security videos, logs, and receipts. On November 7, 2018, Mr. Newman denied the request for a recount indicating that he could order a recount only if two candidates received the same number of votes. He also advised Mr. Kett that Scugog council could order a recount by way of a special council meeting. Lastly, he denied Mr. Kett's requests for access to the listed items on the basis that the items had nothing to do with the election results.

l. The Mayor was advised of Mr. Kett's request. The Mayor decided not to call for a special council meeting to address the issue. An email was sent to council indicating that a majority of council could call for a special council meeting to address the possibility of a recount. No one asked for a special meeting and some councillors, including one of the original Applicants in this matter, opposed a special meeting.

m. Mr. Kett was advised that as no council member was in favour of a special council meeting, one would not be called. Mr. Kett was then directed to s. 58 of the *Municipal Elections Act*. Mr. Kett responded with a lengthy laundry list series of complaints and questions which mirror many of his complaints advanced in this Application.

Analysis

[35] I commence my analysis with a recognition of the fundamental importance of the election process in a democracy such as Canada. There can be no doubt that the courts must be vigilant to insure that the fairness, integrity and openness of the election process is not only maintained but fostered.

[36] Section 58 of the *Municipal Elections Act* provides a mechanism through which the court can order a recount if there are reasonable grounds to doubt the validity of the election results. In this regard, I note that the validity of the election results relates to the principle that the person with the majority of votes wins the election. The standard is not one of perfection. In other words, it is the result that must be called into question not simply the exact vote count.

[37] Here, Mr. Kett, an incumbent, lost the election resoundingly. He placed third by over 3,700 votes. There were approximately 7,000 votes cast. His former co-Applicants also lost the election, though by smaller margins.

[38] In support his request for a recount, Mr. Kett raises a litany of questions and concerns. Some of these concerns come from unsworn statements of his colleagues. Some of the concerns come from his sworn affidavit. Generally speaking, the concerns fall into three broad categories; (a) alleged failures to provide access to documents and videos that were required to assess the integrity of the process, (b) alleged failures to permit participation in the vote processing and tabulating process and (c) alleged failures to abide by the principles and/or provisions of the *Municipal Elections Act*.

[39] Before dealing briefly with some of the specific concerns raised, I will offer some general comments. First, Mr. Kett maintains that this application is not about sour grapes. That may or may not be the case. However, there is an obvious ex-post quality to his complaints, especially in view of the fact that he was an incumbent and would have been well aware of the election procedures as they were developed and implemented. No substantial complaints were raised by him prior to the election process. He waited until after the election results were announced and after the council elected not to call a special meeting to consider a recount before revealing his laundry list of complaints and requests. The timing is telling.

[40] Second, Mr. Kett essentially offers no evidence that anything untoward happened with the election process. His complaints are based on speculation that something *could* or *might* have happened with the process. While I appreciate that he does not need to prove to a civil or criminal standard that the election result was incorrect, he does need to point to a

credible basis upon which I can find a reasonable probability that the election results were incorrect. That objective credible basis must be found in evidence and not speculation, conjecture or conspiracy theory.

[41] Third, given the result of the votes, this was not a close election on any front. This is not a case where a swing of a small number of votes would have changed the outcome of the election. For the results of this election to be in doubt, a very significant degree of malfeasance or error would be required.

[42] I turn next to the three general categories of complaints. I will not catalogue and address each and every complaint. In my view, none of the complaints taken alone or together remotely undermine the process. I will, however, review a few examples to demonstrate the general nature of the complaints raised by Mr. Kett.

[43] Mr. Kett seeks access to all documents related to the election. He also seeks access to video recordings and faults the Clerk for not allowing him to inspect the secure vault. The *Municipal Elections Act* and the Scugog election procedures provide candidates and their scrutineers with access to various aspects of the voting process so that they can satisfy themselves about the integrity of the election. The *Act* and the procedures do not provide unlimited access to anything that could possibly be related to the election process. In this regard, I note that many of Mr. Kett's request are well beyond the scope of the *Act* and the procedures. The requests are also unreasonable, if not fanciful, in the absence of some articulated basis supporting the request. For example, Mr. Kett sought access to video security footage around the areas of the secure vault. He sought logs showing who was authorized to enter certain locations within the Township offices. He also sought access to the vault in order to inspect it. He provided no legal or factual basis for these requests. In these circumstances, I find that the Clerk acted correctly and reasonably in denying these requests.

[44] Mr. Kett alleges that his scrutineers were prohibited from observing the ballots being collected from the post office. However, at no time prior to the tabulation, did Mr. Kett or anyone else ask to accompany the Clerk when he went to retrieve ballots. In any event, there is no requirement that Mr. Kett be permitted to have a scrutineer attend for the transport of the ballots from the post office to the Township offices.

[45] Mr. Kett alleges impropriety in the manner in which ballot boxes were taken to nursing homes for the collection of ballots. He indicates that he was not apprised that this was happening and as a result could not have a scrutineer attend. There was nothing untoward about this process. Quite the opposite, it was done to facilitate accessibility, which is a principle of the *Act*. In any event, once the ballots were collected in this fashion, the ballot boxes were marked accordingly, sealed and taken back to the vault for processing under the watchful eye of scrutineers. The scrutineers would have known that the ballot boxes had been collected at nursing home facilities.

[46] Mr. Kett argues that his scrutineers were prohibited from placing their seals on ballot boxes. It appears that the request was never made and in fact, it would have been contrary to the Scugog election procedures, notwithstanding the provisions of the *Act*.

[47] Mr. Kett complains that the vote tabulation process did not provide preliminary results as it had in the past. There is nothing improper about this. The equipment was not set up to do so in this election.

[48] Mr. Kett complains that a printer used to print ballots was left unsecured and could have been used to print extra ballots. While this may be true, the potential existence of extra ballots is irrelevant in view of the system used for obtaining Declaration forms for each ballot cast.

[49] Mr. Kett complains that scrutineers were not permitted to verify the testing of the tabulators prior to vote counting. The logic and accuracy testing of the tabulators was done in advance of the election. There is no authority requiring that the testing be done in the presence of candidates or scrutineers. Prior to the election, no inquiries were made by either Mr. Kett or his scrutineers. That said, on the evidence before me, the tabulators were tested before and after the election and there were no issues.

[50] On the whole, Mr. Kett's complaints have a thread grasping, conspiracy like quality to them. Each unanswered request becomes proof that something may have happened. Similarly, once requests are answered, the answers invariably result in more questions and concerns that are then unanswered. To give but one example, Mr. Kett requested receipts showing how many voter kits were mailed out. A receipt from DataFix was eventually provided showing a disbursement for postage. Mr. Kett, in his submissions, then pointed to the receipt and questioned why no receipt from Canada Post was provided and questioned how it was that DataFix managed to obtain such a low price for postage. Mr. Kett pointed to this as further proof of potential malfeasance and error.

[51] In short, I find that Mr. Kett is not looking for answers. He is looking for questions. The answers do not matter as Mr. Kett is simply not prepared to accept the results of this election. Nothing he raises provides an objective basis for concluding that there exists a reasonable probability to question the election results.

[52] The application is dismissed.

Costs

[53] The Township of Scugog seeks approximately $29,000 in costs and disbursements on a partial indemnity basis. Prior to the hearing of the Application, the Township offered to settle the application on terms including a withdrawal of the recount application and $15,000 in costs.

[54] The Township argues that in view of its complete success on the application and the offer to settle, the request for costs on a partial indemnity basis is more than reasonable.

[55] I accept that the Township has incurred unnecessary expenses in defending this application. The taxpayers in this small community should not to have bear the brunt of Mr. Kett's failed attempt to review the election process. That said, the costs consequences of applications seeking to maintain and foster open, transparent, and fair elections, should not operate as a deterrent to persons who legitimately seek resort to the court process to test the validity of election results.

[56] Bearing in mind the principles of proportionality and reasonableness, I find that costs of $20,000 all-inclusive are warranted in this case.

Justice J. Di Luca

Date: February 7, 2019

Tab 5

2018

Candidates' guide

for Ontario municipal council and school board elections

Ontario

2018 Candidates' guide for Ontario municipal council and school board elections

This guide provides information to candidates for the 2018 municipal council and school board elections. The information also applies to any by-elections that may be held during the 2018-2022 council and school board term.

This guide is not meant to replace provincial legislation. It provides general information about the rules contained in the Municipal Elections Act, 1996 and other legislation and regulations, such as:

Municipal Act, 2001
City of Toronto Act, 2006
Education Act

Goods and services

Goods or services that are contributed to your campaign are also expenses. They should be treated as if the contributor gave you money and you went out and purchased the goods and services – you must record both the contribution and the expense.

Example:
Your friend spends $150 on coffee and baked goods which they donate for a campaign event. You should record a contribution of $150 in goods or services from your friend, and record an expense of $150.

If you are given a special discount on a good or service that you are purchasing for your campaign, you should record the expense as if you were not given the discount (since the value of the discount is considered to be a contribution of the good or service to your campaign).

Example:
Your order for campaign signs would normally cost $500, but the vendor lets you have them for $300 because he wants to help out your campaign. You should record an expense of $500 for the signs, and record a contribution of $200 in goods or services from the vendor. **Note:** As businesses are not permitted to make contributions, the contribution would have to be a personal contribution from the vendor.

Spending Limits

Candidates are subject to two spending limits – a general limit, and a separate limit for expenses relating to parties and expressions of appreciation after voting day.

General spending limit
The general spending limit for your campaign is calculated based on the number of electors who are eligible to vote for the office that you are running for. The formula to calculate the limit is:

- for head of council: $7,500 plus $0.85 per eligible elector
- for council member or trustee: $5,000 plus $0.85 per eligible elector.

When you file your nomination the clerk will give you an estimate of your general spending limit. This estimate will be based on the number of electors in the previous election.

On or before September 25, 2018 the clerk must give you a final general spending limit which is based on the number of electors on the voters' list for the current election.

If the spending limit estimate that you received when you filed your nomination is higher than the final spending limit you receive in September, the estimate becomes your official spending limit.

Spending limit for parties and expressions of appreciation
The spending limit for expenses related to holding parties and other expressions of appreciation after the close of voting is calculated as ten percent of the amount of your general spending limit.

Example:
Your general spending limit is $25,000. Your spending limit for throwing a party on voting night and making expressions of appreciation such as giving gifts to the members of your campaign team would be $2,500. These expenses do not count toward your $25,000 general spending limit.

The clerk will provide you with your spending limit for expenses related to parties and other expressions of appreciation after the close of voting on or before September 25, 2018.

Types of expenses

Most of your expenses will be subject to the spending limit.

The following expenses are not subject to the spending limit:

- expenses related to holding a fundraising event or activity
- expenses relating to a recount
- expenses relating to a court action for a controverted election
- expenses relating to a compliance audit
- expenses incurred by a candidate with a disability that are directly related to the candidate's disability and would not have been incurred if not for the election
- audit and accounting fees.

Note: Any materials, events or activities must have fundraising as the primary purpose in order to be exempt from the spending limit. An incidental mention of contributions is not enough to qualify as fundraising.

When the spending limit applies

Your spending limit covers expenses that you incur between the beginning of your campaign and voting day. Expenses that you incur between the day after voting day and the end of your campaign are not subject to the spending limit.

Note: If you incur an expense before voting day, but don't get around to paying for it until after voting day, it would still be subject to the spending limit.

Expenses related to parties and expressions of appreciation are subject to the specific spending limit regardless of whether they are incurred before or after voting day.

Campaign inventory

If you ran in the last municipal council or school board election and you want to reuse leftover goods such as signs or office supplies you must establish the current market value of the goods – what it would cost you to purchase them today. You must record the current market value as an expense.

If you have inventory left at the end of your campaign it becomes your personal property. If you wish to store materials such as signs for use in another election, any costs related to storage are personal costs, not campaign expenses.

Note to accountants: The value of all goods must be recorded as an expense regardless of whether the campaign ends with used or unused goods in inventory. Do not deduct the value of unused goods from the campaign expenses, as this will result in the campaign having a surplus on paper that the candidate does not actually have.

Campaign financial statement

It is your responsibility as a candidate to file a **complete** and **accurate** financial statement **on time**.

The filing deadline is 2 p.m. on the last Friday in March following the election (**March 29, 2019**).

If you have a bookkeeper or accountant complete the financial statement for you, you are still responsible for ensuring that it is complete and accurate and filed on time.

Financial statements are not required to have original signatures. You should contact your clerk for information about whether you can file your financial statement by a method such as fax or email if you are not able to file your statement in person.

If you filed a nomination form, you must file a financial statement. This includes candidates who withdrew their nomination, candidates who were not certified and did not appear on the ballot, and candidates who were acclaimed.

If you did not receive any contributions (including contributions from yourself) or incur any expenses, you are only required to fill out the first page of the financial statement and sign it.

If you received contributions or incurred any expenses you must complete the relevant parts of the financial statement.

If your campaign contributions (including contributions from yourself) or campaign expenses are greater than $10,000 you must have your financial statement audited and include the auditor's report when you submit your financial statement to the clerk.

Campaign surplus

At the top of Box D, you must subtract the total amount of your campaign expenses from the total amount of your campaign income. If your income is greater than your expenses, your campaign has a surplus.

If you ran for office on the same council or school board in the previous election, and that campaign had a deficit, you may subtract this amount from your surplus.

You are entitled to recoup contributions made by yourself or your spouse out of the surplus. For example, if the surplus was $500 and you contributed $400 to your campaign, you may deduct that $400, leaving your campaign with a surplus of $100. If the surplus was $500 and you contributed $600, you may deduct $500 of your contribution, leaving your campaign with $0. You may not deduct more than the value of the surplus.

If, after deducting contributions made by yourself or your spouse, the campaign still has a surplus, these funds must be turned over to the clerk.

Contributions from yourself and/or your spouse

If you are running for municipal council, you and your spouse are subject to limits on how much you can contribute to your campaign. This limit applies to contributions of money, goods and services, as well as the value of any inventory from a previous campaign that you have used in your current campaign.

Record these amounts on the lines provided in Schedule 1. Do not include them in the tables of contributions (Table 1 or Table 2). The other reason to identify the contributions from you and your spouse is because those contributions can be recouped by you and your spouse if the campaign ends with a surplus.

Contributions totalling more than $100

If a contributor makes one or more contributions totalling more than $100 (including the value of goods and services and the cost of tickets to fundraising events), you must record all of these contributions in the tables provided.

Contributions totalling $100 or less

If the total amount contributed (including the value of goods and services) from a single contributor is $100 or less, you do not need to provide details on the form. Simply indicate the total value of all such contributions on the line provided.

Note: it is the total amount contributed that matters – if an individual buys a ticket to a fundraising event for $50, and then later in the campaign contributes $75, each of these contributions must be recorded in Table 2 because the total exceeds $100.

Corporations

Corporations are not permitted to make contributions to candidates. If you have accepted a contribution from a corporation, you must return it.

Declaration

By signing the form, you are declaring that the information recorded in the financial statement is true and accurate. If your financial statement was prepared by someone else, you as the candidate are still responsible for its accuracy.

Expenses

Your campaign expenses include the value of any goods or services that have been contributed to your campaign (it is as if the contributor gave money to the campaign, which the campaign then spent on acquiring the goods or services).

The general spending limit applies only to expenses incurred until the end of voting day. Expenses incurred after voting day are not subject to the spending limit.

Note: An expense subject to the general spending limit that was incurred prior to voting day but not paid for until after voting day is still subject to the limit.

Some types of expenses are not subject to the general spending limit even if they are incurred prior to voting day.

Fundraising events/activities

The cost of holding fundraising events or activities is not subject to the spending limit. However, in order to be considered a fundraising cost, the primary purpose for the expense must be related to fundraising rather than promoting the candidate. Incidental fundraising that happens to occur during a promotional event is not sufficient to make it a fundraising event. Similarly, a line at the bottom of a campaign brochure asking people to donate does not make the production of the brochure a fundraising expense.

If you have included costs of fundraising events/activities as an expense in Box C, you must provide details of these events and activities in Schedule 2.

Contributions received at a fundraising event may include:

- the price of the ticket

- if goods or services are offered for sale, any amount of money paid that exceeds their market value (e.g. if a $100 item is sold for $175, the purchaser has made a $75 contribution to the campaign)
- personal cheques collected from contributors at the event.

If contributors have donated goods or services for the fundraising event, these must be recorded as contributions and as expenses.

These contributions must be recorded in Schedule 1, and where the total from a contributor exceeds $100, be detailed in the appropriate tables.

The fundraising event may also generate income that is not considered to be a contribution:

- donations of $25 or less
- if goods or services are offered for sale, the market value of those goods and services sold (e.g. if a $100 item is sold for $175, $100 is income)
- if goods or services are offered for sale for $25 or less, the money paid is campaign income.

Goods and services

Eligible contributors may donate goods and services to the campaign. These must be recorded as a contribution and as an expense (as if the contributor donated money, which the campaign then spent on the goods and services).

Corporations and trade unions are not permitted to make contributions to candidates. This includes contributions of goods and services.

Income

Your campaign income includes all contributions received from yourself, your spouse and other eligible contributors. This includes the value of contributions of goods and services. Income also includes any refunds of deposits, interest earned by your campaign bank account, and revenue from fund-raising events or activities that is not deemed a contribution (for example, if you sold refreshments at market value).

Ineligible contributions

Only individuals normally resident in Ontario may contribute to your campaign.

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Tab 6

Black's Law Dictionary

Ninth Edition

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incroach, *vb. Archaic.* See ENCROACH.

incroachment. *Archaic.* See ENCROACHMENT.

in cujus rei testimonium (in **kyoo**-jəs **ree**-ɪ tes-tə-**moh**-nee-əm). [Law Latin] *Hist.* In witness whereof. • These words were used to conclude deeds. The modern phrasing of the testimonium clause in deeds and other instruments — beginning with *in witness whereof* — is a loan translation of the Latin.

inculpatae tutelae moderatio. See MIDERAMEN INCULPATAE TUTELAE.

inculpate (in-**kəl**-payt *or* **in**-kəl-payt), *vb.* (18c) **1.** To accuse. **2.** To implicate (oneself or another) in a crime or other wrongdoing; INCRIMINATE. — **inculpation,** *n.* — **inculpatory** (in-**kəl**-pə-tor-ee), *adj.*

inculpatory evidence. See EVIDENCE.

incumbent (in-**kəm**-bənt), *n.* (15c) One who holds an official post, esp. a political one. — **incumbency,** *n.* — **incumbent,** *adj.*

incumbrance. See ENCUMBRANCE.

incur, *vb.* (15c) To suffer or bring on oneself (a liability or expense). — **incurrence,** *n.* — **incurrable,** *adj.*

incurramentum (in-kə-rə-**men**-təm). [fr. Latin *in* "upon" + *currere* "to run"] *Hist.* The incurring of a fine or penalty.

incurred risk. See ASSUMPTION OF THE RISK (2).

in cursu diligentiae (in **kər**-s[y]oo dil-ə-**jen**-shee-ee). [Law Latin] *Hist.* In the course of doing diligence — i.e., executing a judgment.

in cursu rebellionis (in **kər**-s[y]oo ri-bel-ee-**oh**-nis). [Law Latin] *Hist.* In the course of rebellion.

> "In cursu rebellionis . . . . All persons were formerly regarded as in rebellion against the Crown who had been put to the horn for non-fulfilment of a civil obligation; their whole moveable estate fell to the Crown as escheat; they might be put to death with impunity; and lost all their legal privileges. If the denunciation remained unrelaxed for year and day (which was the time known as the *cursus rebellionis*), the rebel was esteemed *civiliter mortuus*, and his heritage reverted to the superior . . . . Denunciation for civil obligation and its consequences were in effect abolished by the Act 20 Geo. II. c. 50." John Trayner, *Trayner's Latin Maxims* 257 (4th ed. 1894).

in custodia legis (in kə-**stoh**-dee-ə **lee**-jis). [Latin] In the custody of the law <the debtor's automobile was *in custodia legis* after being seized by the sheriff>. • The phrase is traditionally used in reference to property taken into the court's charge during pending litigation over it. — Also termed *in legal custody.* [Cases: Attachment ⇨64; Execution ⇨55; Garnishment ⇨58.]

in damno vitando (in **dam**-noh vɪ-**tan**-doh). [Latin] *Hist.* In endeavoring to avoid damage (or injury).

inde (**in**-dee), *adv.* [Latin] *Hist.* Thence; thereof. • This word appeared in several Latin phrases, such as *quod eat inde sine die* ("that he go thence without day").

indebitatus (in-deb-i-**tay**-təs), *p.pl.* [Law Latin] Indebted. See NUNQUAM INDEBITATUS.

indebitatus assumpsit (in-deb-i-**tay**-təs ə-**səm**[p]-sit). See ASSUMPSIT.

indebiti solutio (in-**deb**-i-tɪ sə-l[y]**oo**-shee-oh). [Latin] *Roman & Scots law.* Payment of what is not owed. • Money paid under the mistaken belief that it was owed could be recovered by *condictio indebiti.* See *condictio indebiti* under CONDICTIO.

> "*Indebiti Solutio* — When a person has paid in error what he was not bound to pay the law lays upon the person who has received payment a duty of restitution. . . . Payment (solutio) includes any performance whereby one person has been enriched at the expense of another. Usually it will be the handing over of money or of some other thing, but it may also consist in undertaking a new liability or in discharging an existing liability." R.W. Lee, *The Elements of Roman Law* 373–74 (4th ed. 1956).

indebitum (in-**deb**-i-təm), *n.* & *adj. Roman law.* A debt that in fact is not owed. • Money paid for a nonexistent debt could be recovered by the action *condictio indebiti.* Cf. DEBITUM.

> "A conditional debt if paid could be recovered as an *indebitum*, so long as the condition was outstanding." W.W. Buckland, *A Manual of Roman Private Law* 255 (2d ed. 1939).

indebtedness (in-**det**-id-nis). (17c) **1.** The condition or state of owing money. **2.** Something owed; a debt.

indecency, *n.* (16c) The state or condition of being outrageously offensive, esp. in a vulgar or sexual way. • Unlike obscene material, indecent speech is protected under the First Amendment. Cf. OBSCENITY. [Cases: Obscenity ⇨1.] — **indecent,** *adj.*

> "*Obscenity* is that which is offensive to chastity. *Indecency* is often used with the same meaning, but may also include anything which is outrageously disgusting. These were not the names of common-law crimes, but were words used in describing or identifying certain deeds which were." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 471 (3d ed. 1982).

indecent advertising. 1. Signs, broadcasts, or other forms of communication that use grossly objectionable words, symbols, pictures, or the like to sell or promote goods, services, events, etc. **2.** *Archaic.* In some jurisdictions, the statutory offense of advertising the sale of abortifacients and (formerly) contraceptives.

indecent assault. See *sexual assault* (2) under ASSAULT.

indecent assault by contact. See *sexual assault* (2) under ASSAULT.

indecent assault by exposure. See INDECENT EXPOSURE.

indecent exhibition. The act of publicly displaying or offering for sale something (such as a photograph or book) that is outrageously offensive, esp. in a vulgar or sexual way. [Cases: Obscenity ⇨6, 7.]

indecent exposure. (1828) An offensive display of one's body in public, esp. of the genitals. — Also termed *indecent assault by exposure; exposure of person.* Cf. LEWDNESS; OBSCENITY. [Cases: Obscenity ⇨3.]

> "*Indecent exposure* of the person to public view is also a common-law misdemeanor. Blackstone did not deal with it separately. 'The last offense which I shall mention,' he said, 'more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious

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Rollin M. Perkins &
ed. 1982) (quoting
the Laws of Englan

indecent liberties. (1
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⇨13.]

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meaning in English]

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indefinite payment. S

indefinite postponer
under POSTPONE.

indefinite sentence. S
SENTENCE.

indefinite sentencing.
ING.

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name of God. • The c

in delicto (in də-**lik**-tc
DELICTO. Cf. EX DELIC

indemnification (in-de
action of compensati
2. The compensation
20.] — **indemnificato**

indemnifier. See INDEM

indemnify (in-**dem**-n
(another) for a loss su
or one's own act or de
Indemnity ⇨20–84
(another) for such a l
3. To give (another) s

indemnifiable, *adj.*

indemnis (in-**dem**-nis),
or damage; harmless.

indemnitee (in-dem-nə
indemnity from anoth
33, 63.]

Tab 7

1974 CarswellAlta 54
Alberta Supreme Court

Vladicka v. Calgary School District No. 19

1974 CarswellAlta 54, [1974] 4 W.W.R. 159, 45 D.L.R. (3d) 442

Vladicka v. Board of School Trustees of Calgary School District No. 19

McDonald J.

Judgment: March 12, 1974

Counsel: *W. A. McGillivray, Q.C.*, and *C. K. Yates*, for applicant.
W. E. Code, Q.C., and *N. C. Wittman*, for respondent.

Subject: Public
Related Abridgment Classifications
Education law
III Administration of schools
III.1 Trustees and boards
III.1.d Remuneration
Headnote
Education Law --- Administration of school — Trustees and boards — Remuneration
Schools and school districts — Powers of trustees to pay honoraria to members and fix amounts — The School Act, R.S.A. 1970, c. 329, s. 65, as amended by 1972, c. 84, s. 4.
The word "honoraria" as used in s. 65(4) of The School Act means payments to the trustees of compensation for services rendered in the normal course of their duties, payments which cannot be enforced by suit by the trustees as a group or as individuals against the board, and which may be of any amount which the board determines to be appropriate. It may be that the power to fix the amount is not absolutely unfettered or untrammelled, but the word "honorarium" is not to be limited to mean merely a token payment.
A property tax payer may institute proceedings by originating notice of motion to determine the rights of interested parties under a statute such as The School Act without joining the Attorney General and without the permission of the Lieutenant-Governor in Council: *Thorson v. A.G. Can.*, Supreme Court of Canada, 22nd January 1974 (not yet reported) applied.

***McDonald J.*:**

1 This is an application commenced by originating notice, under R. 410 of the Rules of Court, which reads as follows:

> 410. Proceedings may be commenced by originating notice in the following cases ...
>
> (*e*) proceedings for the determination of any question where there are no material facts in dispute and the rights of the parties depend upon the construction of ...
>
> (ii) a statute ...

and for a declaration of the rights of the persons interested.

2 An affidavit by the applicant was filed, but at the commencement of argument the affidavit was withdrawn and counsel agreed that the following are the two facts which are not in dispute: (1) that the applicant is a public school supporter and ratepayer in the City of Calgary; (2) that on 12th December 1973 the respondent Board passed a resolution "That honorarium for Trustees to be set at $9,000 annually and that honorarium for the Chairman of the Board be $11,500 annually, effective December 1, 1973." (There is thus no evidence whatever before me as to the expressed motives of members of the Board in passing this resolution, or as to the nature of the duties of the trustees or of the chairman, or as to what honoraria had previously been authorized by the Board to be paid to trustees or to the chairman.)

3 Also at the commencement of argument, leave was granted to amend the style of cause so that the applicant is shown as: "Leo Vladicka, suing on behalf of all Public School supporters paying municipal property taxes to the City of Calgary except the majority of the Board of Trustees of Calgary School District #19."

4 The applicant applies for an order determining whether setting the honoraria in the said amounts is within the jurisdiction and powers granted to the respondent Board by The School Act, R.S.A. 1970, c. 329, and for a declaration of the rights of the persons interested.

5 There were two preliminary objections to the status of the applicant. These will be discussed, and then the merits.

1. Should the Attorney General have been the applicant?

6 Counsel for the respondent objected to the status of the applicant. He submitted that the application may be made only by the Attorney General of Alberta ex officio or by the applicant in a relator action authorized by the Attorney General. For this proposition he cited *Fransden v. Lethbridge* (1965), 52 W.W.R. 620, a decision of Riley J. of this Court, and *A.G. ex rel. McWhirter v. Independent Broadcasting Authority*, [1973] Q.B. 629, [1973] 2 W.L.R. 344, [1973] 1 All E.R. 689. The position supported by those cases is that such is the proper procedure where a ratepayer or private citizen seeks an order against a public authority, except when he can show that he has a special interest.

7 However, regard and respect must now be had for the observations of Laskin J., delivering the judgment of the majority of the Supreme Court of Canada in *Thorson v. A.G. Can.*, 22nd January 1974 (not yet reported). There, the actual decision was that the plaintiff, a taxpayer suing in a class action, was entitled to sue for a declaration that certain statutes of the Parliament of Canada were unconstitutional in the sense that they were beyond the powers of Parliament, even though the action was brought neither by the Attorney General of Canada nor with his authority in a relator proceeding. Laskin J. (now C.J.C.) distinguished the *McWhirter* case on the ground that English authorities are inapplicable at least to the question of the justiciability in a federal state like Canada of matters involving the respective powers of the central and the unit legislatures.

8 We are faced in the present application with no such question. However, we must nevertheless heed what was said in the *Thorson* case of suits by ratepayers challenging expenditures by municipal authorities. Laskin J. noted that in *MacIlreith v. Hart* (1907), 39 S.C.R. 657, 4 E.L.R. 468, Duff J. had

> ... concurred in the reasons of Davies J. who founded himself on the principle of *Paterson v. Bowes* (1853), 4 Gr. 170, and who found reconciliation with English authority by concluding that ratepayers, who sue to vindicate a public right to have municipal money lawfully appropriated, suffer damage peculiar to themselves qua ratepayers in the increased rates they would have to pay by reason of illegal expenditures, even though the damage be small. Idington J. proceeded squarely on *Paterson v. Bowes*. So did Maclennan J. (with whom Fitzpatrick C.J.C. concurred) although he viewed that case as reflecting a trustee-beneficiary relationship between the municipality and its ratepayers. It is quite clear that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that ultra vires expenditures were involved which the municipal council was unwilling to reclaim.

9 In the present application, there is no point in making it a precondition of status that the applicant first ask the respondent Board not to pay the money referred to in the resolution, for the Board has obviously made up its mind to do so.

10 Laskin J. clearly approved the decisions in *Paterson v. Bowes*, supra, and *MacIlreith v. Hart*, supra. In *Paterson v. Bowes*, the municipal council refused at first to act to recover for the city from the defendant mayor the sum of £50,000 for debentures in the sum of £50,000 which he had obtained at a discount and which he had retained for his own use. The inhabitants who brought a class action were held to be entitled to sue. In *MacIlreith v. Hart*, to quote Laskin J.,

> ... a municipal council had paid $231 to the mayor to reimburse him for his expenses in attending a municipal convention. A ratepayer of the municipality brought a class action against the mayor (the municipal council having refused to do so) for a declaration that the payment was illegal and that the sum in question should be returned by the mayor. There was at the time no authority for the municipal council to pay convention expenses. On the question whether a ratepayer's action lay, the trial Judge dismissed the suit on the ground that the Attorney General was a necessary party. The Supreme Court of Nova Scotia en banc reversed, holding the action to be maintainable as brought, and this decision was affirmed by this Court.

11 Indeed, in *Smith v. A.G. Ont.*, [1924] S.C.R. 331 at 337, 42 C.C.C. 215, [1924] 3 D.L.R. 189, Duff J. does not question the authority of *MacIlreith v. Hart* as to "actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities".

12 In *Fransden v. Lethbridge*, supra, Riley J. held that an action by a proprietary elector for a declaratory judgment that a municipal bylaw was invalid should be stayed pending joinder of the Attorney General as plaintiff in the relation of the elector. In reaching this conclusion he quoted and relied on a passage from the judgment of Davies J. in *MacIlreith v. Hart*, supra, at p. 662:

> The necessity of the Attorney-General being a party to *any action* against corporations which involve only public rights or interests, or for the protection, in any way, of public interests, as such, and as distinct from cases where there is a distinct private inquiry arising from the act complained of, is admitted.

13 The actual decision in *Fransden v. Lethbridge* on this point may not be affected by *Thorson v. A.G. Can.*, for it is clear that in that case Laskin J. treats *MacIlreith v. Hart* as authorizing "ratepayers' actions to challenge the legality of *municipal expenditures*". No question of municipal expenditures was raised in *Fransden v. Lethbridge*, but it is here and therefore this preliminary objection fails.

2. Should the applicant have obtained the permission of the Lieutenant-Governor in Council?

14 The second objection taken by the respondent is that the application should fail because permission to make has not been given by the Lieutenant-Governor in Council. Reliance is placed on s. 24(2) of The Judicature Act, R.S.A. 1970, c. 193, which reads:

> (2) No action whereby the relief claimed or part of the relief claimed is an injunction, mandamus, prohibition or other process or proceeding affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute of the Legislature of the Province, or by an order in council of the Province, shall be brought or maintained unless permission to bring or maintain the action has first been given by the Lieutenant Governor in Council.

15 Section 2(*a*) of The Judicature Act reads:

> (*a*) 'action' means a civil proceeding commenced in such manner as may be prescribed by the Rules of Court, and includes a suit.

16 The Rules of Court contemplate that (R. 6(2)):

(2) Proceedings may be commenced by originating notice where permitted by statute or by these Rules.

17 Here, the proceeding was commenced by originating notice under R. 410, which has already been quoted.

18 In *Rex v. Highway Traffic Board*, [1947] 1 W.W.R. 342 at 348, [1947] 2 D.L.R. 373 Alta.), O'Connor J. held that this statutory provision did not apply to a proceeding by motion for mandamus. In the present application, however, there can be no doubt that the proceeding, commenced by originating notice, is an "action" within the meaning of the statute. However, in my view, the relief sought by the applicant, if granted, would not amount to "affecting or interfering directly or indirectly with the doing by a person or the omission by a person of an act authorized or directed by a statute". If the applicant is correct in asserting that the respondent's resolution is beyond the powers granted to the respondent by s. 65(4)(*f*) of The School Act, then the respondent, by adopting the resolution, has not done an act "authorized or directed by a statute". Indeed, the position would be that the respondent has done an Act *not* authorized by The School Act. Therefore, it was not necessary to obtain the permission of the Lieutenant-Governor in Council before commencing this proceeding.

3. The merits

19 Turning, then, to the merits of the application, the following are pertinent provisions of The School Act.

65. ...

(4) In addition to the powers vested in it by section 14 of *The Interpretation Act* a board, subject to this Act and the regulations, may ...

(*d*) provide for payment to the chairman or any trustee a sum of money in respect of work authorized by the board in addition to his normal duties ...

(*f*) provide for the payment of travelling and other expenses and honoraria of

(i) trustees, and

(ii) persons appointed to committees of the board.

32. (1) A person is not qualified to remain a trustee if he ...

(*k*) is party to a subsisting contract with the board under which money of the board is payable or may become payable for any work, service, matter or thing, or

(*l*) has a pecuniary interest, whether direct or indirect, in any subsisting contract with the board under which money of the board is payable or may become payable for any work, service, matter or thing ...

(2) Subsection (1) does not apply to a person by reason only ...

(*h*) of the receipt by him of a gratuity or allowance for services on a committee appointed by or responsible to the board.

20 Section 32(2)(*h*) contemplates that the board has the power to pay to a trustee an "allowance for services on a committee". This is presumably an example of "work authorized by the board in addition to his normal duties" for which a trustee may be paid "a sum of money" under s. 65 (4)(*d*). Section 32(2)(*h*) also contemplates that the board has the power to pay to a trustee a "gratuity". Is this separate and apart from the "allowance for services on a committee"? Or is it a synonym for an "allowance for services on a committee"? If the former meaning were adopted, then the word

"gratuity" would have to refer to the word "honoraria" in s. 65(4)(*f*). Yet such a reference would be unnecsary, since the payment of honoraria certainly cannot be a matter of contractual obligation. Therefore a trustee does not receive his honorarium under a "contract with the board under which money of the board is payable". Consequently, s. 32(1) does not threaten a trustee with disqualification when he receives his honorarium, and there is no need for special protection in s. 32(2). My conclusion is that the latter interpretation is correct, that is, the word "gratuity" is used as a synonym for "allowance for services on a committee".

21 One of the meanings ascribed to the word "gratuity" in the Oxford English Dictionary is:

> A gift or present (usually of money), often in return for favours or services, the amount depending upon the inclination of the giver; ... Now applied exclusively to such a gift made to a servant or inferior official; a 'tip'.

22 The Oxford English Dictionary also says that another meaning, viz., "payment; wages", is obsolete. Webster's Third New International Dictionary gives as one of the meanings of "gratuity": "something given voluntarily or over and above what is due, usually in return for or in anticipation of some service."

23 Thus, the draftsman appears to have regarded "gratuity" as equivalent to "allowance for services". As will shortly appear, in my view the word "honorarium" is also referable to compensation for services. Like a "gratuity", it cannot be sued for. Therefore, as "gratuity" and "honorarium" are similar in meaning, it is not unreasonable to infer that when he used the word "honorarium" he was also thinking of some payment for services. Does this help in the interpretation of "honoraria"? It does, in the sense that the word "honorarium" appears to me to be similar in meaning to the word "gratuity".

24 The word "honorarium" is defined as follows:

25 Jowitt, Dictionary of English Law: "a recompense for service rendered; a voluntary fee to one exercising a liberal profession, *e.g.*, a barrister's fee."

26 Oxford English Dictionary (1961), vol. 5: "gift made on being admitted to a post of honour, douceur, fee, neut. sing. of *honorarius*. An honorary reward; a fee for services rendered, especially by a professional person."

27 Webster's Third New International Dictionary (1971): "An honorary payment or reward, usually given as compensation for services on which custom or propriety forbids any fixed business price to be set or for which no payment can be enforced at law." (To illustrate an appropriate use of the word in context, the following illustrations are given: "supplementing his income by honoraria from speaking engagements"; "the medal carried an honorarium of $500". The 1928 edition of Webster, following a definition substantially similar to that in the 1971 edition, added: "as in case of counsel in Great Britain and in some of the United States, or in case of some physicians in England.")

28 The reference to "some physicians in England" is to Fellows of the Royal College of Surgeons; in the case of all other members of the medical profession in England, the disability to sue for fees has been removed by statute.

29 A common thread running through these definitions is the notion that, while the money paid as an "honorarium" is a compensation for services rendered, it is nevertheless not a payment for which the recipient, if not paid, could sue in a court of law. It is thus in the nature of an ex gratia or gratuitous payment, unlike a salary or wage or other contracted remuneration. Certainly "honoraria" paid to English barristers or to Fellows of the Royal College of Surgeons in England may be very substantial in amount. There is nothing in the use of the word in relation to those professions in England denoting a mere "token" amount.

30 The position of barristers in England, in not being entitled to sue for their fees, was discussed in *Rondel v. Worsley*, [1969] 1 A.C. 191, [1967] 3 All E.R. 993, per Lord Morris of Borth-y-Gest at pp. 236-39, and per Lord Upjohn at p. 278. At p. 236, Lord Morris cited *Thornhill v. Evans* (1742), 2 Atk. 330, 26 E.R. 601, where Lord Hardwicke L.C. said, at p. 332: "Can it be thought that this court will suffer a gentleman of the bar to maintain an action for fees, which is *quiddam*

honorarium or, if he happens to be a mortgagee, to insist upon more than the legal interest, under pretence of gratuity or fees for business formerly done in the way of a counsel?" Lord Upjohn, at p. 278, said: "Fees must be regarded as pure honoraria (see *Thornhill v. Evans*, per Lord Hardwicke, and *Re May* (1858), 4 Jur. N.S. 1169, per Kindersley V.-C.)".

31 Reference may also be made to the Preface by Sir John Davys in his Reports, in 1615. I rely on Roxburgh, "*Rondel v. Worsley*: Immunity of the Bar" (1968), 84 L.Q.R. 513, and "*Rondel v. Worsley*: The Historical Background" (1968), 84 L.Q.R. 178 at 179-80:

> ... Sir John Davys ... observed that our learned men of the law did not grow to good estates in the commonwealth by any illiberal means ('as envy sometime suggesteth'), but in a most ingenious and worthy manner. 'For the fees and rewards which they receive, are not of the nature of wages, or pay, or that which we call *salary* or *hire*, which are indeed duties certain and grow due by contract for labour or service, but that which is given to a learned Councellor is called *honorarium*, and not *merces*, being indeed a gift which giveth honour as well to the *Taker* as to the *Giver*; neither is it certain or contracted for ... the worthy Councellor may not demand it without doing wrong to his reputation.'

32 In his Commentaries, vol. 3, p. 28, published between 1765 and 1769, Blackstone wrote: "... it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation".

33 I realize that in our country a barrister's fee is one for which he can sue, and that therefore it is inappropriate in Canada to refer to that fee as an honorarium. However, this does not mean that I can ignore the meaning of the word itself which it has acquired in England, in the absence of any indication that the word has acquired a special or distinctive meaning in Canada, whether indigenously or by virtue of influence from elsewhere in the English-speaking world. There is no such indication as far as I can determine.

34 Counsel for the applicant submitted that the legislative history of the statute could be of some assistance to his position. This submission requires a survey of the history of the relevant provision of The School Act (the present s. 65(4)). Section 127(1) of R.S.A. 1942, c. 175, reads as follows:

> 127. (1) The Board of every district shall in its discretion have power ...
>
> > (*h*) to pay the expenses of any members of the Board, or of any officials who are employees thereof, incurred in attending any convention of school trustees or any other educational convention or conference.

35 There was, at that time, no provision that a district school board could provide for payment to its trustees for their attendance at meetings or otherwise. However, s. 274(1)(*c*) provided that the trustees of divisional boards were permitted $5 per meeting with a maximum of 12 meetings per year. Thus the maximum annual compensation for divisional board members in 1942 was $60, while district board trustees received nothing but their expenses.

36 By 1952, this situation had changed. By this time, non-divisional districts, like Calgary School District No. 19, had been created. The relevant provision in 1952 (Alta.), c. 80, was s. 174(1) which allowed: "for payment to each trustee for attendance at any regular or special meeting of the board, or at any meeting of any standing or special committee, when such meeting is approved by the board." Trustees of a city district, like that in Calgary, were allowed a payment that was not to exceed $5 for each meeting. At this time, divisional district trustees were limited to $8 for each meeting, with a maximum of 12 regular meetings and two special meetings per year. Trustees of other districts were entitled to $3 per meeting.

37 The Alberta legislation was consolidated in R.S.A. 1955, c. 297, still as s. 174. Consequently in 1955, a trustee in the City of Calgary would be allowed a payment of $5 for each meeting, although there would not appear to have been a limitation on the number of meetings per year.

38 In 1958 (Alta.), c. 74, s. 7, the city district trustees had their allowance per meeting raised from $5 to $10, while the allowance for divisional trustees was raised from $10 to $15 and the allowance for other trustees was raised from $4 to $5.

39 In the amendments of 1959, being c. 76, the term "honorarium" was first introduced. The Act of that year added [by s. 5] s. 174*a* to The School Act, as follows:

> 174*a*. The board of a city may by by-law
>
> (*a*) provide for the payment to each trustee of an amount to be fixed by the by-law for attendance at any regular or special meeting of the board, or any meeting of any standing or special committee, when such meeting is approved by the board, or
>
> (*b*) provide for the payment to each trustee of an annual honorarium in an amount to be fixed by the by-law.

40 Thus, the amount of payment to trustees of city district school boards was no longer limited to a specific amount. However, at this time, the statute still read that the divisional trustees were allowed $15 per meeting, with a maximum of 12 regular meetings and two special meetings per year. This would make a maximum total of $210 per annum in compensation. Other trustees were still limited to $5 per meeting.

41 Counsel for the applicant submitted that it is clear from the history of the statute that divisional trustees were considered to have greater responsibility, and thus were entitled to more money, than those in city districts or other districts. Consequently, he submitted that it is clear that the enactment of s. 174*a* including the word "honorarium" was not intended to entitle the trustees of city districts to vote themselves whatever amount they chose.

42 In 1966 (Alta.), c. 90, s. 12, the then existing ss. 174 and 174*a* were struck out and the following was substituted:

> 174. (1) The board of a non-divisional district or of a division may by resolution or by-law provide for payment to each trustee who attends any
>
> (*a*) regular or special meeting of the board, or
>
> (*b*) meeting of a standing or special committee, where the meeting has been approved by the board,
>
> of an amount of money for each such meeting he attends and an allowance per mile for every mile necessarily travelled by him in coming to and returning from a meeting.
>
> (2) In a case of a city district the board may, in lieu of providing for payment in accordance with subsection (1), provide for payment to each trustee of an annual honorarium in an amount to be fixed by resolution or by-law.

43 The only difference indicated by this amendment is that the conjunction "or" was eliminated, and the city district board was given express power to grant annual honoraria "in lieu of" providing for payments per meeting. Counsel for the applicant submitted that the use of this terminology does not in any way change the legislative intention as it existed prior to 1959. Where the statute provided that each trustee was entitled to $10 per meeting in 1958, counsel contended that the trustees cannot be entitled to whatever they choose to pay themselves in 1959 and thereafter.

44 In 1970 [c. 100, s. 189] The School Act was repealed and the current statute was substituted therefor. The current section has already been quoted.

45 Counsel for the applicant therefore submitted that the restriction of permissible payments to trustees for their attendance at meetings to $5 in 1952 and $10 in 1958 indicates that the word "honoraria", as it is included in the 1970 statute, is to be interpreted as referring to a similar amount, which he describes as a "token" amount. He submitted that the history of the legislation points to a close restriction on payments to be made by the trustees to themselves, and that,

when placed in historical perspective, s. 65(4)(*f*) of The School Act does not entitle the Board of Trustees of Calgary School District No. 19 to vote themselves "honoraria" of $9,000 per annum.

46 I have set out this submission at length because the care with which it has been mustered entitles it to respect. However, in my view it fails. I do not feel that the legislative history before 1959 is of any assistance in interpreting the meaning of the word "honoraria" because The School Act before 1959 did not use that word. The introduction of the word "honorarium" in 1959, for ought I know, may have been intended by the Legislature to authorize a city district board to provide for payment to each trustee of an amount unrelated to previous specific limitations of so much per meeting. The very removal of any such specific limitation in 1959 lends support to the view that no limitation was intended, either for fixed payments on a per-meeting basis or on the basis of an annual honorarium. In any event, I find that the legislative history does not assist me in arriving at the meaning of the word "honorarium" as used in 1959 and 1966, or "honoraria" as used in 1970.

47 In my view, therefore, the word "honoraria" as used in s. 65(4) of The School Act means a payment to the trustees of compensation for services rendered in the normal course of their duties, a payment which cannot be enforced by suit by the trustees as a group or as individuals against the board, and which may be of any amount which the board determines is appropriate.

48 I make no finding as to what the "normal course of their duties" encompasses. Undoubtedly it includes attendance at meetings of the board. As to whether, in view of the provisions of s. 32(2)(*h*), it includes attendance at meetings of board committees, I express no opinion.

49 It may be that in certain circumstances, as to the particulars of which I decline to speculate, the amount decided upon by the board as being an appropriate honorarium for the services of each trustee might be held by a court in a proper proceeding not to be "honoraria" within the meaning of s. 65(4)(*f*). For example, if the statutory power to set the honoraria were not exercised reasonably, in the sense that there has been bad faith, or dishonesty, or the board has taken into consideration matters which are irrelevant to the matter, or if the amount decided upon is so absurd that no sensible person could ever dream that it lay within the powers of the board to pay it, then it might be held that there was no statutory power to pay the amount decided upon as "honoraria". Such might be the effect of applying the principles enunciated by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*, [1948] 1 K.B. 223, [1947] 2 All E.R. 680, although I recognize that that was a case of the exercise of executive or administrative discretion rather than the exercise of delegated legislative power.

50 In the sense of the principles just stated, therefore, it may be that it is quite proper to say that the power conferred on the board by s. 65(4)(*f*) is not an absolutely unfettered or untrammelled power to pay trustees whatever amount of money they may choose to describe as "honoraria".

51 In any event, my decision in the framework of this application is that the circumstances now placed before me do not have the result that the principles I have mentioned in the last paragraph but one apply. Whether or not the same circumstances, placed before the court in another proceeding, would, in combination with other facts, have a different result, is something I cannot know. However, I do here point out that no one should interpret my decision in this matter as authority for the proposition that the present s. 65(4)(*f*) gives unfettered and unbridled authority to a school board to set the trustees' honoraria in any amount whatever, however large.

52 Moreover, any such contention that the board has not acted reasonably could probably be asserted properly or effectively only in an action for a declaratory judgment, or perhaps for a mandamus, in which the issues of fact, as to the nature and extent of the duties of the trustees, could be fully explored in the pleadings, in pre-trial proceedings, and at a trial with the hearing of viva voce evidence. Likewise, if I am wrong in my conclusion that the word "honoraria" does not necessitate payment only of "token" amounts, then it would be necessary to determine what is a "token" amount in the light of the time expended and responsibility undertaken by the trustees of the particular school board in question, in the exercise of their normal (and perhaps abnormal) duties. That decision could be reached only after the hearing of

viva voce evidence at the trial of an action of the kind just mentioned. The issues would be such as not to be susceptible of proper determination on the hearing of an application such as the present, the framework of which is not designed to provide a forum for determination of detailed facts. It may be that the facts necessary for the determination of the matter could be agreed on or otherwise be beyond dispute, but, more likely than not, the court would be hampered by not being at liberty to explore the facts at all if the procedure adopted were under R. 410(*e*).

53 Indeed, if I am wrong in my interpretation of the word "honoraria", and if the submission of counsel for the applicant is correct, that the word authorizes only a "token" payment, I would not consider it an easy matter to determine what is a "token" payment when there is no evidence before me as to the extent of the time expended by, or the gravity of the functions and responsibilities assumed by, these particular trustees. Counsel for the applicant urged that a sum of $9,000 is greater than the annual wages or salary of many citizens, and therefore cannot be regarded as a "token" amount. That contention might be of some weight if I had come to the conclusion that the word "honoraria" implies a "token" payment; how much weight I cannot say, for it would be one of the matters to be taken into account, others being, for example, time spent and responsibility assumed.

54 In arriving at my conclusion that the word "honorarium" does not mean a "token" payment, I have not failed to note that statutorily delegated power to spend public revenues should be strictly construed in the sense that the legislative intention to delegate the power to make the particular kind of expenditure must be expressly stated: *Re Mclean and Cornwall* (1871), 31 U.C.Q.B. 314 at 322 (C.A.); *Amherst v. Read; Amherst v. Fillmore* (1897), 40 N.S.R. 154 at 155.

55 My view is that the word "honorarium" is not ambiguous, and that therefore there is no need to apply a "strict" construction. The power to pay an "honorarium" is expressly given by statute, and the ordinary meaning of the word does not contain a limitation as to amount. Nor are there even conflicting definitions, one or some containing such a limitation, others not containing it; if there had been conflicting definitions on this point and hence ambiguity, the definition containing a limitation as to amount would have prevailed.

56 The application is therefore dismissed. Costs, if desired, may be spoken to.

End of Document

Tab 8

Authority: Executive Committee Item EX27.3, as adopted by City of Toronto Council on October 2, 3 and 4, 2017

CITY OF TORONTO

BY-LAW 1085-2017

To authorize the payment of rebates to individuals who contribute to candidates for office on City Council in the 2018 municipal election.

To authorize the payment of rebates to individuals who contribute to candidates for office on City Council in the 2018 municipal election; and

Whereas subsection 88.11(1) of the Municipal Elections Act, 1996 ("MEA"), provides that a municipality may, by by-law, provide for the payment of rebates to individuals who make contributions to candidates for an office on the municipal council; and

Whereas subsection 88.25(11) of the MEA, provides that the City Clerk of the municipality may provide for electronic filing under this section and may establish conditions and limits with respect to electronic filing; and

Whereas the City Clerk has established the Electronic Financial Filing System ("EFFS") Policy, which sets out the conditions and limits with respect to electronic filing; and

Whereas candidates who choose to file financial statements electronically under the provisions of the EFFS Policy must also file original financial statement(s) with the City Clerk in accordance with the requirements and deadlines set out in the MEA; and

Whereas candidates who choose to file financial statements electronically using EFFS must also issue all contribution receipts electronically;

The Council of the City of Toronto enacts:

For the 2018 municipal election:

1. The payment of rebates to individuals who make contributions to candidates for an office on the municipal council is authorized.

2. An individual who, during the campaign period, makes a contribution to a candidate for an office on Council may apply to the City Clerk for a rebate.

3. Notwithstanding section 88.15 of the MEA, only a contribution of money will be eligible for a rebate.

4. All contributions must comply with the provisions of the MEA.

5. The Clerk must receive the application for a rebate on or before 4:30 p.m., six months after the supplementary reporting period ends as set out in the MEA.

6. The application for a rebate must be in the form that the City Clerk has established for that purpose and must include the original or electronic signature of the candidate or their designate.

7. To participate in the contribution rebate program, a candidate for an office on Council must:

A. File an audited primary financial statement, and if applicable, a supplementary financial statement, in compliance with subsections 88.25(1) to (7) of the MEA; and

B. Include with the documents filed under subsection 88.25(1) or (4) of the MEA, as the case may be, a copy of the receipt issued for the contribution and a copy of all campaign expense invoices incurred as part of the campaign.

8. A contributor, including the candidate and his or her spouse, to a candidate for an office on Council whose campaign period is extended will not be eligible to receive a rebate until after the candidate's campaign closes and an audited supplementary financial statement is filed in accordance with the MEA.

9. The City Clerk shall pay the applicant a rebate in accordance with section 11 of this by-law if the following conditions are met:

A. The applicant complies with sections 5 and 6 of this by-law;

B. The candidate has complied with sections 4 and 7 of this by-law;

C. The City Clerk is satisfied that the receipt that the applicant filed and the copy that the candidate filed are consistent by comparing both copies;

D. The City Clerk is satisfied that the candidate has filed an audited financial statement(s) required by the relevant filing dates or by court order under the MEA, and that the candidate has not incurred expenses exceeding what is permitted under the MEA;

E. The City Clerk is satisfied that the candidate has paid any surplus, at the time of filing, in accordance with the provisions of the MEA; and

F. The time for an application for a compliance audit has expired and any proceedings in relation to a compliance audit and/or resulting court proceeding(s) is complete.

10. Despite section 9 of this by-law, where an applicant for a rebate claims that their application was mailed but the City Clerk did not receive it prior to the deadline set out in section 5 of this by-law, that applicant can provide an affidavit to the City Clerk. The affidavit must be in the form that the City Clerk has established for that purpose and attesting to the facts. The City Clerk is authorized to process that application in accordance with the relevant provisions of this by-law.

11. An applicant who makes one or more contribution(s) to one or more candidate(s) may apply for a rebate in accordance with the following formula:

A. If the total of the applicant's contribution(s) to all candidates is $300.00 or less, the maximum rebate that will be paid to the contributor is 75 per cent of that total; or

B. If the total of the applicant's contribution(s) to all candidates is more than $300.00 but not more than $1,000.00, the maximum rebate that will be paid to the contributor is $225.00 plus 50 per cent of the difference between that total and $300.00; or

C. If the total of the applicant's contribution(s) to all candidates is more than $1,000.00, the maximum rebate that will be paid to the contributor is the lesser of:

(i) $575.00 plus 33⅓ per cent of the difference between the total and $1,000.00; or

(ii) $1,000.00;

D. Total contributions of $25.00 or less will not receive a rebate;

E. Notwithstanding the above formula, any contribution to a candidate that is not in compliance with this by-law and, therefore, does not qualify for a contribution rebate, shall not be included in the total calculation of the contribution amounts.

12. Any election campaign surplus funds that become the property of the City according to the MEA will be deposited into the Election Reserve Fund XR1017.

13. If candidates choose to participate in the contribution rebate program and use EFFS, the following provisions apply:

A. Candidates must issue all contribution receipts electronically (whether or not eligible for a contribution rebate) and file the prescribed audited financial statement(s) in accordance with the MEA, this by-law and the EFFS Policy.

B. Despite subsection 7B of this by-law, candidates must submit their electronic financial statement(s) and contribution receipts through EFFS within 48 hours of filing the original financial statement(s) with the City Clerk.

C. Candidates must attach copies of their campaign expense invoices to the original financial statement filing at the time of filing with the City Clerk.

Enacted and passed on October 4, 2017.

Frances Nunziata,
Speaker

Ulli S. Watkiss,
City Clerk

(Seal of the City)

ADAM CHALEFF and JIM KARYGIANNIS

Applicant Respondent

IN THE MATTER OF an Application under s. 88.33(1) of the *Municipal Elections Act, 1996*

CITY OF TORONTO COMPLIANCE AUDIT COMMITTEE

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