IN THE MATTER OF AN APPLICATION BY **EVAN BALGORD** UNDER THE *MUNICIPAL ELECTIONS ACT, 1996* (THE "ACT") TO THE CITY OF TORONTO COMPLIANCE AUDIT COMMITTEE IN RESPECT OF THE FINANCIAL STATEMENT OF

FAITH GOLDY, CANDIDATE FOR TORONTO MAYOR (THE "CANDIDATE")

For the convenience of the Compliance Audit Committee (the "Committee"), this submission is divided into three portions. The first addresses issues raised that are common to most such applications. The second portion is more specific to the present case, and the third portion summarizes the conclusions that the Candidate asks the Committee to reach.

PART 1 - COMMON ISSUES

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

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

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

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

3. On a plain reading, it may be seen that the question of "belief on reasonable grounds" is a threshold question – a condition precedent for an application to be brought. An application that does not evidence a belief on reasonable grounds is not proper, and if the Committee finds that such a belief is not evidenced on the material before it, then it should dismiss the application on that basis. In contrast, the language of subsection 81(5), which confers the decision-making power upon the Committee, contains no such direction or standard. Rather it is a question for the Committee to "decide whether [the application] **should** be granted or rejected". Accordingly, in *Lancaster v. Compliance Audit Committee et al.*[1], the Ontario Superior Court held that even where a violation of the Act had been identified:

   > "The Committee is not bound to appoint an auditor in the face of a breach or contravention of the Act. The Committee is entitled to look at all of the circumstances to determine whether an audit is necessary."

[1] 2012 ONSC 5629

4. The Committee's discretion in such matters is, accordingly, significant. The Courts have acknowledged that a Compliance Audit Committee is entitled to a high level of deference[2] and the expertise giving rise to that deference is such that the Committee is entitled to exercise a measure of discretion in determining whether or not an application has sufficient merit such that a compliance auditor should be appointed. The Court will not interfere in the Committee's exercise of this discretion unless it finds the Committee's decision to be unreasonable.
5. This is congruent with the decision of the Court in *Harrison*, which found that a minimal transgression did not warrant a compliance audit, and with the comments of Justice Lane in *Lyras*, who set out the role of the Committee as follows:

> "It also strikes me that even if the appellant had what he considered reasonable grounds to ask for an audit, the Committee has considerably more information at their disposal. Having heard all the submissions and reviewed all the material before them, the Committee is in a better position than the appellant to determine whether, in fact, "reasonable grounds" do exist to proceed with an audit. It is the role of the Committee to weigh the evidence and to make determinations of what weight should be accorded to the representations before it[3]."

6. Accordingly, as Justice Lane put it in Lyras, what is required for a Compliance Audit to be ordered is "an objective belief based on compelling and credible information which raises the "reasonable probability of a breach of the statute." It should be stressed that the standard includes **each** of the following:

- objective belief
- compelling information
- credible information, and
- reasonable probability of a breach.

7. In making this determination and as previously indicated, this Committee is entitled to considerable deference.
8. A minor violation of the legislation may properly be considered by the Committee to be "*de minimis*" - so small as to be of no importance.[4]

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

[3] at page 6

[4] *Harrison v. Toronto District School Board*, unreported, OCJ, June 19, 2008

9. Further, Justice Lane, in *Lyras*[5], comments on the "gatekeeper" function of the Committee. This is an important element in the enforcement of electoral law at all three levels - municipal, provincial and federal.
10. The *Canada Elections Act* establishes, in sections 509 - 512, a process whereby any prosecution under the Act requires the consent of the Director of Public Prosecutions.
11. Similarly, the Ontario *Election Act* provides in subsection 98.1(1) that "(n)o prosecution shall be instituted under this Act without the Chief Electoral Officer's consent.
12. It is submitted that this "gatekeeper" function is intended to provide a check against the potential for frivolous or politically-driven charges against candidates for elected office, who, by virtue of the public office which they hold or have sought and the risk of vindictive behaviour before, during or after a campaign that may be vociferously contested, might otherwise be subject to private prosecutions that seek less to enforce the law than to embarrass or weaken a political opponent.
13. Prior to 2010, this was equally the case under the Act, and this function, whether it had as gatekeeper the municipal council or local board, was found by the Superior Court in ***R. v. Hall***[6] to be the legislative intention behind the compliance audit application process:

> " 21. Given the Legislative intention, that is, to ensure the legitimacy of attacks on elected officials and, I infer, other candidates, by electors, it is my view that s. 81 of the Act is, in its purpose and effect, a provision to screen allegations by electors of election campaign finance wrongdoing by candidates and elected officials, especially where the allegations are determined by an auditor and/or a council to be frivolous, vexatious or otherwise devoid of merit."

14. In ***R. v. Hall***, the Court found that the nature of the Act at that time was such that a voter could not initiate a charge against a candidate other than through the section 81 process. This specific constraint informs much of the judicial decision-making under the Act prior to 2010.[7]
15. But this "only means" constraint was statutorily overridden by the Province with the enactment of subsection 81(17) of the Act, as part of the 2009 amendments:

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

[5] at page 5

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

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

16. The amendment represents a complete paradigm shift from the previous case law. In effectively overruling *Hall*, the legislature has changed the context of a compliance audit request. It is no longer the only means by which an elector may pursue a prosecution for a perceived contravention. Now it is the only means by which such a voter may cause the municipality to carry out an audit of the candidate at its own expense, invoke the extraordinary powers of a commission under the *Public Inquiries Act* and potentially cause the municipality to prosecute the perceived contravention, all the while fully insulating the complainant from any potential civil action for malicious prosecution where a conviction is not obtained.
17. Under both paradigms, the Committee has been a "gatekeeper," but it is submitted that the nature of the gatekeeping has now changed. Previously, the gate was one through which all complainant-driven prosecutions must pass; now it is one through which only the compliance audit driven path of prosecution must pass. In this context, the Committee can and should adopt a high threshold for making a decision that can result in a substantial expenditure of public funds. It is suggested that the prosecutorial test of "in the public interest" has an intrinsic appeal.
18. In short, it is respectfully submitted that the Committee should engage in a two stage process. First, it should consider whether the application reflects "an objective belief based on compelling and credible information which raises the "reasonable probability of a breach of the statute," and secondly, whether the conduct of a compliance audit of the financial affairs of the subject councillor is in the public interest.

Interpretation of the Act

19. It has been said that this Act creates genuine and considerable ambiguity, and that is "not pretty legislation."[8] It must therefore be read most carefully.
20. While it is a truism that electoral law must strive to create a "level playing field," it does not follow from this proposition that the law should be applied "restrictively"
21. To the contrary, Part VI of the Legislation Act, 2006 deals with statutory interpretation. Section 64 of that Act directs that Ontario Acts be interpreted as being remedial in these terms:

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

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

PART 2 – THE SPECIFIC ALLEGATIONS

22. The essence of the Applicant's claims is as follows:

1. (a) That the Candidate solicited worldwide donations for her lawsuit against Bell Media, and hence, contravened the Municipal Elections Act.

   (b) That the Candidate, outside of the campaign, solicits donations from supporters outside Ontario, and hence, personal finances were not kept separate from campaign donations.

   (c) That the Candidate solicits donations via e-transfer, and hence, her "personal bank account should also be captured by the compliance audit".

23. In support of the claims, the Applicant identifies no provision of the Act which he claims to have been breached, and falsely and libelously argues that, "Faith Goldy is a self-proclaimed propaganda arm of the alt-right neo-Nazi movement," wherein no documentation of said claims are provided, nor does it exist.
24. The Applicant points to the fact the Candidate, outside of her campaign, regularly solicits donations from supporters.
25. The Applicant unreasonably and incorrectly claims the Candidate was incapable of keeping personal finances separate from campaign donations.
26. The Applicant neglects to include the provision for personal contribution limits allotted in the Act and additional campaign financing documents.
27. Subsection 88.8(3) of the Act provides that a candidate can make a contribution to their own campaign, while the maximum amount allowable for a candidate to personally donate during the 2019 Municipal Election was $25,000.
28. The Candidate made a $25,000 donation to her own campaign, which was used to cover legal fees incurred.
29. The Candidate did not make any additional donations before or after the total amount listed in the point above.
30. There is no provision in the Act to require an audit of a candidate's personal donation.
31. There is no provision in the Act to require a candidate's personal donation be generated from within provincial boundaries.
32. All the Applicant therefore offers in support of the suggestion that the Candidate did not keep her personal income separate from campaign donations is his personal "confidence" in the Candidate.
33. The Applicant's lack of "confidence" stems from his former employment as Special Assistant to John Tory, the Candidate's chief rival during the campaign, and the Applicant's current employment with the "Anti-Hate" Network, which has engaged in several targeted online smear campaigns against the Candidate.
34. The Candidate's campaign donations and expenditures are documented in full and have been submitted for thorough audit to an independent auditor as required by the Act.
35. The Candidate did not, through act or omission, deliberately violate any campaign financing laws, and hence, any improper donations received during the campaign, either via e-transfer to the campaign account, cheque, or NationBuilder, were returned in full.

36. Should any violations of campaign financing exist, the independent auditor will include them in their report wherein no requirement to capture the Candidate's personal bank account exists.

PART 3 – CONCLUSIONS

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

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Blessings,

Faith Goldy