City of Greater Sudbury

Compliance Audit Committee Meeting of
January 4, 2016

Re: Application by Bernard Garner
Regarding the Financial Statements of Brian Bigger

WRITTEN SUBMISSIONS ON BEHALF OF BRIAN BIGGER

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IN THE MATTER OF AN APPLICATION BY **BERNARD GARNER (the "Applicant")** UNDER THE *MUNICIPAL ELECTIONS ACT, 1996* (THE "ACT") TO THE CITY OF GREATER SUDBURY COMPLIANCE AUDIT COMMITTEE IN RESPECT OF THE FINANCIAL STATEMENT OF **BRIAN BIGGER**, CANDIDATE FOR ELECTION TO THE OFFICE OF **MAYOR** OF THE CITY OF **GREATER SUDBURY (the "Candidate")**

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Written Submissions of Brian Bigger

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WRITTEN SUBMISSIONS ON BEHALF OF BRIAN BIGGER

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 demonstrate the Applicant's belief on reasonable grounds is not proper, and if the Committee finds that such a belief is not evidenced on the material before it, then it should dismiss the application on that basis. In contrast, the language of subsection 81(5), which confers the decision-making power upon the Committee, contains no such direction or standard. Rather is it a question for the Committee to "decide whether [the application] **should** be granted or rejected". 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."

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[1] 2012 ONSC 5629 (Tab 2)

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] and on that basis the Committee may properly decline to order a compliance audit.

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.

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[2] *Harrison v. Toronto District School Board*, unreported, OCJ, June 19, 2008 (Tab 3) and *Lyras v. Heaps* 2008 ONCJ 524 (CanLII) (Tab 4)

[3] at page 6

[4] *Harrison v. Toronto District School Board*, unreported, OCJ, June 19, 2008 (Tab 3)

[5] at page 5

10. The *Canada Elections Act* provides in subsection 512(1) that "No prosecution for an offence under this Act may be instituted by a person other than the Director of Public Prosecutions without the Director's prior written consent."

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 amendments adopted in 2009 :

> "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."

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

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

[7] See *Chapman v. Hamilton*, 2005 ONCJ 158 (CanLII) at ¶39 ("unequivocally a condition precedent") (Tab 6), *Mastroguiseppe v. Vaughan (City)*, [2008] O.J. No. 5734 at ¶33-34 "only remedy") (Tab 7), *St. Germain v. Bussin* [2008], O.J. No. 408 at ¶34 (Tab), *Savage v. Niagara Falls (City)* [2005], O.J. No. 5694 at ¶11 (Tab 9),

extraordinary powers of a commission under the *Public Inquiries Act,* and potentially cause the municipality to prosecute the perceived contravention (again at its own expense), 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.

PART 2 – THE SPECIFIC ALLEGATIONS

19. As set out in Paragraph 6 above, in order for an Applicant to succeed on an Application of this nature, he or she must attest to having "an objective belief based on compelling and credible information which raises the "reasonable probability of a breach of the statute." The overall nature of the Applicant's Reasons for the Audit Request is, accordingly, fatally flawed in that, in most paragraphs of the Application, he fails to assert any such belief, instead simply asking rhetorical questions as to why something is the case, or whether something is appropriate. In framing his request in this manner, the Applicant has failed to demonstrate any belief at all, let alone an "objective belief" that he might hold, to the effect that the issues he raises in each of paragraphs 1, 2, 4, 6, 7, 8(despite the lack of a question mark), 13, 14, 15 of the Application give rise to a reasonable probability of a breach of the statute. For this reason alone, the Committee lacks the jurisdiction or authority to order a Compliance Audit on the basis of any of the issues raised in any of those paragraphs. Nevertheless, given that the Applicant has by his questions identified potential concerns in a rather public manner, some explanatory information as to the circumstances is set out below.

20. Despite the provision below of such information, the Committee's consideration of the Application is limited to those paragraphs that assert the Applicant's belief in a breach, namely paragraphs 3, 5, 9, 10, 11 and 12 of the Application. Those paragraphs are addressed by the Candidate as follows:

Claims Made By The Applicant

21. **Paragraph 3:** The Applicant asserts that "people" who attended a campaign event were charged $20.00 and were unaware of "a hat being passed around". Again with reference to Paragraph 6 above, the assertion provides no "compelling information" as to what

transpired, naming none of the "people" who attended, nor providing "credible information" as to the nature of the supposed breach. The issue does not, therefore, meet the threshold to warrant the conduct of a compliance audit.

22. **Paragraph 5:** The Act requires that a candidate submit a financial statement reporting upon certain things, such as the money paid to the Clerk's office that is referenced in Paragraph 5 of the Application. The Act does NOT require the filing of documentary proof of such payments. Paragraph 5 of the Application therefore discloses no possible breach that might give rise to a compliance audit.

23. **Paragraph 9:** This paragraph identifies a bona fide clerical error in the candidate's filing, apparently arising out of the fact that a $200.00 contribution cheque from Levert Personnel Resources Inc. is pre-printed with the name "Levert Personnel Resources", which does not identify it as a corporate entity. The contribution was incorrectly recorded in Part II Table 1 of the Financial Statements, which is for contributions from individuals. Hence there is no column in the Schedule for the information relating to a corporate contribution, of President or Business Manager and Authorized Representative. It is notable, however, that at no place does the Act require the provision of this information. Rather, it is merely solicited in the Form 4 mandated for the Candidate's Financial Statement. It is therefore the Candidate's position that the omission of information not mandated by the Act to be reported cannot constitute a breach of that Act. Nevertheless, in the name of transparency and complete disclosure, the President of this corporation is Richard Levert, who also authorized the contribution in question.

24. **Paragraph 10:** Similarly, this paragraph of the Application identifies information that was inadvertently omitted from the Schedule 2 to the Form 4, the collection of which is not mandated by the Act. Again, a failure to provide such information is not, in the Candidate's position, a contravention of the Act. Moreover, the Schedule is based on the incorrect notion that fundraising events are always held with a single ticket price or that revenues are limited to such purchases. Rather, a "ticket price" can be more of an "asking price" with contributions made for larger or smaller amounts. Nevertheless, and again in the name of transparency, for the November 27, 2014 event, the nominal price for a table of 8 was $750, and for individual seats, $100. Approximately 212 guests had been paid for or were in attendance, although of course, given the purchase of tables by single contributors, and the transferability of tickets, not all persons in attendance were in fact the contributors. As discussed below, the October 2, 2014 event had no tickets at all, and hence, this information could not be and cannot be provided.

25. **Paragraph 11:** Although it does not present a concern in the form of a question, Paragraph 11 is entirely speculative, raising a possibility based on no evidence whatsoever that contributors may have exceeded the $750 contribution limit. Yet again, the Application asserts no belief, and presents neither compelling nor credible information that could support any belief that this limit might have been exceeded. All contributions are properly reported on the audited Financial Statements and supporting documentation filed, and the simple fact of the matter is that no over-contributions exist. Paragraph 11 of the Application discloses no possible breach that might give rise to a compliance audit.

26. **Paragraph 12:** This paragraph merely restates the point made in Paragraph 10 of the Application, fully responded to in Paragraph 24 above.

27. As indicated above, the Application does not, accordingly, set out any information that could properly give rise to a compliance audit.

28. Nevertheless, the Application does raise some questions that warrant complete explanation, again in the name of transparency and complete disclosure. Specifically, the following areas of potential concern have been identified by the Applicant:

    (a) **Paragraph 1:** There is a variance between reported campaign expenses as between the initial Financial Statement of March 26, 2015 (the "Primary Statement") and the supplementary Financial Statement of September 25, 2015 (the "Supplementary Statement"). Specifically, the Primary Statement reports expenses subject to spending limit of $46,199.17 and the Supplementary Statement reports expenses subject to spending limit of $44,854.47, a **decrease** of $1,344.70. While, generally, the Statements also show a difference between expenses not subject to the limit, this is to be expected given the additional costs that are necessarily incurred during the extended campaign period. More specifically, however, the Statements reflect an **increase** in the amount attributable to the cost of fundraising events / activities from $6,497.50 to $8,140.52, a difference of $1,643.02. The details of these changes are set out below. Similarly, revenues increased as a result of further fundraising activity carried out during the extended campaign period[8].

    (b) **Paragraphs 2, 4, 6, 7 and 13:** A fundraising event held on October 2, 2014 at the Ambassador Hotel was not conducted in accordance with some of the requirements of the Act. It was a non-ticketed, informal fundraising event with an intended admission price of $20.00, which requires the collection of name and address information, as well as the issuance of receipts. In the absence of this information, the function was erroneously not reported as a fundraising event requiring the completion of Schedule 2 on the Primary Statement. When the full scope of these errors was determined, after the submission of the Primary Statement, it became clear that the candidate was obliged to return the contributions so received to the clerk, pursuant to clause 69(1)(m) and (n) of the Act. The revenue from that event, plus an additional $40.00 of unattributed contributions received by the campaign, amounting to a total of $1,248.80, was paid to the Clerk as required, by cheque dated September 22, 2015, submitted concurrently with the filing of the Supplementary Statement. Copies of both the cancelled cheque and corresponding bank statement are attached[9]. This resulted in an adjustment as between the two Statements as detailed below.

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[8] Although all of this relates primarily to Paragraph 1 of the Application, the concerns are, in large part, interrelated.

[9] See Tab 10.

(c) **Paragraph 8:** The Applicant implies that campaign activities at the Ambassador Hotel were not accounted for appropriately, asking "where is the expense accounted for or the donation in kind". While all expenses and contributions in kind (contributions in goods and services) are properly reported, the additional information provided below is required in order to demonstrate that point.

(d) **Paragraph 14:** A supplier, Alman Publishing and Printers (Espanola) Limited, printed tickets for the November 27, 2015 fundraising dinner, but did not issue an invoice, something that was not detected until the subsequent review of the fundraising events in preparation for the supplementary filing. The supplier's intention had been to contribute the printing, therefore when this was determined, the value of the tickets was both newly reported as an expense on the Schedule 2 of the Supplementary Statement and as a contribution in goods and services on Part II, Table 4. The same amount was added to the total cost of fundraising activities reported as expenses not subject to the spending limit on the Supplementary Statement.

(e) **Paragraph 15:** The Applicant has failed to comprehend the nature of the differences in advertising expenses as between the Primary Statement and the Supplementary statement. Those differences are fully detailed below.

29. The changes in reported campaign expenses between the two Financial Statements may be accounted for as set out below, and in the table that follows:

(a) As indicated in Paragraph 28(b) above, when it came to the attention of the Candidate and those assisting him in the financial reporting that the October 2, 2014 fundraising event had not been adequately handled, in addition to paying the revenue for the event to the Clerk, it was also necessary to prepare a Schedule 2 for this failed event. In so doing, the sum of $1,344.70, that had originally been included in the total spent on advertising subject to the limit on the Primary Statement, was identified as more accurately a cost of fundraising reportable as an expense not subject to the limit, and therefore reported accordingly in the Supplementary Statement. This corresponds to the amount of the decrease in reported expenses described in Paragraph 28(a) above.

(b) As indicated in Paragraph 28(d) above, the contribution of goods and services from Alman Publishing and Printers (Espanola) Limited valued at $298.32 was detected after the Primary Statement had been submitted. The inclusion of this contribution in the Supplementary Statement resulted in the amount being reported as a "donation in kind" in Part II, Table 4 of that Statement, and its inclusion in the total reported as an expense not subject to the spending limit, attributable to the cost of fundraising events/activities.

(c) The amounts discussed in the preceding two subparagraphs ($1,344.70 and $298.32) total $1,643.02. That amount corresponds to the difference between the amount originally reported for the cost of fundraising events on the Primary

Statement ($6,497.50) and the corresponding amount reported on the Supplementary Statement ($8,140.52) [8,140.52 - 6,497.50 = 1,643.02].

(d) Summary of Changes:

Brian Bigger Campaign Continuity of expenditures reported in Primary and Supplementary filings						
		Primary Filing	Changes			Supplementary Filing
			Reclassification	Donation in kind of ticket printing	Total changes	
		A	B	C	D (B +C)	E (A + D)
Expenditures subject to spending limit		46,199.17	(1,344.70)	-	(1,344.70)	44,854.47
	Advertising component	13,506.38	(1,344.70)		(1,344.70)	12,161.68
Fundraising expenditures not subject to spending limit		6,497.50	1,344.70	298.32	1,643.02	8,140.52

30. It is submitted that the foregoing detail makes it clear that the election campaign finances of the Candidate, Brian Bigger, are fully and properly set out in the Supplementary Financial Statement. Reasonable adjustments were made from the Primary Statement, and the notion of pursuing such matters by way of a compliance audit would both result in unnecessary expense to the municipality and provide a strong disincentive to candidates in the future against making improvements to Primary Statements when preparing Supplementaries. It is notable that the Applicant has alleged no flaw in the Supplementary Statement other than the variation from the Primary fully explained herein.

31. It is clear that there are insufficient facts before this Committee to support a finding that this elector has an objective belief that a contravention of a provision of the Act relating to campaign finances has occurred. Accordingly, and on that basis alone, the Application must be dismissed.

32. As discussed above, only the portions of the Application that assert reasonable belief in a contravention are proper. Nevertheless, and in anticipation of the possibility that the Committee might be at all troubled by the rhetorical questions posed by the Applicant, those points have been addressed above.

33. While reiterating that it is outside the proper authority of the Committee to order a compliance audit on the basis of those rhetorical questions, Mr. Bigger wishes that these details be disclosed fully to the Committee and be placed on the public record in the interest of the principles of transparency that are integral to the Act. Despite this, it is important to stress that the consideration of those mere questions that assert no

reasonable belief would constitute a fundamental jurisdictional error by the Committee, as it has no inherent jurisdiction to consider matters that fall outside the four walls of the Act.

34. It is submitted that the primary purposes of the campaign finance provisions of the Act are to ensure a level playing field in electoral competition through the imposition of spending and contribution limits, and to provide transparency through the requirement for the filing of financial statements. Viewed through this lens, it is clear that the Candidate has met those goals fully.

35. Any possible contravention that might be identifiable as a result therefore falls within the *de minimus* concept described above, and is not of such a nature that might warrant the exercise of the Committee's discretion to require the City of Greater Sudbury to incur the significant expense of a compliance audit in light of all of the circumstances.

36. Accordingly, this Application should be refused.

PART 3 – CONCLUSIONS

37. In paragraph 3 above, the Ontario Superior Court decision in *Lancaster* is quoted in support of the principle that the mere existence of a breach of the Act does not **require** a Compliance Audit Committee to appoint an auditor. The facts of that case are in fact somewhat similar to the present circumstance. The Court was dealing with an appeal from a Committee's denial of a compliance audit where four separate candidates had either received improper corporate contributions or reported corporate contributions on their individual contributions tables (Table 1). Upon receiving the respective applications of compliance audits, the candidates each took steps to return contributions or to otherwise attempt to rectify the flaws that had been identified. The Court found that the Committee in that case had been wrong to conclude that these failings were not contraventions of the Act. It is clear that they were. Nevertheless, in concluding that this **still** did not warrant the holding of a compliance audit, the Judge commented as follows:

> "[93] 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. The uncontradicted information received by the Committee was that the omissions in the Form 4s were unintentional.
>
> [94] There is 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.
>
> [95] 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."[10]

[10] *Lancaster v. Compliance Audit Committee* 2012 ONSC 5629, paragraphs 93 - 95. See also paragraph 85 (Tab 2).

38. Clearly, a similar conclusion appertains here. No additional information is to be gleaned from a Compliance Audit; any such exercise would in fact be futile, expensive and redundant.

39. 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 and the relevant facts, within the context of the above analysis. It is respectfully submitted that no such grounds have been raised by the Application, and that, accordingly, this Committee should dismiss the Application for a compliance audit of the campaign of Brian Bigger.

40. In the alternative, if any potential contravention is seen by the Committee to exist, its nature is, in any event, such that it identifies no compromise of the spending limit or the transparency principle and is entirely of a *de minimis* nature. It therefore constitutes a case in which the Committee can, and should, decline to order a compliance audit.

All of which is respectfully submitted,

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CITATION: Lancaster v. Compliance Audit Committee et al., 2012 ONSC 5629
St. Catharines Court File Number 53579/12
October 9, 2012

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
	)	
	)	HEARD: June 26, 2012
	)	at St. Catharines

J.W. Quinn J.: —

Introduction

[1] I have in front of me an appeal from a decision of the Ontario Court of Justice which dismissed an appeal of four denied applications requesting a compliance audit under the *Municipal Elections Act, 1996,* S.O. 1996, c. 32, Sched.

[2] This proceeding principally revolves around three legal principles that govern the campaign finances of candidates in municipal elections: (1) 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.

Background

municipal election

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

contribution limit

[4] 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."

[5] 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.

[6] 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 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.[1]

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[1] It is a cold commentary on the perceived quality of politicians that our legislature thinks one can actually "buy" a candidate for the sum of $751 (the mid-range cost of two decent seats at an NHL game).

requirement to file Financial Statement – Auditor's Report

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

[8] 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.[2] The filing date here was March 25, 2011.

[9] 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.

Form 4

[10] 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.

[11] 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").

[12] 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

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

[13] Four schedules are found in Form 4:

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2 Section 77(a) and s. 78(1)(a) of the *Act*.

3 The Form 4 filed on behalf of Harris is the only one where a date was inserted.

- 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: 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:[4] "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."

[14] 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.

penalties involving Form 4

[15] The importance of the requirement to file a proper Form 4 is obvious from the penalty provisions of the *Act*.

[16] 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 . . ."[5]

[17] Forfeiture also results where a candidate "fails to file [a Form 4] . . . by the relevant date."[6]

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4 This is becoming tedious, but I am committed to completing the process.
5 Section 80(2)(a) of the *Act*.
6 Section 80(1)(a) and s. 80(2)(a) of the *Act*.

Lancaster seeks compliance audit

[18] 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.

[19] On June 23, 2011, the appellant, Eleanor Lancaster ("Lancaster"), a St. Catharines elector with a long and productive history of community interest and involvement, applied to the respondent, Compliance Audit Committee of the Corporation of the City of St. Catharines ("Committee"), for an audit of the election campaign finances of Harris, Siscoe, Stack and Dorsey. Her applications (one for each of the individual respondents) stated:

> . . . 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*].

[20] 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.

[21] 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*.

individual respondents asked to return excess contributions

[22] On June 29, 2011, John A. Crossingham, a lawyer for three corporations who 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:

> . . . 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 . . .

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

[24] 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."

composition of the Committee

[25] 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*").

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

[27] A compliance audit committee is to have "not fewer than three and not more than seven members."[7]

[28] 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*]."

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7 Section 81.1(2) of the *Act*.

[29] 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."

[30] 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.

[31] Mr. Richardson, counsel for Harris, Siscoe and Stack, accurately points out in his factum: "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."

Committee considers the applications

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

[33] 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 . . ."

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

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

1. The Harris application

[36] 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

[37] 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).

[38] 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.[8]

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

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[8] 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.

[39] 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 . . .

2. The Siscoe application

[40] 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

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

[42] The minutes of the Committee record 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 and read his provincial candidate's guide, but is a first-time candidate and the guide is vague on this issue.[9] 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 . . .

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

3. The Stack application

[43] In respect of the Stack application, Table 2 of Form 4 is blank (and, indeed, has a line drawn through it). Table 1 lists 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

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

[45] 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 . . . 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.[10] He stated that he believed the [City] Clerk's staff should have caught the error when he was filing the papers . . .

[46] In an affidavit filed for the hearing of the appeal in the Ontario Court of Justice,[11] Stack deposed, at paras. 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 . . .
>
> 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.

4. The Dorsey application

[47] 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 are 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

With Table 2 not having been completed, there are 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.

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[10] 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.

[11] 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 am told that this affidavit (and the others filed with the Ontario Court of Justice) only contains information that was before the Committee.

[48] The minutes of the Committee state 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 Rosetta requesting the return of funds that had been an over-contribution. He stated that he promptly returned the funds on June 30, 2011. 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.

powers of a compliance audit committee

[49] Where a compliance audit committee decides to grant an elector's application, "it shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances."[12] Thereafter, the auditor is required to submit a report to that committee.

[50] 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."[13] In addition, the compliance audit committee may "make a finding as to whether there were reasonable grounds for the application."[14] The municipal council "is entitled to recover the auditor's costs from the [elector]" where reasonable grounds are missing.[15]

disposition by Committee

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

[52] 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

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12 Section 81(7) of the *Act*.
13 Section 81(14)(a) of the *Act*.
14 Section 81(14)(b) of the *Act*.
15 Section 81(15) of the *Act*.

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 . . ."

[53] 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."

[54] 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*.

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

[56] The Committee seems not to have paid much attention to the shortcomings in the completion of the Form 4s.

appeal to Ontario Court of Justice

[57] 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.

[58] 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]

[59] The notice of appeal named the Committee as the only respondent, but it also was served on Harris, Siscoe, Stack and Dorsey who, at their request, were

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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 contributions exceeding $750.

17 The *Act* does not provide for a hearing *de novo*. The Ontario Court of Justice is 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 is the same as in the Ontario Court of Justice.

granted added-party status by the Ontario Court of Justice such that they are now respondents in the proceedings.[18]

[60] At paras. 6-15 of its well-written decision, the Ontario Court of Justice determined that the standard of review 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]

[61] 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.

[62] 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:

> . . . 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

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[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 and abstained from delivering a factum or other materials and from making submissions. The Committee is 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 here. Despite my concern that the Committee should not be dealing with the merits of the appeal in any manner, in the circumstances, I will leave this issue alone, except to say that the fact counsel for the Committee supports the position of Mr. Richardson does not, in law, add weight to that position.

[19] A view which seems to be unchallenged.

> 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.

[63] 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.

[64] 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[20] and also illegal for associated corporations to do likewise,[21] it was not a breach of the *Act* for a candidate to receive such contributions. The only obligation on the candidate is to return a contravening contribution "to the contributor as soon as possible after the candidate becomes aware of the contravention."[22]

[65] 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.*"

[66] 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 once more to *Braid v. Georgian Bay (Township), supra,* at paras. 28 and 29, which I will repeat, in part:

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20 Section 71(1) of the *Act.*
21 Section 72 of the *Act.*
22 Section 69(1)(m) of the *Act.*

> [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 . . .

[67] The Ontario Court of Justice concluded that the decision of the Committee passed the test of reasonableness and dismissed the appeal.

Discussion

the grounds of appeal to the Superior Court of Justice

[68] The notice of appeal to this court contains six grounds, the first two of which deal with the standard of review adopted by the Ontario Court of Justice. I was informed during argument that Mr. De Lisio, counsel for the appellant, now concurs with Mr. Richardson that the standard properly used by the Ontario Court of Justice was that of reasonableness.[23] Therefore, these two grounds of appeal, effectively, are abandoned.

[69] The third ground of appeal alleges 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;

[70] Mr. De Lisio submits, on this appeal, that the test for ordering an audit is whether the elector who applies for a compliance audit believes on reasonable grounds that a candidate has contravened the *Act*. I must disagree. In my opinion, the belief of the elector is relevant only to the extent that it justifies making the application in the first instance.[24] Thereafter, what is important is whether the

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

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

Committee, after considering the application in accordance with s. 81(5), shares that belief. The basis for the belief of the elector, as amplified at the hearing before the Committee, determines whether reasonable grounds exist.

[71] It was correct in law for the Ontario Court of Justice to have concluded as it did on the third ground.

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

[73] The fourth ground of appeal states 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;

[74] Doing the best that I can with the awkward opening words of the fourth ground – "section 17.1" certainly seems to be a typographical error and presumably should read "section 71(1)" – I gather it is 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*.

[75] 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 is not necessary to do so for the purposes of this case) that the duty to return the contribution also crystallizes 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.[25]

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

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[25] 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.

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

[78] I would add that I agree 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.[26]

[79] The fifth ground of appeal alleges 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*;

[80] The fifth ground is largely an extension or restatement of the fourth ground. Receiving illegal campaign contributions cannot sensibly be construed to contravene of 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 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.

[81] The final ground of appeal states 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*.

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

[83] 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.

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[26] 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; (4) family relationship evident from (1) and/or (2).

[84] 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.[27] 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.

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

[86] 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. The omissions in the Form 4s of Siscoe, Stack and Dorsey were contraventions of the *Act*.

Summary

receiving contributions from associated corporations does not contravene Act

[87] It is undisputed that Harris, Siscoe, Stack and Dorsey accepted illegal campaign contributions from associated corporations. Similarly, it is 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 follows 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.

[88] I offer the thought that it would be helpful if Form 4 were amended to contain some guidance as to the definition of "associated corporations" rather than forcing candidates into the offices of tax lawyers and chartered accountants for

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

guidance. 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.

improper completion of Form 4

[89] A significant error or omission in the completion of Form 4 will amount to a contravention of the *Act*.

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

[91] Siscoe, Stack and Dorsey did not properly fill out or complete the Form 4 that each filed. Their omissions were glaring:[28] (1) Siscoe left entirely blank the column for President or Business Manager in Table 2. This is a significant omission and amounts to a breach of the *Act* (his listing of associated corporations, by itself, is not a breach because it is 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 are missing so as to constitute a contravention of the *Act* (the fact that corporate contributions are wrongly set out in Table 1 is not a contravention because, again, the information in the entries is 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.

[92] 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.

breach of Act does not necessarily lead to an audit

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[28] Siscoe, Stack and Dorsey were careless in completing Schedule 1 of Form 4 and did not approach this responsibility with the necessary seriousness and attention. Notwithstanding the eye-glazing nature of Form 4, one would expect a politician to have a tolerance, if not an affinity, for paperwork.

[93] 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. The uncontradicted information received by the Committee was that the omissions in the Form 4s were unintentional.[29]

[94] There is 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.

[95] 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.

Conclusion

[96] 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, it was correspondingly reasonable and correct not to proceed with an audit. The appeal, therefore, is dismissed.

[97] I thank everyone for their helpful arguments.

[98] I hope that costs will not be an issue but, if they are, counsel should contact the trial co-ordinator to obtain a date for submissions.

The Honourable Mr. Justice J.W. Quinn

RELEASED: October 9, 2012

[29] Mr. Richardson submits that, in the Ontario Court of Justice, the appellant, 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 are 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?

CITATION: Lancaster v. Compliance Audit et al., 2012 ONSC 5629

COURT FILE NO.: 53579/12

DATE: October 9, 2012

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 FOR JUDGMENT

J.W. Quinn J.

Released: October 9, 2012

Toronto Region

ONTARIO COURT OF JUSTICE

BETWEEN:

SEAN HARRISON

(Appellant)

-AND-

THE TORONTO DISTRICT SCHOOL BOARD

(Respondent)

-AND-

MICHAEL COTEAU

(Added Party)

Before Justice Patrick Sheppard
Heard on April 11, 2008
Reasons for Judgment

Melissa A. Kehrer.....for the Appellant
Christine Lonsdale.....for the Respondent
Jack Siegel.....for the Added Party

P. SHEPPARD, JUSTICE

This is an appeal from a decision of the Compliance Audit Committee (the C.A.C.) of the Toronto District School Board (the T.D.S.B.) (the Respondent) made on May 23,2007 rejecting Sean Harrison's (Appellant) application for a compliance audit pursuant to Section 81 of the Municipal Elections Act, 1996.

THE LEGISLATIVE FRAMEWORK

The legislative framework of this appeal is found in Sec. 81 (1) through (4) of that Act:

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.

Requirements

(2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80 (6), if any; it shall be in writing and shall set out the reasons for the elector's belief.

Decision

(3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.

Delegation to committee

(3.1) A council or local board may, before voting day in an election, establish a committee and delegate its powers and functions under subsection (3) alone or under subsections (3), (4), (7), (10) and (11) with respect to applications received under subsection (2) and the council or local board, as the case may be, shall pay all costs in relation to the operation and activities of the committee.

Powers and limitations

(3.2) A committee established under subsection (3.1),

(a) shall exercise the powers and duties delegated to it under that subsection with respect to all applications received under subsection (2) in relation to the election for which it is established; and

(b) shall not include employees or officers of the municipality or local board, as the case may be, or members of the council or local board, as the case may be.

Appeal

(3.3) The decision of the council or local board under subsection (3) and of a committee under subsection (3) pursuant to a delegation under subsection (3.1) 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, local board or committee could have made.

Appointment of auditor

(4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

I. FACTUAL HISTORY:

It is not disputed that:

[1] Prior to the November 13, 2006 municipal elections, Michael Coteau (the added party) was the sitting T.D.S.B. Trustee for Don Valley East, Ward 17; and, he was actively engaged in trustee functions.

[2] Sean Harrison was running for Trustee against Michael Coteau in the municipal elections held November 13/07. He lost by 1287 votes with Michael Coteau receiving 6629 votes to 5342 votes for Sean Harrison.

[3] After an unsuccessful attempt (letter of November 18, 2006) to prevent Michael Coteau from assuming the trustee seat for Ward 17 due to the same alleged violations which are the subject of this appeal; on May 17, 2007, Sean Harrison made an application to the C.A.C., (through the Director of Education), seeking a compliance audit of Michael Coteau's election Campaign finances pursuant to Sec.81 (1) of the Municipal Elections Act.

[4] The allegations of Sean Harrison can be summarized as follows:

(a) The TDSB made a contribution to Mr. Coteau's re-election campaign because Mr, Coteau, briefly, had a web link from his T.D.S.B. site to his re-election web-site.

(b) The TDSB made a contribution to Mr. Coteau's re-election campaign because TDSB printed and distributed a document entitled, "September Trustee Update Budget Consultation" at the request of Michael Coteau.

(c) The TDSB made a contribution to Mr. Coteau's re-election campaign because Mr. Coteau used the Toronto District School Board's email to promote his October Ward Council Meeting.

(d) The TDSB made a contribution to Mr. Coteau's re-election campaign because TDSB printed and distributed a document entitled, "2006/2007 Budget Report" on Toronto District School Board letterhead at the request of Michael Coteau,

[5] The T.D.S.B. would not have been entitled to make a contribution to the election campaign of Mr. Coteau under the Municipal Elections Act.

[6] The existence of these documents/sites is not disputed, nor the fact Mr. Coteau did not report any such contributions in his financial statement required by Section 78 of the Municipal Elections Act

[7] The TDSB had established a C.A.C. to fulfill its Sec.81 functions for the 2006 municipal elections by motion at its meeting of September 20, 2006. The C.A.C. was composed of the same

members as the City of Toronto's C.A.C. for the 2006 Municipal/School Board elections. The members did not include any municipally elected persons. These individuals being first appointed by the council of the City of Toronto no viable attack on their independence can be made.

[8] Its members are described by the Toronto City Clerk in its "Appointment of Individuals to the 2006 Elections C.A.C." as:

> "Two of the recommended individuals are chartered accountants and one is a lawyer in the municipal field. All three have extensive knowledge of the election campaign finance provisions of the Municipal Elections Act, 1996. Mr. Colbourne and Mr. Love were members of the Toronto Election Review Task Force and Ms. MacLean has served on various committees of the Ontario Bar Association."

[9] The C.A.C. met to consider Sean Harrison's application. The C.A.C. met at 10:30 am on May 23, 2007 and considered Mr. Harrison's request for a compliance audit of Mr. Coteau's finances. The proceedings of the C.A.C. were open to the public. The C.A.C. heard and considered the following:

(a) Mr. Harrison's written submissions were made Exhibit 1 before the C.A.C. and are before this court;

(b) Mr. Harrison's representative also made oral submissions to the C.A.C.;

(c) Mr. Coteau's written submissions were made Exhibit 2 before the C.A.C. and are before this court;

(d) Mr. Coteau's counsel also made oral submissions to the C.A.C.

[10] The C.A.C. recessed. On its return, by motion of Virginia MacLean, the C.A.C. rejected Mr. Harrison's application for an audit of Mr. Coteau's financial statements.

[11] The Committee issued no reasons for their decision.

[12] The C.A.C.'s decision was appealed to this court by amended Notice of Appeal dated March 12, 2008.

II STANDARD OF REVIEW

This is an appeal on a question of fact and law in which the delegating elected bodies both Toronto City Council and T.D.S.B. created a body whose members were appointed specifically for their expertise. Therefore, it is argued that this court, on appeal, ought to apply a standard of review reflecting deference to the expertise of this body. This importantly distinguishes this appeal from those before my colleagues Culver and Duncan in Chapman v. City of Hamilton 2005 ONCJ 158 and Savage v. Niagara Falls 16 M.P.L.R (4th) 252 where the appeals under the same section were from decisions of the elected City Councils. My colleagues found, and I agree, that the elected councillors possessed no real expertise, other than that gained from a

successful run for elected office and therefore, no deferency was owed to their decision. In fact, an issue of competitive electoral bias might exist in such situations.

This court finds that a far greater deferency is owed to the decision of this C.A.C. in the case at bar because they were appointed by a non expert School Board and the City because of then-expertise. The applicant in this appeal does not challenge this fact.

However, in this case, either under the correctness standard or a less demanding deferential standard on the hard copy documents making up the Applicant's initial complaint, this appeal can not succeed. The documents raised in the complaint simply do not support the complaint.

III ANALYSIS OF THE FOUR COMPLAINTS

It must first be noted that Mr. Coteau was the sitting and presiding trustee for Ward 17 at the time of each of the four elements of the complainant occurred.

Trustees of current T.D.S.B. remain in office throughout election periods and for some days following by legislation.

The business of the school board continues throughout election periods. The students continue to go to school. The school board meets and make decisions. Trustees' constituents and parents have a right to be consulted and advised of School Board business throughout election periods as they are at other times during the trustee's term of office. In other words, the municipal world does not stop so as to permit the holding of statutorily set elections. Indeed, this makes sense given the immediate nature of the responsibilities of elected municipal bodies.

With this back drop, it is often said that the municipal electoral system favours incumbents running for re-election. In large measure, this is due to name and activity recognition which falls on anyone doing the duties of the office. Incumbents will say that this 'advantage' can cut two ways. For example, if operations or finances of the municipal bodies are going badly, then it is the high profile elected incumbent to that body that the voters will hold responsible and punish at the election.

Mr. Harrison was attempting to unseat an incumbent, Mr. Coteau. This court finds that each of the 4 communications - 3 printed and 1 electronic - appear to have been produced in the ordinary course of a school board elected representative's responsibilities. None of the four pieces speak to why the trustee should be re-elected and certainly not to why Mr. Harrison should not be elected. Mr. Harrison is mentioned no where in the four communications.

On review, the closest Mr. Coteau comes to an electorally partisan message in these items is the following closing lines of his "September Trustee Update: Budget Consultation" where he states:

> "Thank you for your continued support and interest in our children's future. As always, I am pleased to be here to help support our children, staff and community in whatever ways I can."

Any self promotion read into these words is entirely referred to trustee duties in office and therefore, not meat for a valid complaint.

Finally, within the TDSB website, space is provided to identify schools and incumbent trustees by Ward. At least on Aug.29/07, the electronic site for Ward 17 above the school list and beside the photo/name/telephone number and e-mail address of Mr. Coteau appeared the following:

> "Please visit Michael's community website at www.michaelcoteau.com for more information."

This community website was clearly an election driven partisan website with content not addressing legitimate TDSB/Ward/Schools/Trustee business. It describes Michael Coteau as: "Candidate for School Board Trustee, Don Valley East, Ward 17" and it carries the following tag: "Authorized by the Campaign to re-elect Michael Coteau." No issue was taken in the hearing of this appeal with the fact that immediately upon Mr. Harrison's complaint being made to the TDSB concerning this link that the link to the 'community website' went down permanently. That action was appropriate but can it by itself warrant the granting of a compliance audit of the election campaign finances of Mr. Coteau. It is not an issue that this website was established entirely at the personal expense of Mr. Coteau. Although under TDSB policy, in the election period, it was not appropriate that this partisan website was linked to the TDSB site, the link was broken long before election day, quickly after the complaint and without real expense to the TDSB. This element of the complaint is one in which the doctrine of de minimus should apply.

Therefore, there are no substantial merits to any of the four allegations making up the substance of the complaint of Mr. Harrison. The Applicant has failed to raise, let alone establish, any reasonable grounds for the application.

This appeal is dismissed and as requested, a date can be arranged with the Trial Co-ordinator for the issue of costs to be addressed.

Released: June 19, 2008

Signed: Justice Patrick Sheppard

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**

REASONS FOR JUDGMENT

LANE, J.:

This is an appeal pursuant to section 81 (3.3) of the *Municipal Elections Act, 1996*, S.O. 1996, 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 purchased 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 not contributions." Section 66(3) describing how to value goods and services only applies to "goods and services provided as a contribution." (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." H

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.

Case Name:

R. v. Hall

Between
Barbara Hall, applicant, and
Thomas R. Jakobek, respondent

[2003] O.J. No. 3613

[2003] O.T.C. 834

42 M.P.L.R. (3d) 55

59 W.C.B. (2d) 119

Court File No. 03-CV-254116CM1

Ontario Superior Court of Justice

Trafford J.

Heard: September 8, 2003.
Judgment: September 18, 2003.

(38 paras.)

Criminal law -- Compelling appearance, detention and release -- Summons -- Validity of -- Elections -- Offences -- Election expenses.

Application by the accused, Hall, for an order quashing a summons against her. Hall and another individual, Jakobek, were both candidates for the office of Mayor. Jakobek swore an information alleging that Hall had committed election campaign finance offences contrary to the Municipal Elections Act. The alleged offences occurred before Hall became a candidate. The actions included opening bank accounts, holding public meetings and sending out letters to solicit funds and volunteer help. Hall applied to quash the summons on the basis that there had not been an audit under the Act and that there were no reasonable and probable grounds to believe that Hall had contravened the Act. She also argued that the alleged offences lacked particulars and were too vague to permit her to make full answer and defence.

HELD: Application allowed. The summons was quashed. Jakobek had reasonable grounds to support his belief that Hall contravened the Act by accepting contributions and incurring expenses before her campaign began. The information was sufficiently detailed to describe the offences alleged to have been committed. However, the justice of the peace was without jurisdiction to issue the summons. Hall was a candidate and Jakobek was an elector. Hall was entitled to the protection of the Act. Jakobek could apply for a campaign audit under the Act or file a complaint with the police alleging election campaign finance wrongdoings. The Act did not require an audit as a condition precedent to legal proceedings where a non-elector such as a peace officer investigated a complaint and had probable cause to believe that an offence had been committed and wanted to lay an information against the candidate.

Statutes, Regulations and Rules Cited:

Criminal Code, ss. 581, 583, 587.

Municipal Elections Act, 1996, S.O. 1996, c. 32, ss. 6(3), 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 92(2), 92(4).

Prosecution of Offenses Act 1985, (U.K.), 1985, c. 23, s. 6.

Provincial Offences Act, R.S.O. 1990, c. P.33, ss. 23, 23(1), 25, 35, 77(1), 77(2), 78, 140.

Public Inquiries Act, R.S.O. 1990, c. P.41.

Counsel:

David G. Boghosian, for the applicant.
Alan D. Gold, for the respondent.

TRAFFORD J.:--

Introduction

1 On August 13, 2003 Thomas Jakobek appeared before a Justice of the Peace in Toronto and, with the assistance of counsel, Lorne Honickman, swore an information alleging that Barbara Hall committed a number of election campaign finance offenses contrary to the Municipal Elections Act, 1996, S.O. 1996, c. 32, as amended ("MEA 1996" or "the Act"). Both Ms. Hall and Mr. Jakobek are candidates for the Office of Mayor of Toronto in an election to be held on November 10, 2003. The alleged offenses occurred before Ms. Hall became a candidate. A summons was issued by the learned Justice of the Peace compelling Ms. Hall to appear before the Court on September 23, 2003.

She was personally served with the summons on August 18, 2003.

2 This is an application by Ms. Hall under s. 140 of the Provincial Offenses Act, R.S.O. 1990, c. P.33, as amended ("POA") for an order quashing the summons on one or more of the following bases:

> FIRST, in the circumstances of this case, there was no jurisdiction to issue the summons because of the failure to comply with the compliance audit provisions in s. 81 of the MEA 1996 as they relate to the campaign of Ms. Hall. In the submission of the Applicant, the MEA 1996 precludes a private prosecution for all breaches of its election campaign finance provisions unless these requirements are met.
>
> SECOND, in the circumstances of this case, reasonable and probable grounds do not exist to support a belief that Ms. Hall contravened the election campaign finances provisions of the MEA 1996 before she became a candidate;
>
> and
>
> THIRD, the alleged offenses, as drafted in the information, lack particulars and are so vague that Ms. Hall is not able to make full answer and defence.

3 Let me begin, then, with a brief review of the circumstances of the case, including a summary of the information placed before the Justice of the Peace.

The Circumstances as Alleged by the Informant

4 The presiding Justice of the Peace had practiced law for approximately 32 years and served his community as an elected municipal councillor before he was appointed. It is apparent from a review of the transcript of the proceedings before him that he carefully considered the legal and factual allegations made by the informant. Counsel for the informant was asked questions by the Justice of the Peace and answered them. The Justice of the Peace recessed and took time to consider the matter. It is to be noted, as well, that the informant had first approached the Office of the Chief Election Officer for Ontario with this complaint in early August 2003 but was advised by the Assistant Chief Election Officer that the Office did not have any responsibility for the administration of the MEA 1996. Consequently, it is apparent that the laying of the information leading to this application was considered by the informant and his counsel to be a secondary alternative.

5 The essence of the information sworn to be true is that Ms. Hall, through an organization called

"Friends of Barbara Hall", knowingly took a number of steps before her candidacy began on January 2, 2003 that contravened the MEA 1996. Funds were solicited, expenses were incurred and at least one campaign style, public meeting was held. Bank accounts were opened. Records were kept. An office was opened and staffed. A website was created. E-mail messages were sent to potentially interested persons soliciting funds and volunteer help. These efforts were, at least in part, undertaken to conduct a poll and otherwise determine the viability of a potential campaign by Ms. Hall. A reception for volunteers was apparently held on July 25, 2002. A regular newsletter, a bi-monthly publication designed to advise its readers of Ms. Hall's plans and activities, was created and circulated by e-mail. For example, the first newsletter included Ms. Hall's position on the official plan for Toronto and her planned activities for October 2002, testimonials and the following remarks:

> All of us at Friends of Barbara Hall thank you for your interest, and we welcome your support in encouraging Barbara to run in the 2003 mayoral campaign.
>
> Please take the time to read the following carefully.
>
> We are building tremendous momentum as more and more people visit our Web site at www.friendsofbarbarahall.com. To truly call it a success, we need your help to spread the word.
>
> You can help by becoming a "Cyber Supporter". It will only take a few minutes of your time, and it will make a big difference.
>
> **Before you close this e-mail** we ask you to do at least one of the following things:
>
> 1. If you have a Web site, add a link or a banner to the Friends of Barbara Hall site. Here's a sample banner you might wish to use.
>
> Read more details on linking to our site.
>
> 2. Add a link to your e-mail signature that readers will find at the bottom of your messages. Simply add: "Support Friends of Barbara Hall at http://www.friendsofbarbarahall.com". Find other examples of e-signatures.

3. Tell a friend about our Web site. Use our convenient online form.

Thank you for your time and effort, and for becoming a Cyber Supporter. Every little bit helps -- you can make a difference!

6 One letter sent by the Friends of Barbara Hall in September 2002 said, in part:

> As a confirmed supporter of Barbara Hall, I am writing to ask you to sign on as a Captain for a covert operation that will be an important indicator of public support for Barbara's candidacy.
>
> This assignment is designed for a select number of people who are not shy to speak with friends, family, neighbours, or co-workers about why Toronto needs Barbara Hall now more than ever.

7 The financial statements of Friends of Barbara Hall were also provided to the Justice of the Peace. They included the following statements:

> The following financial statements are of the income and expenses incurred by Friends of Barbara Hall. The committee was formed to explore the possible viability of Barbara Hall entering the mayoral election in 2003. The activities of the Friends of Barbara Hall committee were undertaken in compliance with the Municipal Elections Act.

On December 31, 2002 the committee suspended all activities as required by the Municipal Elections Act.

> Friends of Barbara Hall
> Statement of Income and Expenses
> (June 1 to December 31 2002)

Income:	107,598
Fundraising and Donations	
Expenses:	
Ad by supporters encouraging BH to run	5,153

Bank Charges	503	
Fund-Raising Expenses	19,758	
Meetings Hosted	1,499	
Office Expenses	9,385	
Salaries& Benefits/Professional Fees		42,312
Other (including polling, web and computer services)		28,904
Total Expenses:	$ 107,524	

8 Ms. Hall was quoted, in an article provided to the Justice of the Peace, as saying at a candidate's debate in June 2003, that "... (w)hile I was deciding to run, I got some advice to hold a meeting. I could have done it secretly, but I did not. I had people contribute to a fund to do polling, and what I did was in the spirit of the law."

9 This, then, is the summary of the information sworn to be true by the informant when he appeared, with counsel, before the Justice of the Peace on August 13, 2003.

The Existence of Probable Cause

10 In my opinion, looking at that information as a whole, it, objectively viewed, provided the informant with reasonable grounds to support his belief that Ms. Hall, through the organization called Friends of Barbara Hall, contravened the MEA 1996 by, in essence, accepting contributions and incurring expenses before her campaign began on January 2, 2003. For a definition of "reasonable and probable grounds" see R. v. Storrey (1990), 53 C.C.C. (3d) 316 (S.C.C.), Chartier v. Quebec (A.G.) (1979), 9 C.R. (3d) 97 (S.C.C.), Eccles v. Bourque (1974), 19 C.C.C. (2d) 129 (S.C.C.), R. v. Golub (1997), 117 C.C.C. (3d) 193 (Ont. C.A.) and Nelles v. Ontario [1989] S.C.J.

No. 86 at para. 43. The degree of Ms. Hall's involvement in the impugned activity and the bona fides of her belief in its lawfulness under the MEA 1996 are issues of fact to be determined at trial, if one is held. Based on the record of the proceedings before the Justice of the Peace, the informant's belief that she committed the alleged offenses is a reasonable one. There is, on the face of this information, an articulable basis for discounting the exculpatory interpretations of the information that might be advanced by, or on behalf of, Ms. Hall. Moreover, the hearsay character of the information and the reliance by the informant on a statement attributed to Ms. Hall by the media do not assist the Applicant in this case. Rather, the information must be considered as a whole in determining if it amounts to reasonable and probable grounds to support a belief in the commission of an offence. Much of the information provided to the Justice of the Peace tends to confirm the reliability of the admission attributed to Ms. Hall in the media.

11 Accordingly, the application is dismissed insofar as it is based upon the position that the Respondent lacked the requisite grounds to lay the information.

The Particularity of the Counts

12 Moving to the second position advanced by the Applicant, namely, that the counts in the information, as drafted, are fatally deficient of details concerning the alleged offenses, I disagree. All of the counts stipulate that the alleged offence occurred between June 1, 2002 and December 31, 2002 and consisted of Ms. Hall, before she was a candidate in the municipal election, directly or indirectly through Friends of Barbara Hall, committing an offence. Each of the counts described the offence in simple language and complemented the description with the number of the section of the MEA 1996 that was allegedly contravened. This draftsmanship is compatible with the requirements of s. 25 of the POA. All of these counts provide sufficient details of the circumstances of the alleged offenses to reasonably identify the acts or omissions to be proven against Ms. Hall and the impugned transaction. Moreover, a trial judge has jurisdiction to order particulars under s. 35 of the POA if it is necessary to ensure the fairness of a trial of a defendant. These pleadings are in compliance with the golden rule of pleadings, namely, that the defendant is "... reasonably informed of the transaction alleged against (her), thus giving (her) the possibility of a full defence and a fair trial ...". See R. v. Cote (1977), 33 C.C.C. (2d) 353 (S.C.C.) at 357. See also the analogous requirements of s. 581, s. 583 and s. 587 of the Criminal Code, R.S.C. 1985, c. C.46, as amended.

13 Accordingly, the application is dismissed insofar as it is based upon a lack of particularity or vagueness in the drafting of the alleged offenses.

The Jurisdiction to Allege an Offence under the MEA 1996

14 Lastly, let me move to a consideration of the Applicant's submission that the learned Justice of the Peace did not have any jurisdiction under the MEA 1996 to, inter alia, issue the summons compelling Ms. Hall to appear in Court on September 23, 2003. This position is based upon the failure of the informant to comply with s. 81 of the MEA 1996, insofar as it requires a compliance audit of a candidate's election campaign finances before a "council" may commence a legal

proceeding against the candidate. This result follows, in the submission of the Applicant, from the plain wording of the section and Audziss v. Santa (2003), 223 D.L.R. (4th) 257.

15 For ease of reference, I begin with a reproduction of s. 81 and the related provisions in the MEA 1996. They provide as follows:

> 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.
>
> (2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80(6), if any; it shall be in writing and shall set out the reasons for the elector's belief.
>
> (3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.
>
> ...
>
> (4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finance.
>
> (5) Only an auditor who is licensed under the Public Accountancy Act may be appointed under subsection (4).
>
> (6) An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of the Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate.
>
> (7) The auditor shall submit the report to,
>
> (a) the candidate;
> (b) the council or local board;
> (c) the clerk with whom the candidate filed his or her nomination; and
> (d) the applicant.

(8) For the purpose of the audit, the auditor,

(a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate and of the municipality or local board; and
(b) has the powers of a commission under Part II of the Public Inquiries Act, which Part applies to the audit as if it were an inquiry under that Act.

(9) The municipality or local board shall pay the auditor's costs of performing the audit.
(10) The council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances.
(11) If the report indicates that there was no apparent contravention and the council or local board finds that there was no reasonable grounds for the application, the council or local board is entitled to recover the auditor's costs from the applicant.
(12) No action or other proceeding for damages shall be instituted against an auditor appointed under this section for any act done in good faith in the execution of the audit or for any alleged neglect or default in its execution in good faith.

...

1. In this Act,

"candidate" means a person who has been nominated under section 33;

...

"clerk" means the clerk of a municipality;

16 Section 92(2) of the MEA 1996 makes it an offence for an individual to contravene, inter alia, s. 69 (Duties of a Candidate), s. 70 (Contributions Only after Nomination), s. 73 (Restrictions on Fund-Raising Functions) and s. 76 (Expenses Only after Nomination). Under s. 92(4) a limitation period of one year is prescribed in the following terms:

(4) No prosecution for a contravention of any of sections 69 to 79 shall be commenced more than one year after the facts on which it is based first came to the informant's knowledge.

17 The position of the Applicant is that the requirements of s. 81 of the MEA 1996 are a condition precedent to all prosecutions alleging offenses against the "Election Campaign Finance" provisions of the Act from s. 66 to s. 82, inclusive. Unless an informant, within one year of knowing the circumstances alleged to be an offence, is instructed by a municipal council to lay an information alleging the offence by a candidate and, further, the municipal council has given such instructions to the informant after it considered the report of an auditor appointed by it to conduct an audit of the candidate's election campaign finances and, further, the appointment of the auditor was made by the council upon an application by "... an elector who is entitled to vote in an election ..." and who believed on reasonable and probable grounds that a candidate contravened a provision of the MEA 1996 relating to election campaign finances, there is no jurisdiction in a Justice of the Peace to receive the information and issue process compelling the candidate to attend Court to answer to the charges. It is the position of the Applicant that each, and all, of these requirements must be met to establish the jurisdiction of the Court. Reference was made to Audziss v. Santa, supra, where the Court said at paras. 27-29:

> The general right of a private person to lay an information in respect of an offence created by a provincial statute is found in s. 23(1) of the POA reproduced earlier. The MEA is a provincial statute and it creates a number of offenses. There is no express restriction or limitation in the MEA on an individual's right to lay an information in respect of any offenses contained in that statute. The question that arises is whether it is implicit that the Legislature intended to reserve that right to the council or local board of a municipality in respect of election campaign finances when it enacted s. 81(10). As set out above, that section authorizes the council or local board, following the conduct of a compliance audit, to "commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances".
>
> I certainly agree with the applications judge's comment that the statute is far from clear on whether an elector, or only council, can lay an information in respect of an alleged contravention of the MEA with respect to election campaign finances. Nonetheless, when the provisions relating to election campaign finances are considered in their entirety, it is my view that the conclusion reached by the applications judge is the only one that can provide coherence to the legislative scheme. Having regard to a candidate's obligations under the MEA in relation to election campaign finances; the automatic sanctions that apply upon the clerk serving notice of default; the elector's right to apply for a compliance audit to

> ensure compliance with these provisions; the council's obligation to consider that application and its power to appoint an auditor; the council's obligation to consider any report resulting from a compliance audit and its power to commence a legal proceeding against the candidate for any apparent contravention of a provision relating to election campaign finances; and finally an elector's right to seek judicial review in respect of the council's decision; it is my view that the Legislature did not intend that an elector could simply bypass the whole process and lay a private information. This interpretation is also one which, in my view, achieves 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 to ensure the legitimacy of, attacks on elected officials.
>
> Hence, I would conclude that an elector's general right to lay an information in respect of provincial offenses has effectively been superseded by the legislative scheme contained in the MEA in relation to election campaign finances. In light of my conclusion on this point, it is not necessary to decide whether the laying of an information by Audziss constituted a collateral attack on the decision of Smith J.
>
> Consequently, I would conclude that the process issued by the justice of the peace was properly quashed and I would dismiss the appeal.

These comments, in the submission of the Applicant, are binding on this Court and clearly lead to a decision in favour of Ms. Hall on this application.

18 In ruling on this part of the application it is necessary to begin with an interpretation of s. 81 of the Act. Essentially, it applies to cases where an "elector" has reasonable grounds to believe that a "candidate" has violated the election campaign finance provisions of the Act. There are two important limitations to the scope of this procedural provision of the Act. First, in subsection 1 it contemplates an application by "... an elector who is entitled to vote in an election ..." and, ultimately, in ss. 10, a legal proceeding being commenced by the council after it considered the auditor's report of the election campaign finances of a candidate, the auditor having been appointed by the council as a result of the application by the elector. It does not require such an audit as a condition precedent to legal proceedings where a non-elector, such as, for example, a peace officer, has investigated a complaint like the one made in this case, has probable cause to believe, and does believe, that an offence has been committed against the MEA 1996 and wants to lay an information alleging such an offence against a candidate. Second, the section does not cover cases where the alleged wrongdoer is not a "candidate". For example, under s. 77(1) of the POA all persons are a party to an offence under the MEA 1996 by a candidate if they do or omit to do anything for the purpose of aiding the candidate to commit the offence or, alternatively, abet the candidate in

committing it. Others may be liable as parties to such an offence by a candidate through the operation of s. 77(2) and s. 78 of the POA. Where an informant, whether s/he be an elector or another person, has probable cause to believe that a person who is not a candidate has contravened the election campaign provisions of the MEA 1996, the campaign audit requirements of s. 81 of the Act do not apply to the case.

19 In short, s. 81 of the Act does not create a legal impediment to prosecutions of any person, including candidates, where the informant is not an elector. Nor does it create a legal impediment to prosecutions of persons who are not candidates where the informant is an elector. The only prosecutions affected by s. 81 of the Act are those where the informant is an elector and the alleged wrongdoer is a candidate.

20 Is this summary compatible with the observations made in Audziss v. Santa, supra? In my view, it is consistent with the letter and spirit of the judgement, given the historical significance of the right of any person to initiate a prosecution, at common law and under s. 23 of the POA. It must be recalled that the Court of Appeal was ruling on a case where a number of electors alleged, after an election was held, that one of the successful candidates had, during the campaign, violated the election campaign finance provisions of the Act. In that context, Charron, J.A. concluded that "... (in) my view ... the Legislature did not intend that an elector could simply bypass the whole process and lay a private information. This interpretation is also one which, in my view, achieves a proper balance between an elector's right to challenge an elected official in regard to his or her statutory obligation and the need to limit, and to ensure the legitimacy of, attacks on elected officials." [Emphasis added.]

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.

22 This conclusion is reasonable and just for a number of reasons. First, it has long been a right of citizens at common law to lay a private information alleging an offence, criminal or otherwise. This right is a safeguard against improper failures, or refusals, of the authorities to proceed with such an allegation. As was noted by Lord Wilberforce in Gouriet v. Union of Post Office Workers [1977] 3 All E.R. 70 (H.L.) at p. 79:

> When Parliament decides to prohibit certain conduct (eg. delaying the mail) it enacts legislation defining the prohibited act (eg. the Post Office Act 1953, ss. 58, 68). To violation or disregard of the prohibition it attaches a sanction -- prosecution as for a misdemeanour with a possible sentence of two years' imprisonment. Enforcement of the law means that any person who commits the relevant offence is prosecuted. So it is the duty either of the Post Office itself, or

> of the Director of Public Prosecutions or of the Attorney-General, to take steps to enforce the law in this way. Failure to do so, without good cause, is a breach of their duty (for a recent formulation of this duty see the statement of Sir Hartley Shawcross, Attorney-General (1951), in J LI J Edward's The Law Officers of the Crown. The individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution. This historical right which goes right back to the earliest days of our legal system, though rarely exercised in relation to indictable offenses, and though ultimately liable to be controlled by the Attorney-General (by taking over the prosecution and, if he thinks fit, entering a nolle prosequi) remains a valuable constitutional safeguard against inertia or partiality on the part of authority. This is the true enforcement process and it must be clear that an assertion of a right to invoke it is of no help to Mr. Gouriet here. His case is not based on the committal of an offence plus a refusal to prosecute ... [Emphasis added.]

23 In a similar spirit, Lord Diplock said at p. 97:

> In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation), to invoke the aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure. It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and to bring criminals to justice and the creation in 1879 of the office of Director of Public Prosecutions, the need for prosecutions to be undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.
> [Emphasis added.]

24 The importance of the right of private prosecution was summarized by the Law Commission for England and Wales in Report 255, "Consents to Prosecution", (London: Her Majesty's Stationery Office 1998), at para. 4.4 as follows:

> The right of private prosecution is regarded by many as fundamental to the criminal legal system. Lord Simon of Glaisdale, for example, speaking during the Second Reading debate on the Prosecution of Offenses Bill in 1984, said that the principle upon which that right was founded was the general "fundamental constitutional principle of individual liberty based on the rule of law". Likewise in 1958, in his submission to the Select Committee on Obscene Publications, the Attorney-General expressed the view that the "fundamental principle ... that proceedings may be instituted by private individuals" should not be restricted

> "unless some very good reason to the contrary exists". In the House of Lords case of Gouriet v. Union of Post Office Workers, both Lord Diplock and Lord Wilberforce emphasised that this right remained an important constitutional safeguard against wrongful failure by the authorities to prosecute. [Emphasis added.]

25 These principles have been preserved by s. 6 of the Prosecution of Offenses Act 1985, (U.K.), 1985, c. 23 which provides:

> 6.-(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply.
>
> (2) Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage.

26 The importance of these principles to the administration of criminal justice in Ontario was recently stated in the "Report of the Attorney Generals Advisory Committee on Charge Screening, Disclosure and Resolution Discussions", the Honourable G. Arthur Martin, O.C., O. Ont., Q.C., LL.D., Chair. In recommending that there exist in Ontario a system of post-charge screening by agents of the Attorney General the following comments were made at pp. 121-122:

> There are, in the Committee's view, a number of considerations that may be relevant to whether screening should be conducted before or after a charge is laid.
>
> The Committee observes that, in the opinion of Professor Edwards, the Commonwealth's leading scholar in this area of the law, the constitutionality of pre-charge screening is open to question. In written submissions to the Committee, Professor Edwards reiterated an opinion he had prepared for the Commissioners of the Royal Commission on the Marshall Prosecution:
>
> > ... the Criminal Code [s. 504] preserves the historic right of "anyone who, on reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice. [emphasis added] ... This right extends to police officers and private citizens alike and embodies a constitutional principle that has a long history in both English and Canadian law. It cannot be set aside by

> resort to the argument that "notwithstanding" its existence it is displaceable by virtue of the Attorney General's co-existing right to enter a stay of proceedings.
>
> Both "rights" are rooted in independent constitutional principles that can be invoked to support their viability. Neither one takes paramountcy over the other at the time that each is exercised. Indeed, they should be viewed as embodying the doctrine of "checks and balances" that protects society from any abuse of power. It is only in exceptional circumstances that the right of the police to lay an information would be invoked when faced with advice to the contrary by the Attorney General or his agents; from the Deputy Attorney General down to the local Crown prosecutor. But if the circumstances are such that the advice is fundamentally wrong or is dictated by improper considerations then, in my judgment, there is an incontestable right on the part of the police to start the criminal process by laying an information. Responsibility for taking this action is thereby publicly manifested. By a similar token it is within the prerogative of the Attorney General (now enshrined in the Criminal Code, s. 579) to terminate the criminal proceedings initiated by the police, by formally entering a stay in open court accompanied by a statement as to the reasons for so doing.

> The Supreme Court of Canada held in Dowson v. The Queen (1984), 7 C.C.C. (3d) 527, that the Attorney's General power to intervene and stay prosecutions cannot be exercised until a justice of the peace has issued process, recognizing that the Attorney General's "accountability to the Legislature would be much greater if he acted after the justice of the peace has determined that there is cause to issue process." [Emphasis added.]

27 The reference to R. v. Dowson, supra, is an important one because the Court emphasized the need for a clearly expressed legislative intent to limit the right to initiate a private prosecution before concluding that it has been limited or, indeed, taken away. At p. 536 the Court said:

> The power to stay is a necessary one but one which encroaches upon the citizen's fundamental and historical right to inform under oath a Justice of the Peace of the commission of a crime. Parliament has seen fit to impose upon the justice an obligation to "hear and consider" the allegation and make a determination. In the absence of a clear and unambiguous text taking away the right, it should be protected. This is particularly true when considering a text of law that is open to an interpretation that favours the exercise of that right whilst amply

> accommodating the policy consideration that supports the power to stay. When one adds to these considerations the fact that, apart from the court's control, the only one left is that of the legislative branch of government, given a choice, any interpretation of the law, which would have the added advantage of better ensuring the Attorney-General's accountability by enhancing the legislative capacity to superintend the exercise of his power, should be preferred. [Emphasis added.]

28 This, then, is the historical significance of the right to initiate a private prosecution. This is the historical basis of s. 23 of the POA which provides that any person who has reasonable and probable grounds to believe that an offence has been committed may lay an information before a justice and the justice must receive the information. It is this history and the importance of the right to initiate a private prosecution that lead me to interpret Audziss v. Santa, supra, as I have previously indicated. It was not the intention of the Court of Appeal, through its obiter dicta in Audziss v. Santa, supra, to limit the right of a peace officer to lay an information against any person, candidate or otherwise, under the MEA 1996. Nor was it the intention of the Court to limit the right of an elector to lay an information alleging an offence under the MEA 1996 by a person who is not a candidate or an elected person. The purpose of s. 81 of the Act is not defeated by my interpretation of it.

29 In recognizing these distinctions, I am also mindful of the discretionary powers of a peace officer who is considering charges under the MEA 1996, of a justice who is determining whether to issue process compelling a person to attend Court in answer to any such charge and of the Attorney General to intervene and conduct or stay any such charges. All of them may consider the public interest in proceeding with any such prosecution. All of them may consider when any such prosecution should be conducted in relation to the election day. The inapplicability of the campaign audit provisions to some prosecutions under the MEA 1996 does not mean that those prosecutions are more likely to be frivolous, vexatious or otherwise inappropriate.

30 What, then, is the result of this application? In my view, Ms. Hall is entitled to the protections of s. 81 of the Act. The Respondent, as an elector, must comply with the section if he is to be the informant in the case. Ms. Hall is a "candidate". The council for the City of Toronto continues to exist until the successors are elected and the newly elected council is organized. See s. 6(3) of the Act. There is no evidence on this application that the Respondent filed an application with the Clerk of the municipality under s. 81(1) of the Act and was met with a response that was capricious, corrupt, biased or otherwise unlawful. In other words, there were available to the Respondent two lawful ways of determining the merit of the allegations he has made against Ms. Hall. He could have filed, and still may file, the application with the Clerk under s. 81(1) of the Act and/or he could have filed, and still may file, a complaint with the Toronto Police Service and ask them to investigate the alleged offenses. He is not in a situation where there is no remedy available at law for the wrongs that he believes have occurred in the campaign. Counsel for the Respondent has taken the position that the requirements of s. 81 of the Act should be limited to cases involving

elected officials who allegedly misconducted themselves after their candidacy began. I disagree, respectfully. There is no reason to distinguish post-candidacy wrongdoing under the Act from pre-candidacy wrongdoing under the Act. Moreover, the use of the term "candidate" throughout the section in conjunction with a reference to all of the election campaign finance provisions from s. 66 to s. 82 of the Act lead me to conclude that the section should not be limited as he advocated in this case. Any auditor appointed by the council under s. 81(4) of the Act has ample powers under subsection 8 to conduct an audit, including the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1990, c. P.41, as amended. While this process would likely be a time-consuming one, any decision made by the council to commence a legal proceeding against Ms. Hall, such as a prosecution chosen by the Respondent in this case, would not be prohibited by the one year limitation period prescribed by s. 92(4) as long as the informant in the case did not have knowledge of its facts more than one year before it was commenced. The informant need not be the applicant under s. 81(2) of the Act.

The Summary of the Ruling

31 Let me, then, summarize the ruling of the Court on this application.

32 First, the Respondent has reasonable grounds to support his belief that Ms. Hall has directly or indirectly contravened the election campaign finances provisions of the Act through the organization called Friends of Barbara Hall before her candidacy was declared on January 2, 2003.

33 Second, the offenses, as drafted in the information received by the Justice of the Peace, reasonably identify the transactions alleged to be in contravention of the Act.

34 Third, however, Ms. Hall, as a candidate is entitled to the protection of the campaign audit requirements of s. 81 of the Act because the Respondent is an elector. See Audziss v. Santa, supra. Accordingly, the Justice of the Peace was without jurisdiction to issue a summons compelling Ms. Hall to attend Court on September 23, 2003 and answer the charges. The summons is quashed.

35 Fourth, the Respondent is not left without a remedy for the wrongs that he believes were committed by Ms. Hall before her campaign began. He may apply for a campaign audit under s. 81 of the Act. There is no evidence of a capricious, corrupt, bias or otherwise unlawful response by the existing council. He may also file a complaint with the Toronto Police Service alleging election campaign finance wrongdoing by Ms. Hall. A peace officer could lay a charge under the MEA 1996 against any person, including Ms. Hall, if s/he believed on reasonable and probable grounds that the person had committed an offence under the Act. Section 81 of the Act does not create a jurisdictional impediment to any such charge by a peace officer who is not an "elector".

36 Fifth, the Respondent may lay a private information alleging an election campaign finances offence under the MEA 1996 by any other person than Ms. Hall if he believes, on reasonable and probable grounds, that the person committed such an offence in connection with the activity of the organization known as Friends of Barbara Hall before Ms. Hall declared her candidacy on January

2, 2003. The Respondent could, as a matter of law, make such an allegation against a person either as a principal offender or as a party to an offence committed by Ms. Hall.

Conclusion

37 Accordingly, the summons issued by the Justice of the Peace compelling Ms. Hall to appear before the Court on September 23, 2003 in response to the information sworn by Thomas Jakobek on August 13, 2003 alleging election campaign finance offenses under the MEA 1996 is quashed.

38 Counsel may approach the Court on costs for this matter, if either of them wishes to do so, on or before September 30, 2003.

TRAFFORD J.

cp/e/nc/qw/qlrme

COURT FILE No's: 04-6083-97; 04-6083-98; 04-6083-99
Citation: *Chapman v. Hamilton (City of)*, 2005 ONCJ 158

ONTARIO COURT OF JUSTICE

BETWEEN:

JOANNA CHAPMAN

Appellant

-and-

CITY OF HAMILTON

Respondent

-and-

LARRY DI IANNI

Added Party

Proceeding under the *Municipal Elections Act, 1996*, section 81 (3.3)

Before Regional Senior Justice Timothy. A. Culver
Heard at Hamilton, on February 7th, 8th, 11th, 21st, March 9th, 10th, 11th, 2005

Eric K. Gillespie ..... for the Appellant

Peter A. Barkwell .....for the Respondent, City of Hamilton

Jeff Levy and Jack Siegel ..... for the Added Party, Larry Di Ianni

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Culver, Timothy A., J.:

1. This is an appeal from the decision of the Council of the City of Hamilton, sitting as the Committee of the Whole, on July 14, 2004, rejecting the Appellant's application for a Compliance Audit pursuant to s. 81 of the Municipal Elections Act, 1996 ("The Act"). The appeal is brought pursuant to s. 81 (3.3) of The Act.

2. The relief sought by the Applicant, is for the decision of Council to be set aside, and for an order requiring a Compliance Audit pursuant to s. 81 of the Municipal Elections Act, 1996, of Larry Di Ianni, successful candidate for Mayor, of John Best and of Marvin Caplan, both unsuccessful candidates for aldermen, and other relief ancillary to the order for a Compliance Audit.

FACTUAL BACKGROUND

3. The Appellant is an elector living in the City of Hamilton who was entitled to vote in the November 2003 Municipal election.

4. John Best, Marvin Caplan, and Larry Di Ianni stood as candidates in the November 2003 elections held in The City of Hamilton.

5. On June 23, 2004, the Appellant applied to the Clerk of the City of Hamilton, in writing, requesting Compliance Audits pursuant to s. 81 of The Act, of nine candidates in the election, among whom were the candidates that are subject of this appeal. Subsequent to commencing this proceeding, the appeal was withdrawn in relation to a number of candidates, leaving John Best, Marvin Caplan, and Larry Di Ianni, as candidates who would be subject to the order for Compliance Audit if the appeal were successful.

6. The notice of appeal and appeal books were served on all candidates who were subject to the request for Compliance Audit. John Best has not sought status before this court. Marvin Caplan sought and was granted status as an added party. He, however, withdrew his application to have added party status at the commencement of this appeal. His

request was granted. Mr. Larry Di Ianni, the Mayor, sought and was granted added party status to this appeal.

7. The request for Compliance Audit, by the Appellant, alleged that there are a number of violations of the Municipal Elections Act together with a number of "probable" violations, disclosed in the candidate's financial statements and auditor's reports filed under s. 78 of The Act.

8. In the case of John Best, the Appellant alleges that Mr. Best had received $719.33 from the "Citizen Action Group", a charitable organization under the Income Tax Act, which she alleges was ineligible to contribute to an election campaign; and $1000 from R. Denninger Ltd., a contribution over the donation limit of $750 set by The Act, although her request states "note that there is a $250 return to an unspecified contributor which may apply to this item".

9. With regard to the candidate Marvin Caplan, the Appellant complained of $750 donations made by Renimob, Carling Building Co., and Effort Square, each of which, she alleges "cannot be traced as a corporation, but appears to be linked to Effort Trust." She further alleges that the total of any two of these donations "exceeds the allowable limit".

10. With regard to the candidate Mr. Larry Di Ianni, the Appellant alleges the following over-donations after review of the financial statement and auditor's report: Ramada Plaza Hotel, two donations totalling $1000; 456941 Ontario Ltd., three donations totalling $1100; Homelife Effect Realty Inc., three donations totalling $1250; Dival Developments Ltd., two donations totalling $1000; The Effort Trust Company, two donations totalling $900; Veneter Equipment Rental Inc., two donations totalling $900; A. DeSantis Holdings Ltd., A. DeSantis Development Ltd and A. DeSantis Real Estate Ltd, companies she alleges are related under s. 256 of the Income Tax Act, three donations totalling $1200; two donations, one from Pasquale Palletta and one from Pasquale Smith, each in the amount of $750, with the same address, which the Appellant alleges would appear to be the same person, and if so, the two donations would total

$1500; and three donations of $750 from each of three companies of which she alleges are all companies related to St. Lawrence Cement.

11. The Appellant further alleges 17 other instances of donations in excess of $750 made by entities that she alleges were either associated corporations under the Income Tax Act, or companies that could not be traced as validly incorporated entities. She listed a donation from the Hamilton International Airport, Ltd., in the amount of $750, which she alleges was owned by the City of Hamilton and leased to Tradeport International. She also lists 14 donations from law firms, for which no individual contributor was identified, and an "in kind donation for rent, further raising the question of whether the cost of the rental space had been properly reported, and if the in kind donations exceed the allowable limit."

12. On Wednesday July 14, 2004, the Appellant attended the Committee of the Whole meeting of Hamilton City Council and was permitted to speak for five minutes.

13. The Committee of the Whole considered the Applicant's request for Compliance Audits, and voted to reject the request for audits. If anything can be taken from the "transcript" of the discussion of the Committee of the Whole, filed with consent of the parties, it's that councillors were reluctant to exercise their jurisdiction, to consider the request for Compliance Audit on its merits, because they did not want to be seen as "standing in judgement" of their colleagues.

14. The Applicant served and filed this appeal from the decision of Council. Subsequent to the filing of the appeal, Mayor Di Ianni commissioned a review of his corporate donations by Taylor Leibow LLP, "accountants and advisors". Three hundred and thirty-four letters were sent, and 212 responses were received. In their report dated September 14, 2004, contained in the Evidence of the Added Party Brief, and filed on consent, they found "there were 24 corporations or groups of associated corporations that had exceeded the $750 limit and the total of the excess contributions was $10,950," and further, "there were a total of two individual contributors that had exceeded the $750 limit and the total of the excess contribution was $500." The list of contributors that was reviewed, involved all contributions made to the election campaign up to July

31, 2004. Without putting too fine a point on it, this "investigation" confirmed that many of the "violations", alleged in the June 23 letter of complaint written by the Appellant were accurate.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

15. The obligation of a candidate to file financial statements is contained in s. 78 of The Act, which provides in part:

> (1). On or before 5 p.m. on the filing date, a candidate shall file with the clerk with whom the nomination was filed a financial statement and auditors report, each in the prescribed form, reflecting the candidate's election campaign finances,
> (a) in the case of a regular election, as of December 31 in the year of the election; and
> (b) in the case of a by-election, as of the 45th day after voting day. 1996, c.32, Sched., s. 78 (1); 2000, c. 5, s.35(1); 2002, c. 17, Sched. D, s.29 (1)

16. Form 5, which is the form referred to in s. 78, contains, inter alia, a summary of campaign income and expenses, a statement of assets and liabilities, as at the date referred to in the form, a statement of determination of surplus or deficit and disposition of surplus, a statement of campaign period income and expenses, Schedule 1, listing contributions, Schedule 2, listing fundraising functions, and other schedules not germane to this analysis.

17. The auditor's report contains a declaration, which provides as follows:

> "I (candidate), a candidate in the Municipality of Hamilton, hereby declare that to the best of my knowledge and belief that these financial statements and attached supporting Schedules are true and correct."

The declaration must be sworn by the candidate before the clerk or a commissioner. The report also contains an audit report, signed by a chartered accountant, which states, in paragraph 1, as follows:

> "These financial statements are the responsibility of (candidate), candidate. Our responsibility is to express an opinion of these financial statements based on my audit",

and further,

> "The Municipal Elections Act, 1996, does not require me to report, nor is it practical for me to determine, that contributions reported include only those which may be properly retained in accordance with the provisions with the Municipal Elections Act, 1996."

18. The statutory provisions of The Act, relevant to the making and receiving of contributions, as it relates to the issues in this appeal are as follows:

> 69. (1) A candidate shall ensure that …
>
> (f) records are kept of,
>
> (i) the receipts issued for every contribution,
> (ii) the value of every contribution,
> (iii) whether a contribution is in the form of money, goods or services, and
> (iv) the contributor's name and address
>
> (l) proper direction is given to the persons who are authorized to incur expenses and accept or solicit contributions on behalf of the candidate
>
> (m) a contribution of money made or received in contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention;
>
> (n) a contribution not returned to the contributor under clause (m) is paid to the clerk with whom the candidate's nomination was filed
>
> 70. (1) A contribution shall not be made to or accepted by or on behalf of a person unless he or she is a candidate. 1996, c. 32, Sched., s. 70 (1).
>
> Who may contribute:
>
> (3) Only the following may make contributions:
> 1. An individual who is normally resident in Ontario.
> 2. A corporation that carries on business in Ontario.
> 3. A trade union that holds bargaining rights for employees in Ontario.
>
> (7) A contribution may be accepted only from a person or entity that is entitled to make a contribution. 1996, c. 32, Sched., s. 70 (7)

71. (1) A contributor shall not make contributions exceeding a total of $750 to any one candidate in an election. 1996, c. 32, Sched., s. 71 (1).

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. 1996, c. 32, Sched., s. 72.

74. (1) A contributor shall not make a contribution of money that does not belong to the contibutor. 1996, c. 32, Sched., s. 74 (2)

19. The obligation on the candidate to report accurately under s. 78 is imposed by the following section:

92. (5) A candidate is guilty of an offence and, on conviction, in addition to any other penalty that may be imposed under this Act, is subject to the penalties described in paragraph 1 of subsection 80 (2), if he or she,

(a) files a document under section 78 that is incorrect or otherwise does not comply with that section.

20. The elector's rights and the obligations of Council, are contained in the following section:

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 the Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances. 1996, c. 32, Sched., s. 81 (1).

Requirements

(2) The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80 (6), if any; it shall be in writing and shall set out the reasons for the elector's belief. 1996, c. 32 Sched., s. 81 (3).

Decision

(3) Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected. 1996, c. 32, Sched., s. 81 (3).

Appointment of auditor

(4) If it is decided to grant the application under subsection (3), the appropriate council or local board shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances. 2002, c. 17, Sched. D, s. 32 (3).

21. This Court obtains its statutory jurisdiction over this appeal in s. 81 (3.3) which provides as follows:

81 ...(3.3) The decision of the council or local board under subsection (3) and of a committee under subsection (3) pursuant to a delegation under subsection (3.1) 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, local board or committee could have made. 2002, c. 17, Sched. D, s. 32 (2).

NATURE OF THE APPEAL – STANDARD OF REVIEW

22. Counsel referred the Court to a number of cases regarding the Standard of Review I should apply, as a judge sitting on appeal of the decision of Council. It's of some interest to note that all counsel before me changed their position on this standard, some quite drastically, during the course of argument. I will now summarize the different approaches that I was urged to take, by reference to the cases referred to me.

THE DICKASON TEST

23. Also referred to the *University of Alberta v. Alberta (Human Rights Commission), Olive Patricia Dickason v. Governors of University of Alberta and Alberta Human Rights Commission,* [1992] 2 S.C.R. 1103, a decision of the Supreme Court of Canada. This was an appeal by an employee from the judgement of the Alberta Court of Appeal reversing a judgement of the Court of Queen's Bench which upheld a complaint filed by Dr. Dickason under the Individual Rights Protection Act, and the decision of a board of inquiry which ruled in her favour on the complaint.

24. The pertinent legislation under the Individual's Rights Protection Act stated as follows:

> 33. (1) A party to a proceeding before a board of inquiry may appeal an order of the board to the Court of Queen's Bench by originating notice filed with the clerk of the Court of the judicial district in which the inquiry was held ....
>
> (6) The court may confirm, reverse or vary the order of the board and may make any order that the board can make under section 31.

25. It was submitted to me that although these appeal provisions are literally different than section 81 (3.3) of The Act, in substance they are identical.

26. In discussing the Standard of Review, Cory, J. wrote the following:

> 31. The principle of deference to findings of fact made at first instance has been to a large extent adopted in reviewing the decisions of administrative tribunals, although the standard of review of decisions made by administrative bodies will always be governed by their empowering legislation. Where the legislature has enacted a privative clause restricting review it has been held by this court that appellate courts must defer to a tribunal's finding of fact: see *National Corn Growers Assn v Canada (Import Tribunal),* [1990] 2 S.C.R 1324, 45 Admin. L.R. 161, 114 N.R. 81, 74 D.L.R. (4th) 449, *W.W. Lester (1978) Ltd. V U.A., Local 740*, [1990] 3 S.C.R. 644, 48 Admin. L.R. 1, 76 D.L.R. (4th) 389, 91 C.L.L.C 14, 002, (sub nom. *Planet Development Corp. v. U.A., Local 740*) 123 N. R. 241, 88 Nfld. & P.E.I.R 15, 274 A.P.R. 15, and *Gendron v. Supply & Services Union of the P.S.A.C.*, Local 50057, [1990] 1 S.C.R. 1298, [1990] 4 W.W.R 385, 44 Admin. L.R. 149, 109 N.R. 321, 66 Man. R, (2d) 81, 90 C.L.L.C. 14,020.
>
> 32. In Bell Canada v Canada *(Radio-Television & Telecommunications Commission), [1989]* 1 S.C.R. 1722, 38 Admin. L.R. 1, 60 D.L.R. (4th) 682, 97 N.R. 15 at p. 1746 [S.C.R.], this court further recognized that curial deference must be given to findings made within the field of specialized knowledge of an administrative decision-maker.
>
> 33. However, the situation is different where there is neither specialized skill and knowledge exercised by an administrative decision-maker not a statutory restriction imposed upon the court's review of those decisions. Here the I.R.P.A. has clearly indicated that a very broad standard of review would be appropriate to decisions rendered by a board of inquiry under the Act. Section 33 (2) provides that a party may appeal a decision of the board on questions of fact or mixed fact and law with the leave of a judge of the Court of Queen's Bench. In the case at bar, Murray J. granted leave for an appeal on the facts. On a plain reading of the I.R.P.A., it is clear that the legislature specifically intended that appellate courts should examine the evidence anew and, if deemed appropriate, make their own findings of fact. Under this Act, no particular deference is owed by the Court of Appeal to the findings of initial trier of fact. This court possesses the same statutory jurisdiction as the Court of Appeal.

34. In support of this position I would note that the provision for appeal in the I.R.P.A. is similar to that in the Ontario *Human Rights Code* (formerly R.S.O. 1970, c. 318), which this court considered in *Etobicoke*, supra. The statutory basis for an appeal from the Ontario Board of Inquiry is found in s. 42(3) of the *Human Rights Code*, R.S.O. 1990, c. H. 19. It provides for an appeal on any question of law or fact and states that the court may substitute its opinion for the board. In *Etobicoke*, McIntyre, J. held that this section (then s 14d(4)) granted an appellate court broader powers to review findings of the trier of fact than exist at common law. The wording of s. 42 (3) of the Ontario Code is more explicit than that found in s. 33(2) of the I.R.P.A. However, the import of the two sections must be the same, as the right to an appeal on questions of fact would be meaningless if the appellate court were not empowered to substitute its own opinion for that of the board. Nor is this a situation in which the administrative decision-maker possesses a specialized expertise which would merit curial deference. It can be seen that the I.R.P.A. grants the Court of Appeal and thus this court the jurisdiction to make findings of fact based on a review of the evidence on the record, without deferring to the conclusions drawn by the Board of Inquiry.

THE NANAIMO TEST

27. Counsel referred to *Nanaimo (City) v. Rascal Trucking Ltd.* (2000) 1 S.C. R. 342. This was an appeal from the Court of Appeal for British Columbia. The decision under appeal was a resolution from the City Council of Nanaimo, passing a resolution declaring a pile of soil a nuisance pursuant to section 936 of The Municipal Act, and ordering the company and its lessor to remove it. Justice Majors considering, "upon what standard must the Appellant's decision be reviewed?" found that the test on issues of jurisdiction and questions of law was one of correctness. When considering the tests, he wrote the following:

30. A consideration of the nature of municipal government and the extent of municipal expertise further militates against a deferential standard on the question of jurisdiction. Furthermore, these factors reflect the institutional realities that make municipalities (page 356) creatures distinct and unique from administrative bodies.

31. First, in contrast to administrative tribunals, that usually adjucate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence....

32. Second, municipalities are political bodies. Whereas tribunal members should be and are generally, appointed because they possess an expertise within the scope

of the agency's authority, municipal councillors are elected to further a political platform. Neither experience nor proficiency in municipal law and municipal planning, while desirable, is required to be elected a councillor. Given the relatively broad range of issues that a municipality must address, it is unlikely that most councillors will develop such a special expertise even over an extended time. **Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent**. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise. ***(Emphasis mine)***

33. The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for intra vires decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

37. I find these comments equally persuasive in the scrutiny of municipal resolutions. The conclusion is apparent. The standard upon which courts may entertain a review of intra vires municipal actions should be one of patent unreasonableness.

THE SOUTHAM TEST

28. The Supreme Court of Canada dealt with this issue again in *Canada (Director of Investgations & Research) v. Southam Inc.* [1997] 1 S.C.R. 748. This appeal related to a decision of the Competition Tribunal relating to the acquisition of a community newspaper.

29. Iacobucci, J., in writing for the Court, stated inter alia as follows:

F. The Standard:

54. In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable" … Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.

55. I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence.

Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test and, as I have said, the statutory right of appeal puts the jurisdictional question to rest ... But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For the reasons alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.

56. I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination...

57. The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable...

ANALYSIS OF STANDARD

30. I find the "Dickason Test" to be the appropriate approach to the Standard of Review when considering counsel's position in this case.

31. There is no privative clause in The Act, nor do I find is there specialized skill and knowledge exercised by Council, precursors to the requirement that deference be shown to Council's decisions under The Act set out in Dickason.

32. I find the Standard of Review in Dickason, although different in language, is functionally indistinguishable from the standard articulated in s. 81 (3.3) of The Act.

33. I acknowledge that municipal bodies are treated differently than Tribunals in the case law. The "Nanaimo Test" states clearly that "Council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or

institutional precedent. To a large extent Council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise." (32)

34. This same thread is found in the "Southam Test", which states, " Because the expertise of the Tribunal, which is the most important consideration, suggest deference, a posture more deferential than exacting is warranted."

35. The Southam and Nanaimo Tests cause me to ask two questions: firstly, is the test to be applied by Council in the making of its "decision" pursuant to s. 81(3) of The Act manifestly political, and secondly, does City Council have any particular expertise in applying The Act?

36. The answer to the first question, I find is clearly "No". I find that the issue to be determined, namely whether or not the elector has reasonable grounds to believe that a candidate has contravened a provision of The Act relating to campaign finances, is a question of mixed fact and law. Political considerations, in their highest sense, the creation of public policy as the political will of the citizens of the City, or in the lowest sense, political opportunism fed by ambition, have no place to play in such an analysis. The order for Compliance Audit is not dispositive. It may be that political considerations are appropriate when considering the laying of charges, should the audit determine misfeasance, but not at this stage.

37. I would answer the second question "No" as well. There is nothing to indicate that Council would have any expertise in interpreting The Act, which has taken numerous days of submissions by counsel on this appeal. In addition, I note that Council in its debate, did not consider the merits of the application as it relates to the provisions of The Act, but, applied a political consideration, namely the unwillingness to judge their peers, and therefore dismissed the application with the desire to have the court make the ultimate decision. This debate, I find, amounts to a failure or refusal to meaningfully exercise jurisdiction, although none of the parties submitted I should take this position in my deliberations.

THE ACT AS A COMPLETE CODE

38. The parties all have submitted to me that The Act, particularly s. 81, is a complete code of procedure for any elector who alleges campaign finance wrongdoing by candidates and elected officials. In support of this position, I have been referred to *R v. Hall [2003] O.J. No. 3163*, a decision of Trafford J. At paragraph 21 of the decision he writes:

> [para21]. 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.

I accept that conclusion without reservation.

39. Having found that s. 81 represents a "complete code" I address a position taken by counsel for Mr. Di Ianni. Counsel urged me to find that the ordering of an audit is an *exceptional* remedy under The Act. Accepting as I do the propositions in *R. v Hall*, I conclude that if the elector is found to have had reasonable grounds to believe that a candidate had contravened a provision of the Act relating to campaign finances, an audit is the *only* remedy available. Although the order for an audit is not despositive of any ultimate issue, failure to order an audit is a complete bar to any further proceedings for any breach alleged by an elector relating to election campaign finances. It is unequivocally a condition precedent.

OBLIGATIONS OF A CANDIDATE

40. The Appellant argues that a candidate who accepts contributions from individual contributors in excess of $750 is in violation of The Act. The Act makes it clear in s. 71(1) that a contributor cannot make any contributions in excess of a total of $750. There is no corresponding statement with that level of clarity as it relates to the obligation of a candidate not to accept such donations. The Appellant argues that s. 69 (1m) which refers to "a contribution of money made or received in contravention of this Act" creates an obligation on the candidate not to accept donations in total worth more than $750 from any one contributor. With respect, I disagree. If Parliament wished to

create an obligation not to accept contributions of more than $750 it had the clear opportunity to do so. It would not, in my view, be appropriate to torture the wording of s. 69 (1m) to create an obligation which is not clearly present. S. 69 (1m) only requires a candidate to return to the contributor any contribution exceeding a total of $750, or any other contribution received in contravention of The Act as soon as possible.

THE EXISTENCE OF REASONABLE GROUNDS

The Standard

41. In considering whether an application for compliance audit should be granted or rejected, Council must consider whether the elector has reasonable grounds to believe that a candidate has contravened a provision of The Act relating to campaign finances. In dealing with the definition of "reasonable grounds", albeit in different circumstances, in *R. v. Sanchez and Sanchez* 93 C.C.C. (3d) 357, Justice Hill, at page 10 stated the following:

> 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 or 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 inferences asserted.

42. I find no reason not to apply that standard to the test in this case.

THE OBLIGATIONS TO RETURN CONTRIBUTIONS "AS SOON AS POSSIBLE"

43. It is clear that s. 69 (1m) creates an obligation on the candidate to return a contribution made in contravention of The Act "as soon as possible" after the candidate becomes aware of the contravention. In my view, "as soon as possible" has a different meaning

than "immediately" or "forthwith". In my view the term must be viewed in relation to the thing that is required to be done, and may vary from circumstance to circumstance. In this case, what is required to be done after learning of the over-contribution, is that instructions must be given to a person with signing authority over the candidate's accounts, and a cheque must be sent to the contributor. In my view, that suggests a relatively simple process, not involving much delay.

ANALYSIS OF THE JUNE 23 APPLICATION

CANDIDATE JOHN BEST

44. With regard to candidate John Best, the Complainant raises two issues; firstly, the over contribution by R. Denninger Ltd., although she states "note there is a $250 return to an unspecified contributor which may apply to this item" and secondly, a contribution by Citizen Action Group, a charitable organization under the Income Tax Act which is ineligible to contribute. An examination of the Form 5 statement discloses only one donor having contributed more than $750, and a refund in amount of $250. There is no way to determine if the two are connected. This leaves reasonable grounds to believe that the candidate did not refund an excess donation as soon as possible. The later filing of a letter submitted by Mr. Best on this issue only reinforces this conclusion. In addition, the Appellant complained of a donation made to Mr. Best by a charitable organization, a clear violation of The Act. Had I applied the test, in either Nanaimo, or Southam, I would have found it patently unreasonable for the City Council, Committee of the Whole, to refuse an application for Compliance Audit on these facts.

45. Under s. 70(3) of The Act, there are reasonable grounds to believe that the candidate John Best has contravened a provision of The Act relating to election campaign finances. Accordingly, with regard to the candidate John Best, the appeal is allowed, and the matter is remitted to the Council of the City of Hamilton, Committee of the Whole, to appoint an auditor to conduct a Compliance Audit of the candidate John Best's campaign finances for the 2003 Municipal Election.

CANDIDATE MARVIN CAPLAN

46. In her letter June 23, the Appellant complains of donations to Mr. Marvin Caplan from three contributors, namely Renimob, Carling Building Co., and Effort Square. She asserts that none of these could be traced as a corporation but appear to be linked to Effort Trust. Although the allegation of a relationship with Effort Trust is underdeveloped, none of these contributors appear to be lawful contributors pursuant to s. 70(3) of The Act, and accordingly there are reasonable and probable grounds to believe that the candidate Marvin Caplan has contravened a provision of The Act relating to election campaign finances. A letter dated February 20, 2005 was filed on this appeal relating to the campaign contribution of the Carling Co. Tenancy. I have no way of ascertaining if this is the same contributor as Carling Building Co, but in any event, this would have no impact given that an unincorporated group still could not contribute under s. 70 of the Act. Had I applied the test, in either Nanaimo, or Southam, I would have found it patently unreasonable for the City Council Committee of the Whole to refuse an application for Compliance Audit on these facts.

47. Under s. 70(3) of the Act, there are reasonable grounds to believe that the candidate Marvin Caplan has contravened a provision of The Act relating to election campaign finances. Accordingly, with regard to the candidate Marvin Caplan, the appeal is allowed, and the matter is remitted to the Council of the City of Hamilton, Committee of the Whole, to appoint an auditor to conduct a Compliance Audit of the candidate Marvin Caplan's campaign finances for the 2003 Municipal Election.

CANDIDATE LARRY DI IANNI

48. With regard to candidate Larry Di Ianni, the Appellant identified in her letter six instances where the candidate received over-contributions from corporate donors. The issue for me is whether or not the candidate has complied with his obligation under s. 69(1m) of The Act, to return the contribution to the contributor as soon as possible after the candidate becomes aware of the contravention. The candidate's filing in Form 5 was sworn on March 31, 2004. The period covered by the filing ended December 31, 2003. All of the over-contributions were easily identifiable in the filing. The candidate swore a declaration confirming that the Schedules, which reveal this over-contribution, were

true and correct. The candidate had a statutory obligation pursuant to s. 69 to ensure the accuracy of the record. The elector, I find, had reasonable and probable grounds to believe, that the candidate was aware of the over-contributions and had not returned the funds as soon as possible, a contravention of The Act. Had I applied the test, in either Nanaimo, or Southam, I would have found it patently unreasonable for the City Council Committee of the Whole to refuse an application for Compliance Audit on these facts.

49. I find that the elector had reasonable and probable grounds to believe that the candidate Larry Di Ianni had contravened a provision of The Act relating to election campaign finances. Accordingly, with regard to the candidate Larry Di Ianni, the appeal is allowed, and the matter is remitted to the Council of the City of Hamilton, Committee of the Whole, to appoint an auditor to conduct a Compliance Audit of the candidate Larry Di Ianni's campaign finances for the 2003 Municipal Election.

50. In addition to these alleged breaches of The Act, the application by the Appellant discloses a number of allegations that would have prompted me to make the same finding. These are:

1. Contributors who are not individuals, who are clearly not corporations, and are not otherwise allowed to contribute by virtue of s. 70 (3) of The Act.
2. Donations identified as coming from the same source, exceeding the allowable limit (Voortman).
3. Fourteen law firms that made donations, rather than as individuals, in contravention of The Act.

51. I would not extend the obligations of the candidate as far as the Applicant has urged me, requiring candidates to do corporate searches of the "non-individual" contributors or on the candidate to make inquiries of every corporate donor as to whether or not it is an associated corporation to another donor under the Income Tax Act, unless there is some compelling reason, for example a similar corporate name, to do so.

52. Counsel for Mr. Larry Di Ianni urged me to accept that the Taylor Leibow investigation is evidence of the candidate's good faith, and is also indicative of the adequacy of the

candidate's reporting. Counsel submitted that I should apply the result of the report to the "reasonableness" of ordering what they view to be an "extraordinary" remedy, namely a Compliance Audit.

53. I note that Taylor Leibow sent 334 letters and received 212 responses, a response rate of only 63%. I also note that the Taylor Leibow investigation disclosed that the Appellant was accurate in the majority of the issues she raised, even on the limited information available to her, in her request for Compliance Audit.

54. Counsel for the Appellant submits that I should not allow this appeal to be turned into an audit, a proposition with which I agree. Both the Taylor Leibow audit, and most importantly, the Appellant's request for a Compliance Audit, discloses a pattern in the receiving, recording and handling of election contributions to this campaign, that may have resulted in a failure to comply with the provisions of the Municipal Elections Act. It is the duty of this court to consider the grounds for the request for Compliance Audit, not to become the auditor. It should not be taken from these reasons, however, that I have made a finding of malfeasance against any of the candidates whose election campaign finances are the subject of this order.

CONCLUSION

The Appeal is allowed. A Compliance Audit is ordered pursuant to section 81of The Act with regard to the campaign finances for the 2003 Municipal Election of John Best, Marvin Caplan and Larry Di Ianni.

The matter is remitted to the Council of the City of Hamilton to appoint an auditor, who will conduct an audit as required by section 81(6) of The Act, and will report to those parties as required by section 81(7) of The Act.

Counsel may address the issue of costs, if they see fit, in court, by appointment.

Released: **May 13, 2005** **Signed: "Justice Timothy A. Culver"**

Case Name:

Mastroguiseppe v. Vaughan (City)

Between
Quintino Mastroguiseppe and Gino Ruffolo,
Appellants, and
The City of Vaughan, Respondent, and
Mayor Linda Jackson, Intervener

[2008] O.J. No. 5734

2008 ONCJ 763

61 M.P.L.R. (4th) 138

2008 CarswellOnt 9087

179 A.C.W.S. (3d) 364

Ontario Court of Justice
Newmarket, Ontario

L. Favret J.

February 19, 2008.[1]

(74 paras.)

Counsel:

Eric K. Gillespie, for the Appellants.

George H. Rust-D'Eye, for the Respondent.

Andrew L. Jeanriefor, the Intervener.

Reasons for Judgment

1 L. FAVRET J.:-- This is an appeal by Quintino Mastroguiseppe and Gino Ruffolo (the "Appellants") from the decision of the Council of the City of Vaughan (the "City/Respondent") of May 22, 2007, on their application made pursuant to s. 81 of the Municipal Elections Act, 1996 S.O. 1996, C. 32 (the "Act") requesting a compliance audit of the financial statements and auditor report of then Candidate Mayor Linda Jackson (the "Candidate") be directed within 30 days (the "Application"), to extend the time period within which the City may consider the Application to a date after the last supplementary filing date in accordance with the Candidate's extension for filing and in accordance with the Act. The appeal is brought pursuant to s. 81(3.3) of the Act. The Appellants seek an order directing a compliance audit pursuant to s. 81(3) of the Act.

Issues

1. Does this court have jurisdiction to consider this appeal pursuant to s. 81 (3.3) of the Act?
2. If the Respondent made a decision under s.81(3) of the Act to extend the period to consider the Application was that decision: (a) ultra vires its statutory authority; (b) a failure to exercise jurisdiction; or, (c) a decision rejecting the Application?
3. If this court has jurisdiction to consider the appeal what relief should be granted if the appeal is allowed?

Position of the Parties

2 The Appellants state this court has jurisdiction to review the Respondent's decision to extend the period within which it could consider their Application pursuant to s. 81(3.3) of the Act. The Application was filed within 90 days of the filing of the Candidate?' financial statement and auditor report and as such the Respondent should have exercised its authority to either reject or grant the Application within 30 days of its receipt. The Appellants submit the only two decisions available to the City upon receipt of an application made under s.81 of the Act is to either reject or grant the application. The decision to extend the 30-day period, according to the Appellants is ultra vires the City's statutory authority. On this appeal the Appellants request that the court direct a compliance audit as they have complied with s. 81(2) of the Act and there are reasonable grounds to believe the Intervener contravened a provision of the Act relating to election campaign finances.

3 The Respondent and Intervener state that this court does not have jurisdiction on this appeal because the Application was filed prematurely. The Application did not satisfy the conditions precedent of s.81(2) of the Act. As those conditions were not present, the Respondent and Intervener state there was no application for the City to consider. The Respondent and Intervener state the Act contemplates only one compliance audit may be ordered and that where a Candidate indicates an intention to file supplementary financial statements and auditor's reports, the 90-day filing period referred to in s.81(2) begins when the latest applicable Candidate filing has ended. The

Respondent's jurisdiction to consider the Application, the Respondent and Intervener state, only arises when an application has been filed within 90 days of the end of a Candidate's election campaign as defined by the Act. The Respondent and Intervener state there is only one such period. Where that occurs, as here, an application can only be considered at the conclusion of 30 days following receipt of an application filed within the 90- day filing period. As the candidate has indicated she intends to file a supplementary financial statement and auditor report, the Respondent states that on the basis of the current known facts the period for filing an application is March 1, 2008 to May 29, 2008 and the 30-day period for the Respondent to consider any such application would commence following receipt of an application made in that period.

4 As the Respondent has not made a decision pursuant to a validly filed application the Respondent states the court has no jurisdiction to consider this appeal. The underlying Application is not valid and therefore the court lacks jurisdiction to consider the appeal. The Respondent states the court does not have jurisdiction to consider the appeal as the Application was not made within the within the filing period set out in s.81(2) of the Act specifically "within 90 days after the later of the filing date, the Candidate's last supplementary filing date, if any, or the end of the Candidate's extension for fling granted under subsection 80(6), if any".

5 The Respondent and Intervener submitted the Respondent did not decline jurisdiction or either grant or refuse the Application but extended the time to consider the Application until the Application was properly before it. The Candidate indicated she wished to extend the campaign period pursuant to s.68 (1)5 of the Act. Until a supplementary financial statement and auditor's report was filed, the period for filing an application under s.81(2) of the Act was not available until after those documents were filed and as such on May 22, 2007 there was no application under the Act for the Respondent to consider. The decision to extend the period to deal with the Application the Respondent states was valid and consistent with the law.

6 If the court concludes the Respondent's position on jurisdiction is not correct, it takes no position on whether a compliance audit should be directed or not, but states that if the court disagrees with its position the court should return the Application to the City for its consideration or reject the Application because the Application was not properly made.

7 The Appellants state neither the Respondent nor the Intervener is a proper party on the merits of the appeal. Neither made any submissions on the merits of the Application. Both the Intervener and the Respondent have limited their submissions to the jurisdiction of this court to consider the appeal as set out above.

Issue One: Jurisdiction on Appeal

8 This appeal was made pursuant to s. 83(3.3) of the Act which provides:

> "The **decision of the council** or local board **under subsection (3)** and of a committee under subsection (3) pursuant to a delegation under subsection (31.)

> **may be appealed to the Ontario Court of Justice** within 15 **days after the decision is made and the court may make any decision** either **council**, local board or committee **could have made**." **(emphasis added)**

Jurisdiction on this appeal requires that there be a decision of a municipal council made under s. 81(3) of the Act.

9 Section 81 of the Act provides in part:

> "(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.**
>
> (2) **The Application shall be made to the clerk** of the municipality or the secretary of the local board for which the candidate was nominated for office, **within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80(6),** if any; **it shall be in writing and shall set out the reason's for the elector's belief.**
>
> (3) **Within 30 days after receiving the application, the council** or local board, as the case may be, **shall consider the application and decide whether it should be granted or rejected.**
>
> ...
>
> (4) **If it is decided to grant the application under subsection (3), the** appropriate **council** or local board **shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.**
>
> ...
>
> (11) If the **report indicates that there was no apparent contravention and the council** or local board **finds that there were no reasonable grounds for the application, the council** or local board is entitled to **recover the auditor's costs from the applicant. (emphasis added)**

10 It was not suggested as a basis for concluding there is no jurisdiction on this appeal that: (a)

the appeal was not filed within 15 days of the Respondent's decision to extend the period to consider the Application; (b) the Appellants were not electors living in the City entitled to vote in the election held November 13, 2006; (c) the Intervener was not a Candidate that stood for election that year; and/or (d) that the Application did not set out the Appellant's belief that reasonable grounds existed for requesting a compliance order be made.

11 On April 2, 2007 the Candidate filed a financial statement and auditor's report for the period April 6, 2006 to December 31, 2006. On March 31, 2007, prior to filing those documents the Candidate sent an email to the City Clerk notifying that she wished to extend her campaign period pursuant to subsection 68(1)5 of the Act. No other detail was provided. In the Intervener's factum she states, having extended her campaign period in this way, the supplementary reporting periods in s. 77 and 78 of the Act came into effect. The Intervener states in paragraph 4 of her factum that the Act provides that the campaign period extends to the farthest date following a candidate's last supplementary filing date In this case that will be 60 days after December 31, 2007, February 29, 2008.

12 In its factum the Respondent stated that December 31, 2007 was the anticipated end of the Candidate's current and last supplementary reporting period pursuant to s.77(c) of the Act. The Respondent stated that on the basis of the current facts the Candidate's last supplementary filing date, after the end of her last supplementary reporting period under s.77(c) of the Act, was February 29, 2008.

13 As of the last date of submissions received on this appeal, there is no evidence the Candidate filed any material relating to her campaign election finances by August 29 2007, the first supplementary filing date pursuant to s.77 (b) of the Act or intended to do so prior to December 31, 2007, described by the City in its factum as the "current anticipated end of the candidate's current and last supplementary reporting period" pursuant to s.77(c) of the Act. Further there was no indication on this appeal that any anticipated filings would impact on the issues raised by the Appellants in their Application.

14 On May 14, 2007 the Appellants filed an Application in writing with the Clerk of the City requesting a compliance audit pursuant to s. 81 of the Act regarding the financial statements and auditor report of the Candidate, for the period April 6, 2006 to December 31, 2006, filed April 2, 2007 (the "Statement" and the "Report").

15 On May 17, 2007 a memorandum was prepared by Heather A. Wilson, Director of Legal Services for the Mayor and Members of council concerning the Application filed (the "Memorandum") which was marked as "additional information item no 32 report no 26 council May 22 07". Both this item number and report number are on the extract from council meeting minutes of May 22, 2007 at tab E of the Appeal Book filed (the "Minutes") which indicate a confidential memorandum from the Director of Legal Services dated May 17, 2007 was also received. Neither the Appeal record nor Respondent record include that memorandum.

16 The Memorandum referred to s.81(2) of the Act, the filing requirements at issue on this appeal, which provides in part that an application may be filed in the following period, "90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for a filing granted under subsection 80(6), if any". The Memorandum did not state the Application was not properly received or if it failed to comply with any filing requirements. In part the Memorandum stated:

> "Subsection 68(1)(5) provides that if, after the election campaign period ends (in this case Dec. 31, 2006), **the candidate incurs expenses relating to a recount and the candidate notifies the Clerk in writing, the campaign period is deemed to have recommenced**.
>
> Mayor Jackson gave written notice to the clerk on March 30 2007 pursuant to the above section.
>
> **The act does authorize a candidate to file a supplementary financial statement and auditor's report for a supplementary reporting period**, which, **pursuant to subsection 78(3) of the act, shall include all the information contained in the initial statement or report filed under subsection (1), updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period.**
>
> In view of these provisions, **it would be a prudent course of action that no compliance audit should be considered until the final election expenses for the candidate during the supplementary campaign period have been established,** as shown by the final supplementary financial statement and auditor's report. **This final statement and report may be filed by September 4, 2007 or February 29, 2008[2] 2 in accordance with the Act."(emphasis added)**

17 I infer that the Mayor's notice refers to a recount and the expenses incurred in relation to that recount. The only basis for the City to consider an application is its authority in s.81 of the Act. There is no other authority for doing so. Neither the Respondent or the Intervener referred to any statutory authority to extend the time in s.81(3) for it to consider the Application.

18 The Minutes indicate that the deputation by Mr. Eric K. Gillespie and the affidavit of Mr. Mastroguiseppe of May 14, 207 were item number 32. It had been referred to staff for a report to the council meeting of May 22 2007. I infer from the Memorandum that this occurred. The Memorandum was noted in the Minutes as adopted as amended.

19 Based on the materials listed as received by the City listed in the Minutes, I concluded the

City met on May 22, 2007 and that the affidavits of Mr. Mastroguiseppe of May 14, 2007 and May 18, 2007 and affidavit of Mr. Gino Ruffolo dated May 18, 2007, all listed as received, indeed were received by the City. I find therefore the Application requesting a compliance order was before the City at that meeting.

20 The Memorandum set out following options for the City:

> "1. council may resolve that **the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate's extension for filing and in accordance with the act.**
> 2. council **may reject the application**, if it is provided with information that the act was complied with, or if satisfied there are no reasonable grounds for the application. Council may then deal with the application on May 22, 2007 or at the council meeting of June 11, 2007.
> 3. council **may grant the application**, however a supplementary financial statement and auditor's report will be filed **and an application for a compliance audit may be made after the candidate's last supplementary filing date. A duplication of effort and expense could be avoided should council proceed with option 1."(emphasis added)**

The Memorandum does not provide an opinion or any information regarding the number of compliance audits that may be imposed, if any.

21 The Minutes provide:

> "Item 32, Report No. 26, of the Committee of the Whole, which was adopted, as amended, by council of the City of Vaughan on May 22, 2007, as follows:
>
> **By approving the following:**
>
> That council **resolves that the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate's extension for filing and in accordance with the Act;"(emphasis added)**

22 The word "consider" is defined in the Oxford Dictionary of Current English (3rd edition) at page 186 as: "1. think carefully about. 2. believe or think. 3. take into account when making a judgment." The definition of the word "received" in the same text at pages 750, 751 includes" "1. be

given or paid. 2. accept or take in(something sent or offered). 3. form (an idea) from an experience. 4. experience or meet with." As well this text referred at page 628 states that the definition for the word "option" includes: "1 a thing that is or may be chosen. 2 the freedom or right to choose. ... "A "resolution" is defined in the above text page 786 to include: "1. a firm decision. 2. a formal expression of opinion or intention by a law-making body. ... 4. the resolving of a problem or dispute. 5. ... The verb "resolve" is defined at the same page to include: "1. find a solution to. 2. to decide firmly on a course of action. 3. (of a law-making body) to take a decisions by a formal vote. ...".

23 I have considered the above facts and the above definitions and conclude an application in writing was prepared and filed with the Respondent and that that Application was received by the City prior to its meeting of May 22, 2007. Indeed staff was directed to prepare a report and did so. The Memorandum is the report prepared. In the Memorandum the City was provided with three options. The options included reviewing the Application to determine if it should be granted or rejected. The only inference I find based on the facts is that the City did make a decision. Of the three options presented the City accepted option one and decided, as set out in its resolution in the Minutes, "that the period of time within which council should consider the application and decide whether it should be granted or rejected, be extended to a date after the last supplementary filing date, in accordance with the candidate'" extension for filing and in accordance with the Act."

24 I do not agree with the Respondent's submission or that of the Intervener that by extending the period for it to consider the Application the Respondent did not make a decision pursuant to its authority under s. 81(3) of the Act. That section provides that within 30 days **after receiving an application**, the council **shall consider** the application and decide whether it should be granted or rejected. The Act provides no authority for the Respondent to extend that period of time. The decision to grant or reject an application should include whether the application meets the requirements of s.81(2) of the Act. Part of the Respondent's consideration of the application should include whether or not an application satisfies these requirements. It would be illogical to conclude no application had been made or received given the minutes of the May 22, 2007 meeting of council and the Memorandum which set out options for council's consideration. I do not accept the submissions of the Respondent or Intervener that there was no application to consider.

25 It was submitted that on this appeal the court should consider whether the Application satisfied s.81(2) and if it did not, conclude there is no jurisdiction to consider the appeal. As the Minutes clearly state the Application was received and that the City resolved how to deal with the Application, that submission in my view is illusory and lacks both logic and common sense. Having received an application, s.81(3) of the Act required that the Respondent consider it and then either reject or grant it. There is no other statutory power available to the Respondent. The statute does not allow the Respondent to extend the period of time to consider an application.

26 The City made a resolution. It is set out in the Minutes.

27 The Respondent acted on the Application received, informed by the Memorandum, and by made a resolution to extend the time to consider the Application. I find the Respondent did indeed consider the Application, albeit in a cursory fashion. Having concluded the City made a decision, I conclude this court has jurisdiction on this appeal.

Issue Two: Was the City's decision, ultra vires, a failure to exercise jurisdiction or a decision rejecting the Application?

(i) Standard of Review

28 Counsel agree that the standard of review to be applied on this appeal is set out in *Pezim v. British Columbia (Superintendent of Brokers) [1994] 2 S.C.R. 557 (SCC),* correctness. At page 23 of that decision Justice Iacobucci said that

> "[para. 61 The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved."
>
> [para. 62] Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum than ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of determine that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonable end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and whether there is no statutory right of appeal. ...
>
> [para 63] At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in questions, as for example in the area of human rights. ...

29 I agree with Mr. Justice Culver in paragraph 36 of Chapman v. Hamilton (City), [2005] O.J.

No. 1943, that whether or not an elector has reasonable grounds to believe a candidate has contravened a provision of the Act relating to campaign finances is a question of mixed fact and law. Further I agree with Justice Culver at paragraph 37 of that decision that there is nothing here to indicate that the City would have any expertise in interpreting the Act. None of the parties on this appeal, suggested the City had any special expertise. Counsel have agreed that correctness is the proper standard of review for this court.

30 I agree with the submissions of counsel, correctness is the standard of review on this appeal. The City did not have any special expertise in determining the legal interpretation of s.81(2) of the Act. Indeed it did not have a legal opinion concerning the interpretation of that section and in its decision did not state the Application received did not comply with the statutory filing conditions of s.81(2) of the Act. The question on this appeal concerns the[3] City's authority as set out in the Act. Applying the legal principles in the above paragraphs, correctness is the standard of review on this appeal. As such the decision by the City is not entitled to deference by this court.

(ii) Was the City's decision ultra vires, a failure to exercise jurisdiction, an available decision or a decision rejecting the Application?

31 The position of the Respondent and the Intervener is that by extending the time to consider the Application the Respondent did not decline to consider the Application or decline to exercise its jurisdiction. As the Application was not properly made, both the Respondent and Intervener stated the decision to extend the time was lawful and not a failure by the Respondent to exercise jurisdiction. As the Application was premature, that is, it was not filed within the period referred to in s. 81(2) of the Act, there was no application to consider. The Appellants disagree. They state the City's decision to extend the time for it to consider their Application was ultra vires its statutory authority, to either grant or reject the application, no more.

32 The Act sets out the framework within which a municipal election is run including determining dates for elections, who is a candidate and who is eligible to vote. As well the Act sets out duties of candidates regarding both the expenses and contributions they may incur and receive along with the obligation of a candidate to file financial statements and an auditor report regarding those expenses and contributions. The financial statements, the duties of a candidate and the ability of a voter to bring to the attention of the City reasonable grounds they have to believe a candidate has contravened any section of the Act regarding expenses and contributions are all determined by the Act. See p. 3-7 of Chapman, supra.

33 S.81 of the Act is a complete code of procedure for any elector who alleges campaign finance wrongdoing by a candidate and elected official: See Chapman, supra, and R. v. Hall [2003] O.J. No. 3613. I accept, as did Mr. Justice Culver in Chapman, supra, the following excerpt by Mr. Justice Trafford in Hall, supra, regarding s. 81 of the Act:

> "[para. 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 council, to be frivolous, vexatious, or otherwise devoid of merit." (**emphasis added**)

34 I accept, as did Mr. Justice Culver in Chapman, supra, that if the elector is found to have had reasonable grounds to believe that a candidate had contravened a provision of the Act relating to campaign finances, an audit is the only remedy available. I also accept as did Mr. Justice Duncan in Savage v. Niagara Falls [2005] O.J. No. 5694 that the Act permits proceedings such as the application filed by the appellants herein. Mr. Justice Duncan concluded in para 11 of his decision in Savage, and I agree that "The filter for this kind of application is the need for that applicant to establish reasonable grounds and I think that that is what Justice Trafford was saying in the decision that he gave in the case of The Queen v. Hall, [2003] O.J. no 3613."

35 In this matter there is no evidence of any debate at the City's meeting which informed the decision made. The only evidence of the information at the meeting is that listed in the Minutes, all of which I have concluded was present and informed the decision the City made.

36 Section 81(3) of the Act, set out above, provides the City, in its screening function, may grant or reject an application made. The Respondent and Intervener state the decision to extend the time to consider the Application was valid and consistent with the law and not a failure to exercise the City's jurisdiction nor an act declining jurisdiction because the Application did not satisfy the criteria in s. 81(2) of the Act. As set out above, in my view that reasoning lacks common sense. If after considering an application the City concludes it did not satisfy the filing criteria then the only logical decision is to reject such an application. Deferring its decision, by extending the period of time for it to consider an application does not address the filing criteria and cannot logically be viewed as such.

37 Although I agree whether or not an application satisfies that criteria is an appropriate part of the review of any application received, a decision extending the time period for the City to consider an application does not inform an elector their application was deficient and thereby potentially deprives an elector with a remedy, to re-file in the appropriate period of time, if they chose to do so. The decision here did not set a future date when the Application would be considered. The language of s. 81 of the Act in my view did not intend that the period for considering an application would be a mystery to either the elector or candidate.

38 In this case, there is no evidence when the candidate will file the balance of the financial statements and auditor's report required by the legislation or indeed whether she will seek an extension pursuant to s. 80(6) of the Act. I find the request made by the candidate was made on the basis of a recount. There is no evidence on this appeal regarding the length of time the recount required.

39 The purpose of the legislation and section at issue, is to ensure that legitimate attacks by electors regarding a candidate's campaign finances are dealt with expeditiously. Further, section 81 of the Act ensure that attacks which are frivolous or without merit are dealt with expeditiously so that a candidate can be protected. Deciding whether an Application satisfies the filing criteria is part of the City's screening function.

40 The Minutes and the Memorandum, when considered together, do not support a conclusion that the City looked at whether the Application satisfied the filing criteria. I do not accept that the City did so. The Respondent and Intervener submitted that the legislation only contemplates one compliance audit be conducted for an individual candidate's campaign period. Neither the Memorandum nor the minutes support that this was a factor which the city considered. The Memorandum is silent on this issue. The Act does not state there will be one audit per candidate.

41 The City's decision here does not satisfy any of the purposes of the Act referred to above. The Minutes and Memorandum when viewed together suggest the city considered that, (a) the candidate would file a supplementary financial statements and auditor's reports, (b) by inference the cost of the option to grant the Application, and (c) specifically that deciding to extend the time to consider the Application provided cost savings if the City directed a compliance audit.

42 Based on the record filed on this appeal, I am not satisfied that the City considered whether the Application met the filing criteria. I am not satisfied the City considered whether the Appellant's affidavits set out reasonable grounds to believe the Statement and Report demonstrated a failure to comply with the Act and whether a compliance audit should be held or not, in any fashion other than cursory.

43 There is no basis to conclude the City considered whether or not the legislation only provided it may direct one compliance audit per candidate as submitted during this appeal by the Respondent and Intervener. The submissions on this appeal, I conclude, are an effort to justify the City's decision after the fact. The appeal record does not support a conclusion that those submissions were the basis for the City's decision.

44 Section 81(3) of the Act provides the City, in its screening function, may grant or reject an application made.. For the reasons stated above I cannot conclude that the City declined to exercise its statutory authority. It made a decision. Further as there is no basis to conclude the City concluded the Application was not properly filed, there is no basis for concluding the City rejected the Application for that reason. There is no statutory authority allowing the City to decide to extend the time period for it to consider the Application. The decision to do so was ultra vires.

Issue 3: What relief is appropriate? Should a compliance audit be directed?

(i) Position of the Parties

45 The Appellants state the affidavits filed in support of the Application set out their belief that

there are reasonable grounds to conclude the Candidate contravened a provision of the Act relating to election campaign finances. They request a compliance audit of the Candidate's election campaign finances be directed.

46 The Respondent and Intervener both submitted the Application was filed prematurely. Neither made any submission about whether or not the affidavit material disclosed reasonable grounds. The Respondent suggested that if the appeal was granted the Application should be returned to the City for its consideration. The Intervener made no submission concerning the relief which should be granted.

(ii) Statutory Authority for the Appeal

47 S. 81(3.3) of the Act provides that on appeal, this court may make any decision the City could have made. I have agreed with both the Respondent and Intervener that consideration of an application includes whether or not the application satisfies the filing criteria as well as whether the application discloses reasonable grounds for the belief that a Candidate has not complied with the Act. Returning the Application to the City for it to consider, as suggested by the Respondent would constitute a delegation of the court's authority on this appeal. It is not an appropriate remedy.

(iii) Did the Application satisfy the filing criteria?

48 One of the issues on this appeal was whether the Application satisfied the filing criteria in s. 81(2) of the Act. That subsection provides:

> "(2) **The application shall be made to the clerk** of the municipality or the secretary of the local board for which the candidate was nominated for office, **within 90 days after the later of the filing date, the candidate's last supplementary filing date, if any, or the end of the candidate's extension for filing granted under subsection 80(6),** if any; **it shall be in writing and shall set out the reason's for the elector's belief. "(emphasis added)**

The Appellants state the above section sets out that an Application may be filed within 90 days of the filing date and no later than 90 days after any further filings the Candidate may make. According to the Appellants an application may be filed for each period for which a candidate submits a financial filing. The Respondent and Intervener disagreed with this interpretation. They submitted the language of s. 81(2) of the Act provides that only one application may be filed within 90 days after the final financial filing a candidate makes. Both the Respondent and Intervener submitted this interpretation was consistent with the Act which contemplates only one compliance audit per candidate and with the wording of s. 81(2) underlined above "after the later of".

49 The Intervener submitted the decision of the Supreme Court of Canada in Multiform Manufacturing Co. Ltd. Et al. c. R. et al (2002) 58 C.C.C. (3d) 257 set out the approach to be taken in interpreting section 81(2) of the Act. In that case the Court considered the meaning of then s. 443

of the Criminal Code which referred to whether a justice of the peace could issue a search warrant and its application to the Bankruptcy Act. At paragraph 9 of that decision the Court held:

> "When the courts are called upon to interpret a statute, their task is to discover the intention of Parliament. When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute. As sir Peter B. Maxwell stated in Maxwell on the Interpretation of Statutes, 12th ed. By P. St. J. Langan (London: Sweet & Maxwell, 1969), at pp.28-29:
>
> > If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. "The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."
> >
> > Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise.
>
> Or, as Professor Piere-Andre Cote synthetically puts it in The Interpretation of Legislation in Canada, trans. K. Lippel, J. Philpot and Bill Schabas (Cownaville, Qie.: Yvon Blais, 1984), at p. 2:
>
> > "It is said that when an Act is clear there is no need to interpret it; a simple reading suffices."
>
> To the same effect see Elmer A. Driedger, Construction of Statutes, 2d ed. (Toronto, Butterworths, 1983), at p. 28."

50 I have reviewed Bell ExpressVu Limited Partnership v. Rex, [2002] S.C.J. No. 43, where the Supreme Court of Canada considered the proper interpretation of s. 9(1)(c) of the Radiocommunications Act R.S.C. 1985, c. R-2 (as am. by S.C. 1991, c. 11, s. 83). Mr. Justice Iacobucci stated at paragraph 26:

> "In Elmer Driedger's definitive formulation, found at p.87 of his Construction of Statutes (2nd ed. 1983):

> Today there is only one principle or approached, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example ... I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of is objects".

In the following paragraphs of the above decision Mr. Justice Iacobucci provided the following analysis regarding the preferred approach to statutory interpretation:

> "[para 27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: ... This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instances, the Application of Driedger's principles gives rise to what was described in R. v. Ulybel Enterprises Lts., [2001] 2 S.C.R. 867 ..., at para. 52 as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". ...
>
> [para 28] Other principles of interpretation - such as the strict construction of penal statutes and the "Charter values" presumption - only receive Application where there is ambiguity as to the meaning of a provision ...
>
> [para 29] What, then, in law is ambiguity? To answer, an ambiguity must be "real" (Marcotte, [1976] 1 S.C.R. 108, supra, at p.115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. V. Zang, [1966] A.C. 182 (H.L.), at p.222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxyChemicals Ltd. V. Canada (Attorney General), [1999] 1 S.C.R. 743, at para 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each in accordance

with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[para 30] For this reason, ambiguity cannot reside in the mere fact that several courts - or, for that matter, several doctrinal writers - have come to differing conclusion on the interpretation of a given provision. Just as it would be improper for one to engage in preliminary tallying of the number of decision supporting competing interpretations and then apply that which receive the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if" if the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, supra, at pp.4-5)."

I have also considered Sullivan & Driedger on the Construction of Statutes (4th ed.) at p. 10.

51 I have adopted the modern approach, referred to above, in interpreting s. 81(2) of the Act. For that purpose I have reviewed the Act as a whole. The following sections are helpful in this analysis:

(a) Section 68 of the Act concerns election campaign periods. It provides in part:

"(1) for the purposes of this act, **a candidate's election campaign period for an office shall be determined in accordance with the following rules**:

1. **the election campaign period begins on** the day he or she files a nomination for the office under section 33.

2. **the election campaign period ends on December 31 in the case of a regular election** and 45 days after voting day in the case of a by-election.

3. **despite rule 2, the election campaign ends**,

(i) on the day the nomination is withdrawn under section 36 or deemed to be withdrawn under subsection 29(2), or
(ii) on nomination day, if the nomination is rejected under section 35.

4. **despite rules 2 and 3, if the candidate has a deficit at the time the election campaign period would otherwise end** and the candidate notified the clerk in writing on or before December 31 in the case of a regular election and 45 days after voting day in the case of a by-election, the campaign period is extended and is deemed to have run continuously from the date of nomination until the earliest of ...;

5. **if, after the election campaign period ends under rule 2,3 or 4, the candidate incurs expenses relation to a recount** or to a proceeding under section 83 (controverted elections) **and the candidate notifies the clerk in writing, the campaign period is deemed to have recommenced, subject to subsection (2), and to have run continuously from the date of nomination until the earliest of,**

...

iv. **the following December 31 in the case of a regular election**

..."

(b) Section 69 of the Act provides in part:

"(1) A candidate shall ensure that,

...

(k) **financial filings are made in accordance with section 78**;

...

(m) a contribution of money made or received in contravention of this Act is returned to the contributor as soon as possible after the candidate becomes aware of the contravention;

(n) a contribution not returned to the contributor under clause (m) is paid to the clerk with whom the candidate's nomination was filed;

..."

(c) Section 70 of the Act provides in part:

"...

(2) only the following may make contributions;;

1. an individual who is normally resident in Ontario
2. a corporation that carries on business in Ontario.

...

...

(7) a contribution may be accepted only from a person or entity that is entitled to make a contribution. ...

(d) Section 71 of the Act provides in part:

"(1) a contributor shall not make contributions **exceeding a total of $750 to any one candidate in an election**...

(e) Section 72 provides in part:

"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.

(f) Section 77 of the Act provides in part:

"**For the purposes of sections 66 to 82,**

(a) the filing date is, in the case of a regular election, the following March 31";

(b) **a supplementary filing date** is the date that is 60 days after the end of the supplementary reporting period; and,

(c) **a supplementary reporting period is**, in the case of a regular election, each six-month period in the 12-month period following the year of the election and,"

(g) Section 78 of the Act provides in part:

"(1) **on or before 5 pm on the filing date, a candidate shall file with the clerk** with whom the nomination was filed **a financial statement and auditor's report, each in the prescribed from, reflecting he candidate's election campaign finances,**

(a) **in the case of a regular election, as of December 31, in the year of the election**; and,

...

(2) if the candidate's election campaign period continues during all or part of a supplementary reporting period, he or she shall, on or before 5 pm on the corresponding supplementary filing date, file a supplementary financial statement and auditor's report for the supplementary reporting period.

(3) A supplementary financial statement or auditor's report shall include all the information contained in the initial statement or report filed under subsection (1) and in any previous supplementary statement or report under subsection (2), as the case may be, **updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period."**

(h) Section 80 of the Act provides in part:

"(1) a candidate is subject to the penalties listed in subsection (2), in addition to any other penalty that may be imposed under this Act, if, he or

she fails to file a document as required under section 78 by the relevant date;

...

(6) The Candidate may, within 91 days after the last day for filing a document under section 78, **apply to the Ontario Court of Justice to extend the time for filing the document under that section** and if, the court is satisfied there are mitigating circumstances justifying a later date for fling the document, the court may grant an extension for the minimum period of time necessary for the candidate to file the document."(emphasis added)

52 I have also considered the purpose of the Act referred to in the above case law. The Respondent and Intervener did not submit that the purpose of s. 81 as described by Justices Trafford and Culver in the decisions of Hall supra, or Chapman, supra, respectively, is incorrect. I have accepted the conclusions of the court in those cases, as set out above.

53 Section 81(2) of the Act sets out a limitation period for applications to be received from electors. That section refers specifically to financial filings a candidate is required to make not a candidate's election campaign period as submitted by the Respondent and Intervener. The section specifically does not provide that an application must be filed within 90 days after a candidate's election campaign period ends.

54 When read as a whole the legislation is concerned that the City take action expeditiously, if it concludes an elector has reasonable grounds to believe a candidate did not comply with a provision of the Act, and direct a compliance audit. There is no provision to extend that period of time.

55 The legislation is concerned that a candidate file both financial statements and an auditor's report to reflect expenses and contributions. Sections 69, 77 and 78 refer to these financial filings. The legislation does not contemplate an exception when there is a recount as here. If that were so, the Candidate, on March 31, 2007 would have known a filing for the period April 6, 2006 to December 31, 2006 was not necessary.

56 The legislation contemplates that further filings may be necessary, as here, but that those filings would, in this case, pursuant to section 78(2) of the Act be a supplementary financial statement and auditor's report for the supplementary reporting period. Section 78 provides in part:

(2) if the candidate's election campaign period continues during all or part of a supplementary reporting period, he or she shall, on or before 5 pm on the corresponding supplementary filing date, file a supplementary financial statement and auditor's report for the supplementary reporting period.

> **(4) A supplementary financial statement or auditor's report shall include all the information contained in the initial statement** or report filed under subsection (1) and in any previous supplementary statement or report under subsection (2), as the case may be, **updated to reflect the changes to the candidate's election campaign finances during the supplementary reporting period." (emphasis added)**

This section requires that the supplementary financial statement or auditor's report reflect changes during the supplementary reporting period. The section at issue, above, does not refer to the candidate's election campaign period as submitted by the Respondent and Intervener on this appeal. All of the filings are important and provide information. That a further report also includes the initial filing in my view simply ensures the supplementary report is comprehensive.

57 The legislative role assigned to the City, to scrutinize applications and decide if a compliance audit should be directed, does not depend on the cost incurred. Indeed at the conclusion of the audit if a report indicates and the City concludes there were no reasonable grounds, such costs may be recovered from the Appellants. Any delay in scrutinizing an application is inconsistent with the purpose of the Act which requires that the City act expeditiously.

58 I am not in agreement that the Act contemplates only one compliance audit. First the legislation does not state only one audit is available. Secondly, this interpretation does not consider that more than one elector may make an application within the 90-day period in s. 81(2) of the Act. If that occurred, within 30 days of each application the City must consider that application. On that basis alone, it is possible that two meritorious applications could be received which would require two audits.

59 Section 81(4) of the Act provides that if it is decided to grant an Application under subsection (3), by resolution the City shall appoint an auditor to conduct a compliance audit of the candidate's election campaign finances. This section does not refer to the campaign period but to the finances. It does not preclude the City from requiring an audit be conducted of a specified period. Similarly sections 80 and 81(1) of the Act refer to finances not the election campaign period.

60 I have considered the grammatical and ordinary sense of the words in section 81(2) of the Act and the broader context as well as the consequences of any action taken by the City, all of which in my view require that the City be able to fulfil its screening function expeditiously so that a candidate is protected and so that the public interest in ensuring election campaign finances are conducted pursuant to the legislation is protected. The public has an interest in ensuring that valid attacks on campaign finances be audited so that any wrongdoing can be dealt with quickly. I conclude therefore that s. 81(2) of the Act refers to a 90-day period following each of the filing periods referred to therein. I do not agree with the Appellant that the period continues beyond any one 90-day period. Such an interpretation would be overly long and unfair to a candidate. An

elector must file an application within 90 days of the specific filings referred to in s. 81(2) of the Act.

(iv) Are there reasonable grounds to require a compliance audit?

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.

62 If a review of the Application leads to a conclusion that the Appellants have reasonable grounds to believe the Candidate has contravened a provision of the Act, I agree with Justice Culver in Chapman, supra, the only remedy is a compliance audit.

63 In support of the Application the Appellants filed several affidavits. Mr Ruffolo, in his affidavits of May 14, 2007, May 18, 2007 and May 25, 207 agrees with the information set out in the affidavits of Mr. Mastroguiseppe and states he shares the concerns of Mr. Mastroguiseppe that the Candidate may have contravened the Act. His affidavits do not contain any specific details which assist this court in determining whether there are reasonable grounds. The fact that Mr. Ruffolo accepts the evidence of Mr. Mastroguiseppe does not tilt the balance in favour of this court concluding the information in the affidavits of Mr. Mastrogiuseppe constitute reasonable grounds to believe the Candidate contravened any provision of the Act.

64 Mr. Mastroguiseppe has raised several issues which he believes are contraventions by the Candidate of sections 69(1)(m), 71(1) and 66(2)(i)(iii) of the Act which include:

(1) over contribution by associated corporations (affidavit of May 14, 2007,

tab 2A, Annual Record);

(2) undervaluing the cost of tickets for a fundraising event (affidavit of May 18, 2007, tab 2B, Annual Record);

(3) over contribution of cash donations in relation to fundraising event and failure to issue receipts for cash donations received (affidavit of May 18, 2007, tab 28B, Annual Record);

(4) failure to report over contributions relating to office expenses (affidavit of May 18, 2007, tab 2B, Annual Record); and,

(5) failure to record contribution from the lessor of the Candidate's office on Islington Ave. (affidavit of May 25, 2007, tab 2C, Annual Record).

(v) Over contribution by Corporate Donors

65 As set out above a candidate cannot accept contributions in excess if $750 from individual contributors defined in section 71 of the Act, which includes corporations. Section 72 provides that where corporations are associated they are deemed to be a single corporation if they are associated under s. 256 of the Income Tax Act. Section 69 of the Act requires a candidate return contributions which exceed $750 as soon as possible.

66 I agree with Mr. Justice Culver in Chapman, supra, at paragraph 43, that when a candidate is aware of an over-contribution, instructions must be given to a person with signing authority over the candidate's accounts and a cheque must be sent to a contributor in the amount of the over-contribution. I agree with Justice Culver in Chapman, supra, "In my view, that suggests a relatively simple process, not involving much delay."

67 Mr. Mastroguiseppe states he believed the Candidate's Statement and Report disclosed a number of violations of the Act. In his affidavit of May 14 2007 he stated he believed there were reasonable grounds to conclude the candidate contravened s. 69(1)(m) and 71(1) of the Act on four occasions by failing to return over contributions the Candidate should have known were from associated corporations. The Appellants rely on s. 256 of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) to found their belief, based on the commonalities between the corporations, set out in the affidavits of Mr. Mastroguiseppe, that the corporations are associated.

68 A list of single contributors totalling more than $100 was attached to the affidavit along with corporation profile reports for the associated corporations the Appellant believed made over contributions which had not been returned by the Candidate during the period referred to in the Statement and Report.

69 The Appellants suggest that the commonalities between the above corporations should have caused the Candidate to know the corporations were associated. In Chapman, supra, Justice Culver in paragraph 51, concluded he would not extend the obligations of candidates to require that they make inquiries of every corporate donor as to whether or not it is an associated corporation to

another corporation unless there is a compelling reason to do so "for example a similar corporate name". I concur. Other similarities which should cause a candidate to make further inquiries include shared ownership and/or similar addresses, directors/officers, and business type or related business type. For example, it would not be far-fetched to conclude businesses with a similar name, the same director/officer located at the same address carrying on related activities in a similar field may be associated corporations. A family relationship alone however is not a sufficient basis for such a conclusion. A conclusion based on that alone in my view is speculative.

70 I agree the affidavit material demonstrates that there are reasonable grounds to conclude some, not all, of the corporations listed are associated and that pursuant to s. 72 of the Act they would be deemed a single corporation for the purpose of who is an eligible contributor. As such I agree that there are reasonable grounds to conclude there was a contravention of the Act as there is no indication over contributions were returned.

(ii) Fundraising Events

71 I do not accept that paragraphs 4 to 6 of Mr. Mastroguiseppe's affidavit sets out a sufficient basis to conclude there was a contravention of the Act by the Candidate in relation to either fundraising event. The affidavit lacks sufficient particularity to support such a conclusion. Regarding paragraph 7 however I find it supports a conclusion that the Candidate failed to issue a receipt for one of the events on one occasion contrary to s. 69(1) of the Act.

(iii) Office Expenses

72 Paragraphs 9 to 11 of the affidavit material do not provide a sufficient basis for believing on reasonable grounds that the Candidate contravened the Act. As above, the affidavit does not contain sufficient particularity to support such a conclusion. Doing so in my view would be speculative on the basis of the information in the affidavit.

CONCLUSION

73 The appeal is allowed. A compliance audit is ordered pursuant to s. 81 of the Act regarding the period in the Statement and Report. The City of Vaughan will appoint an auditor pursuant to section 81(4) of the Act to conduct a compliance audit for the period in the Statement and Report as required by s. 81(6) of the Act following which the auditor will report as required pursuant to s. 81(7) of the Act.

74 An application may be made to address the costs of this Appeal by any of the parties on notice.

L. FAVRET J.

cp/e/qlafr/qlmxb/qlced/qlcas/qlcal

1 When the judgment was released the year noted was 2007 not 2008. This has been amended.

2 these are not the dates the respondent on this appeal relied on as the dates for supplementary filings. See p. 3 of the Factum, referred to above.

3 On January 21, 2009 the word "the" repeated in error was deleted.

Case Name:

St. Germain v. Bussin

Between
Leroy St. Germain, Respondent, and
Sandra Bussin, Applicant

[2008] O.J. No. 408

44 M.P.L.R. (4th) 89

2008 CarswellOnt 429

76 W.C.B. (2d) 390

Ontario Superior Court of Justice

W.B. Trafford J.

February 6, 2008.

(41 paras.)

Government law -- Elections -- Candidates -- Regulation -- Campaign contributions -- The applicant, who had been successful in a municipal election, was granted an order quashing a summons requiring her to appear in court and answer charges that she failed to comply with the campaign financing provisions of the Municipal Elections Act -- The informant's failure to comply with the three month time limit prescribed by the Act exhausted his right as an elector to initiate a prosecution under the Act -- Municipal Elections Act.

Municipal law -- Governance -- Council members -- Election -- The applicant, who had been successful in a municipal election, was granted an order quashing a summons requiring her to appear in court and answer charges that she failed to comply with the campaign financing provisions of the Municipal Elections Act -- The informant's failure to comply with the three month time limit prescribed by the Act exhausted his right as an elector to initiate a prosecution under the Act -- Municipal Elections Act.

The applicant sought an order quashing a summons requiring her to appear in court and answer

charges that she failed to comply with the campaign financing provisions of the Municipal Elections Act during the 2006 municipal election in Toronto -- She argued the justice of the peace did not have jurisdiction to issue the summons because the informant did not comply with the applicable compliance audit provisions of the Act -- HELD: The application succeeded and the summons was quashed -- The provisions of the Act relating to the Compliance Audit Committee were mandatory for an elector who, like the respondent, believed an offence had been committed against the campaign financing provisions of the Act by an elected official -- The respondent's failure to comply with the CAC provisions deprived the learned justice of the peace of jurisdiction to issue the impugned summons -- The purpose of the pertinent provisions of the Act was to balance an elector's right to challenge the propriety of an elected official's campaign financing, on the one hand, and, on the other hand, to ensure the legitimacy of those challenges -- The informant had about three months to consider the applicant's statements and, if so advised, to apply to the CAC for a campaign audit -- His failure to comply with those time limits prescribed by the Act exhausted his right as an elector to initiate a prosecution under the Act.

Statutes, Regulations and Rules Cited:

Municipal Elections Act, 1996, S.O. 1996, c. 32, s. 81

Provincial Offences Act, R.S.O. 1990, c. P-33

Counsel:

Alan D. Gold, for the Respondent.

Anthony Paas, for the Applicant.

Reasons for Judgement

W.B. TRAFFORD J.:--

A. Introduction

1 On December 6, 2007, LeRoy St. Germain swore an information alleging that Sandra Bussin failed to comply with the campaign financing provisions of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, as amended ("the MEA" or "the Act") during the 2006 municipal election in Toronto. A Justice of the Peace issued a summons on December 13, 2006, requiring Ms. Bussin to appear in court and answer to the charges.

2 This is an application by Ms. Bussin for an order quashing the summons on the basis that the

learned Justice of the Peace did not have jurisdiction to issue the summons because the informant did not comply with the compliance audit provisions of the MEA that were applicable to him.

B. The Circumstances of the Case

B.1 Introduction

3 Let me begin with a brief review of the pertinent circumstances of the case.

4 Then, I will review the provisions of the MEA relied upon by counsel in this case.

5 Then, I will summarize the positions of the parties and give the ruling of the court.

B.2 The Campaign of Sandra Bussin

6 Sandra Bussin was a candidate in the 2006 municipal election in Toronto. She was successful.

7 On March 26, 2007, she filed her campaign financial statement with the City Clerk's Office.

8 The City Clerk's Office did not receive a request for a compliance audit of Ms. Bussin's campaign financial statement at any time.

B.3 The Compliance Audit Committee for the Election

9 The Council for the City of Toronto established a Compliance Audit Committee ("CAC") for the 2006 municipal election at its meetings held on June 27, 28 and 29, 2006.

10 At its meetings held on September 25, 26 and 27, 2006, the City Council appointed three persons to serve as members of the CAC.

B.4 The Requests for Compliance Audits

11 Electors could file requests for compliance audits beginning on April 3, 2007. The final date for requesting a compliance audit was July 3, 2007, for candidates who were not required to file supplementary statements. Ms. Bussin was not required to file supplementary statements.

12 By December 18, 2007, the CAC had received five requests for compliance audits. None of them related to Ms. Bussin.

B.5 The Status of the Applicant under the MEA

13 Under the MEA, LeRoy St. Germain is an "elector".

B.6 Conclusion

14 These, then, are the pertinent circumstances of the case.

C. The Position of the Applicant

15 The position of the applicant is that the learned Justice of the Peace did not have jurisdiction to issue the summons to Ms. Bussin compelling her to attend court and answer the information sworn by Mr. St. Germain because compliance audit provisions of the MEA were not complied with in this case. No information alleging an offence contrary to the campaign financing provisions of the MEA may be sworn by an elector, such as Mr. St. Germain, or acted upon by issuing a summons, except where the CAC and related provisions of the MEA are complied with. Those provisions were enacted to ensure the fair treatment of electors and elected officials in the context of the right of electors to challenge the legitimacy of the campaign financing of an elected official. Reference was made to *Audziss v. Santa* (2003), 223 D.L.R. (4th) 257 (Ont. C.A.). Since Mr. St. Germain did not comply with these provisions, the summons served on Ms. Bussin should be quashed, in the submission of Mr. Paas.

D. The Position of the Respondent

16 The position of the respondent is that the MEA does not limit the right of an elector to lay a private information alleging offences contrary to the MEA to those cases where the CAC and related provisions of the Act are complied with. The right of a citizen to lay a private information is a longstanding one recognized in free and democratic societies throughout the world, including Canada. Such a right is of fundamental importance particularly in the context of the enforcement of legislation concerning the funding of municipal elections. The MEA provides informants who want to challenge the campaign financing by candidates in a municipal election with the right to lay an information up to one year after the facts came to their attention. However, the informants who are electors must comply with the CAC and related provisions of the Act if it is feasible to do so. Where, as in the case of Mr. St. Germain, the informant does not know the facts of the alleged contravention of the Act until after the CAC has completed its mandate, it is not feasible to comply with the MEA. In those cases, the elector may lay a private information alleging the offence under the Act, thereby giving effect to the longstanding right of a person to commence a private prosecution. *Audziss v. Santa, supra*, does not govern a case like this one. Its principles should be limited to the facts of that particular case, in the submission of Mr. Gold.

E. The Ruling on the Application

17 Respectfully, I disagree with the respondent.

18 The application succeeds.

19 The summons issued by the learned Justice of the Peace requiring Sandra Bussin to appear in court and to answer to the information sworn by Mr. St. Germain is quashed.

20 The provisions of the MEA relating to the CAC are mandatory for an elector who, like the respondent, believes an offence has been committed against the campaign financing provisions of the Act by an elected official. The MEA limits the rights of "electors" to commence such a prosecution at common law and under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended ("POA") to the filing of an application for a compliance audit which may lead to a prosecution by the CAC alleging a violation of the campaign financing provisions of the Act by a candidate or an elected official. The failure of the respondent to comply with the CAC provisions deprived the learned Justice of the Peace of jurisdiction to issue the impugned summons.

F. The Legal Analysis of the Case

F.1 Introduction

21 Let me now give the reasons for this ruling, beginning with a review of the MEA and then moving to a review of *Audziss v. Santa, supra.*

F.2 The Review of the MEA

22 Under s. 81(1) of the MEA Mr. St. Germain, who was entitled to vote in the election and who claimed to believe on reasonable grounds that Ms. Bussin contravened the provisions of the MEA relating to election campaign finances, could apply for a compliance audit of her election campaign finances. The application was to be in writing. It was to set out the basis of his belief. The application was to be filed with the Clerk of the Municipality within 90 days of the filing date, that is, by July 3, 2007.

23 The Council was required to consider the application and decide whether to accept or reject it, within 30 days of receiving it.

24 If the Council accepted the application, it was required to appoint an auditor to conduct the compliance audit. Only an auditor, who was to be licensed under the *Public Accountancy Act, 2004*, S.O. 2004, c. 8 could be appointed by the Council. The auditor was required to promptly conduct the audit and prepare a report outlining any apparent contravention by the candidate, submitting a copy of it to the Council, the candidate, the clerk and the applicant.

25 Upon receipt of such a report, the Council was required to consider it within 30 days. Under s. 81(11) of the MEA the Council may commence a legal proceeding against the candidate for any apparent contravention of the MEA concerning campaign financing.

26 A Council could delegate its powers to perform these tasks to a committee, as was done by the City of Toronto Council in the municipal election of 2006.

27 Moreover, the decisions by the Council, or its Committee, in response to the application for an audit, could be appealed to the Ontario Court of Justice.

28 No prosecution for a violation of the campaign financing provisions of the MEA shall be commenced more than one year after the facts on which it is based first came to the informant's knowledge.

29 The MEA does not define the term "informant" to mean an "elector". Nor does it define the term "elector" to coincide with the term "informant".

F.3 The Application of the MEA to the Case

30 In *Audziss v. Santa, supra*, Charron J.A. (as she then was), in ruling upon an appeal from an order by Pierce J. quashing the process issued by a Justice of the Peace upon an information alleging a contravention of the campaign financing provisions of the MEA, commented in paras. 27 to 29, inclusive as follows:

> The general right of a private person to lay an information in respect of an offence created by a provincial statute is found in s.23(1) of the POA reproduced earlier. The MEA is a provincial statute and it creates a number of offences. *There is no express restriction or limitation in the MEA on an individual's right to lay an information in respect of any offences contained in that statute. The question that arises is whether it is implicit that the Legislature intended to reserve that right to the council or local board of a municipality in respect of election campaign finances when it enacted s. 81(10).* As set out above, that section authorizes the council or local board, following the conduct of a compliance audit, to "commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances."
>
> I certainly agree with the applications judge's comment that the statute is far from clear on whether an elector, or only council, can lay an information in respect of an alleged contravention of the MEA with respect to election campaign finances. Nonetheless, when the provisions relating to election campaign finances are considered in their entirety, it is my view that the conclusion reached by the applications judge is the only one that can provide coherence to the legislative scheme. Having regard to: a candidate's obligations under the MEA in relation to election campaign finances; the automatic sanctions that apply upon the clerk serving notice of default; the elector's right to apply for a compliance audit to ensure compliance with these provisions; the council's obligation to consider that application and its power to appoint an auditor; the council's obligation to consider any report resulting from a compliance audit and its power to commence a legal proceeding against the candidate for any apparent contravention of a provision relating to election campaign finances; and finally

> an elector's right to seek judicial review in respect of the council's decision; *it is my view that the Legislature did not intend that an elector could simply by-pass the whole process and lay a private information. This interpretation is also one which, in my view, achieves 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 to ensure the legitimacy of, attacks on elected officials.*
>
> *Hence, I would conclude that an elector's general right to lay an information in respect of provincial offences has effectively been superseded by the legislative scheme contained in the MEA in relation to election campaign finances.* [Emphasis added]

31 Although these statements were made by the court in the context of a case where the elector had unsuccessfully applied for a campaign audit, in my view they are principles of general application to campaign financing charges under the MEA. The purpose of the pertinent provisions of the MEA is to balance an elector's right to challenge the propriety of an elected official's campaign financing, on the one hand, and, on the other hand, to ensure the legitimacy of those challenges. The procedure provided by the MEA includes the expertise of an auditor and an appeal to the Ontario Court of Justice. The limitation period of one year is prescribed from the time the informant knew the factual basis of the alleged offence because the informant will likely be a member of the CAC. Its processes and deliberations will take some time from the referral of the elector's application, through the audit and a consideration of the auditor's report to the swearing of an information alleging campaign financing offences under the Act. These principles govern this case.

32 Thus, as a result of *Audziss v. Santa, supra*, it is reasonably clear that the informant cannot be an elector where the alleged wrongdoer under the campaign financing provisions of the MEA is a candidate or an elected official. The right of the elector at common law and under s. 23 of the POA to commence a private prosecution is implicitly changed by the MEA to a right to apply for a campaign audit that may lead another person, as an informant, to lay an information under the MEA. This procedure is intended to provide a measure of independence and the professional judgement of an auditor to the decision to allege a campaign financing offence under the MEA by a candidate or elected official. The limitation period of one year from the date knowledge of the facts of the alleged offence came to the informant provides time to consider such issues in a detached, objective way. This framework ensures the fairness of the attacks on alleged officials by electors, as Charron J.A. observed in *Audziss v. Santa, supra*. It provides the aggrieved elector with a right to commence a process that could lead to such charges in substitution for the right of the elector at common law and under the POA to swear an information alleging such offences himself/herself.

33 Thus, where an elector has filed an application for a campaign audit with a Council and the Council rejected the application, the elector may not then lay an information himself/herself. See

Audziss v. Santa, supra.

34 Similarly, where an elector lays an information alleging campaign financing offences under the MEA without complying with the campaign audit provisions of the Act, when the Council is available to receive and determine an application for a campaign audit, a summons issued by a Justice of the Peace will be quashed. See *Hall v. Jakobek*, 2003 Can LII 45521 (ON. S.C.).

35 Similarly, where, as here, the elector fails to comply with the time requirements of the MEA relating to applications to the CAC and then lays an information alleging campaign financing charges under the Act by an elected official, there is no jurisdiction to issue a summons compelling the elected official to attend court and answer the charges.

36 It is important to observe that the campaign financing statements of candidates and elected officials are filed with the City Clerk's Office by March 31 of the year after the election and, I am advised by counsel, are available for inspection by the public. An application for a campaign audit was to be filed within 90 days of March 31 or, in this case, by July 31, 2007.

F.4 Conclusion

37 Thus, LeRoy St. Germain had about three months to consider Ms. Bussin's statements and, if so advised, to apply to the CAC for a campaign audit. His failure to comply with those time limits prescribed by the MEA exhausts his right as an elector to initiate a prosecution of Ms. Bussin under the MEA.

G. Conclusion

38 For these reasons, the application succeeds.

39 The summons issued by the Justice of the Peace on December 13, 2006, compelling Sandra Bussin to attend court and answer to the charges laid under the MEA by LeRoy St. Germain is quashed.

40 The learned Justice of the Peace did not have jurisdiction to issue the summons because LeRoy St. Germain, an elector, failed to comply with the CAC provisions of the MEA.

41 It is to be noted that this application did not require the court to determine the lawfulness of Ms. Bussin's campaign financing or the merit of the charges laid against her under the MEA by Mr. St. Germain.

W.B. TRAFFORD J.

cp/e/qlhjk/qlpwb/qljxl/qltxp

Citation: ***Savage v. Niagara Falls (City of)*, 2005 ONCJ 459**

ONTARIO COURT OF JUSTICE

Central West Region
Welland Ontario

B E T W E E N :

LARRY SAVAGE

Appellant

-and-

THE CORPORATION OF THE CITY OF NIAGARA FALLS

Respondent

and

WAYNE THOMSON

Intervener

Duncan J.

This is an application to settle the amount of costs payable by the Respondent to the Appellant and the Intervener pursuant to a costs Order made by me on June 6 2005 following the hearing of an appeal under section 81 of the *Municipal Elections Act.* The costs Order made at that time was as follows:

The Appellant will have his costs – except in connection with preparation of his Factum[1] – paid by the Respondent. The Intervener will have ½ his costs paid by the Respondent.[2]

Counsel were invited to attempt to agree on the amount of costs, failing which they could come back before me. They were unable to agree. Counsel for the Appellant has submitted a bill totaling $26,547.26. Counsel for the Intervener has submitted a bill totaling $16,741.39. Counsel for the Respondent has termed both accounts to be "grossly excessive".

Background and nature of the case:

The Intervener was an unsuccessful mayoralty candidate in the 2003 municipal election in Niagara Falls. The Appellant was an "elector" i.e. someone entitled to vote in that election. The *Municipal Elections Act* briefly summarized, provides as follows: Within a certain period of time after an election, candidates are required to file a statement of campaign donations and expenses. Any elector may apply to the council of the municipality to order a compliance audit of the statement of any candidate if

---

[1] The Factum of the Appellant failed to reference the source of the various facts that were contained in the statement of facts, leaving the reader to hunt through the record to find the evidentiary basis for the fact alleged.

[2] The Intervener was not successful but I reasoned that the appeal – and hence the need for his participation – resulted largely from the Respondent's odd handling of the initial application from which the appeal was taken.

he has reasonable grounds to believe that the candidate has violated the Act with respect to those donations and expenses. The council can order the audit or refuse to do so. An appeal lies to this Court from council's decision.

The Appellant Savage made a timely application in respect of candidate Thomson and was given audience by Niagara Falls council in June of 2004. Council then passed a motion that the application would be "received and filed" but made no further decision. Savage initially took this as a denial of his application and launched an application for *certiorari* in the Superior Court, which application was eventually abandoned. Council then placed the application back on its agenda for "reconsideration" and in December 2004, after an *in camera* session, announced that the application was denied.

The appeal to this Court was then launched. It first came before me for hearing on May 6 2004 at which time the Intervener Thomson, who had not been made a party to the proceedings, applied to intervene. That application was granted and the hearing of the appeal itself was adjourned to June 6 2004. On that date, following the hearing of argument, I gave oral reasons for judgment allowing the appeal and directing that a compliance audit be conducted. The reasons for judgment as transcribed are attached hereto as an Appendix.

The authority to award costs and governing Rules:

While the Respondent takes no issue with my authority to make a costs order, it is useful to first determine whether such authority exists and its source.

The vesting of jurisdiction in this Court for the appeal under the *Municipal Elections Act* is rather unusual, in that this Court does not otherwise exercise jurisdiction in matters that do not involve either criminal nor family law. The appeal has the characteristics of a judicial review - usually reserved for the Superior Court. Odd as it may be, there is no denying the words of the statute:

> S 81(3.3) The decision of the council……may be appealed to the Ontario Court of Justice within 15 days….

While conferring unmistakable jurisdiction for the appeal, the Act contains no provision for making an order respecting costs in respect of such an appeal. The authority must be found elsewhere. The *Courts of Justice Act* provides:

> S 131 (1) Subject to the provisions of an Act or the Rules of Court, the costs 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 costs shall be paid.

This section is found in Part VII of the Act which applies to civil proceedings in courts in Ontario (s 95), "Civil proceeding" is not defined,

but I take it to mean any matter before the Court that is not criminal, and would include the appeal under the *Municipal Elections Act*. Accordingly, the authority to order costs in this matter can be found in section 131 of the *Courts of Justice Act.*

However, the *Rules of Court*, including rules dealing with the assessment of costs (Rules 56 – 58; Rule 49.10) apply only to civil proceedings in the Superior Court of Justice and the Court of Appeal (R 1.02) and therefore do not apply to this appeal. Nor do *Rules of the Ontario Court of Justice In Criminal Proceedings* (see R 1.02) or the *Provincial Offences Act* or Rules under the *POA* apply. In the result, while this Court is given jurisdiction over this appeal and has the authority to award costs incidental to the appeal, it is left in a no-man's-land as far as governing rules are concerned. This then brings into play section 146 of the *Courts of Justice Act:*

> S 146: Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice.

Should costs have been ordered?

The Respondent did not take issue with the applicability of the usual practice that the successful party be paid its reasonable costs. However, it

seems to me that it is arguable that in some cases of appeals under this statute, the usual practice should not apply. An elector bringing an application for a compliance audit (and pursuing an appeal thereafter) has not been personally wronged or injured in any way. His involvement in litigation is entirely voluntary. On the one hand he may be seen as a busy body, a mischief-maker or worse. On the other hand, he might be viewed as a public-spirited individual fulfilling a valuable democratic watch-dog function by the investment of his own time, at his own risk. It would seem to me that the court might well be disinclined to make an award of costs in favour of one who attracted the former, negative characterization. However, it is unnecessary to make any characterization of the Appellant in this case since the entitlement to costs was not contested.

The principles that govern:

In General: Cost awards should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. The party required to pay costs must not be faced with an award that does not reasonably reflect the amount of time and effort that was warranted by the proceedings. The reasonable expectations of the losing party must be

considered. The losing party should not pay for over-preparation by the successful party: *Boucher v Public Accounts Council for Ontario (2004) 71 O.R. (3d) 291 (CA); Moon v Sher (2004) 246 DLR (4th) 440 (ONT CA)*

Partial indemnity v substantial indemnity: The Appellant makes a claim for substantial indemnity on the basis of what is said to be an offer to settle delivered to the Respondent on April 27 2004 (hearing scheduled for May 6) offering to settle on the terms that:

1. Council direct a compliance audit
2. That an independent auditor conduct the audit
3. That the Respondent pay costs in the amount of $5000

The "offer" was refused.

The claim of entitlement for substantial indemnity flows from Rule 49.10 or more accurately, since the Rule itself does not apply to these proceedings, by strict analogy to it. That Rule provides in substance:

> 49.10 (1) Where an offer to settle,
>
> a) is made by the plaintiff at least 7 days before the commencement of the hearing and
> b)…
> c) it is not accepted
>
> and the plaintiff obtains a judgment at least as favourable as the offer, he is entitled to costs on a substantial indemnity basis from that point on unless the court orders otherwise.

I reject the Appellant's claim for substantial indemnity. In my view this was not an offer to settle at all. There was no aspect of compromise to it. It was more like an invitation to surrender. Further, The Appellant must have known that term #1 could not be accepted by the Respondent's solicitor or any instructing official in Niagara Falls because it would depend on the outcome of a vote of council members, the outcome of which no one could control or predict. Further, while the Appellant delivered the "offer" just over 7 days before the hearing as minimally required, he must have known that the timing would leave little if any time for the Respondent to organize and hold the required vote, even if it was inclined to do so. In short, I view the offer to settle in this case as having been made only as a tactic to attempt to take advantage of the costs consequences of Rule 49.10 and not as any *bona fide* pursuit of a settlement.

Application of principles to case – the assessment:

The Appellant's costs: The main point of dispute is the preparation time. The Appellant's solicitor has claimed 64.9 hours for herself and 21.5 hours for her legal clerk. The Respondent points out that that amounts to

over 8 and 2 ½ full working days respectively and contends that this is grossly excessive. I agree.

This appeal, while unique and novel, was not complex. A reading of the statute would quickly resolve any issues regarding the forum for the appeal. The issue was simple – whether reasonable grounds for a compliance audit existed. The Appellant himself had gathered and summarized those grounds for his initial appearance before council. Little else was required besides putting those grounds in affidavit form and filing a Notice of Appeal. I realize that I have the benefit of hindsight and the perspective of the judge, while counsel was required to anticipate, consider and prepare for other issues that may arise on the view taken of the matter by the presiding judge. Even making allowance for that, the Appellant's expenditure of time betrays over-preparation and over-emphasis on peripheral or non-issues such as alleged conflict of interest by council members.

In my view, particularly considering exclusion of factum preparation, a reasonable and fair allowance for preparation would be 2 full working days for counsel and one day for the legal clerk.

The other point in issue is whether the Appellant should receive a full day or half day counsel fee for the hearing on June 6 2005[3]. While the

[3] The Appellant only claims ½ day for May 6

hearing ended shortly after 1 pm, I think it is fair to assume that it was anticipated that it might take a full day and counsel would have scheduled accordingly. The hearing did run into the afternoon, though barely, and considering travel, the day was substantially consumed with counsel's attendance. I think the Appellant is entitled to the full day counsel fee.

In summary, I assess the Appellant's costs at:

16 hours lawyer prep @ $250 = $4000

8 hours clerk prep @ $80 = $640

Counsel fee ½ day May 6 @ $600

Counsel fee full day June 6 @ 1200

Total fees: $6440

Plus GST on fees: $450.80

Disbursements plus GST on disbursements @ 926.11

Total: $7816.91

The Intervener: The Respondent takes issue with the same points – preparation and counsel fee. The Intervener has claimed 56 hours – 7 days - of lawyer preparation time. Once again, I agree with the Respondent that this is excessive and beyond what is fair and reasonable. Many of my comments made above in respect of the Appellant also apply to the Intervener. There

are distinctions however. The Intervener had to prepare and file both his application to intervene and, after standing was granted, his record and factum on the appeal. Unlike the Appellant, he had not been directly involved in the original application at the city council level and had to start afresh in organizing and preparing his case. Further, he was obliged to respond to issues as formulated by the Appellant even though they were peripheral or irrelevant. For these reasons, it is my view that the Respondent should be entitled to more preparation time than the Appellant. Further in considering what is fair and reasonable for the Respondent to pay, it is appropriate to take into account that the Intervener was aligned with the Respondent and his argument assisted the Respondent – indeed he carried the burden of the opposition to the appeal both in his written material and in oral argument. In my view, 4 full days of preparation time is fair and reasonable.

With respect to counsel fee, I apply the same reasoning as above and allow a full day counsel fee for June 6. Counsel for the Intervener, almost 20 years at the bar, claims, and is entitled to a somewhat higher fee than counsel for the Appellant (6 years at the bar). As for May 6, counsel for the Intervener, unlike counsel for the Appellant, claims a full day counsel fee. That attendance ended at 12:30, approximately the same length as the June 6

proceeding. However unlike June 6, the attendance on May 6 could not have been expected by the Intervener to last more than ½ day. It was essentially an application to be allowed to participate, followed by an adjournment. In my view counsel is entitled to ½ day fee only.

In summary, I assess the Intervener's costs at:

32 hours lawyer preparation @$250 = $8000

Counsel fee May 6 @700

Counsel fee June 6 @ 1400

Total Fees = $10,100

GST on fees = $707

Disbursements plus GST on disbursements @ $391.79

Total: $11,198.79

½ Total: $5599.40

Conclusion:

The Respondent will pay costs to the Appellant and the Intervener as calculated above.[4]

October 28 2005

B Duncan J.

T Mangiacasale *for the Appellant*

John Broderick Q.C. *for the Respondent*

D DeLorenzo *for the Intervener*

[4] If I have made any mathematical errors, counsel are free to agree on corrections and adjust my Orders without my further participation.

APPENDIX

JUNE 6, 2005

REASONS FOR JUDGMENT

Duncan, J. (Orally):

Thank you counsel for your submissions in this matter; it has been a very interesting experience for me. First time I have ventured into this statute. I believe that is shared with most judges of this Court as it is relatively new legislation and I think only Justice Culver has dealt with it up until now. In any event, I am prepared to give
a decision now and this is my decision.

This is an appeal under the Municipal Elections Act from the decision of Niagara Falls Council refusing to order a compliance audit of unsuccessful mayoralty candidate Wayne Thomson in the 2003 election.

The first issue is: When did Niagara Falls Council refuse or reject the application? Mr. Savage made his pitch to Niagara Falls Council on June the 14th of '04. Council discussed his submissions briefly and then voted on a motion of some sort. It is not clear to me what the motion was, but it seems to be accepted, I think by all parties here, that it was a motion to "receive and file" Mr. Savage's motion. The exact legal implication or meaning of that phrase is somewhat uncertain.

Counsel for the respondent and the intervenor take the position that this was a rejection or
tantamount to a rejection of Mr. Savage's application. Counsel points out that Savage himself launched an appeal from the decision treating it as a rejection. He launched the appeal in the wrong court and he otherwise treated the matter in his correspondence and, in general, his behaviour, as a rejection of his application.

I am unable to accept the respondent and intervenor's position on this. There is a definite
lack of clarity in what occurred at the Niagara Falls Council meeting in June.

That is made clear in my view by the fact that Niagara Falls itself readdressed the matter in December. Its decision that day while styled as a "clarification" motion is in fact stated as a "rejection" - in the present tense i.e. December 13th - of Mr. Savage's motion and not specifically a clarification of the June decision. In any event, I do not think I should look at the exact motion and weigh the words like diamonds to determine exactly what was said. It suffices to say that there was a great deal of ambiguity or lack of clarity in the decisions. The responsibility for this lack of clarity lies totally at the feet of the Niagara Falls Council, and in my view, it is not open to the respondent Niagara Falls or the intervenor to raise its own ambiguity against the appellant.

I find that the rejection of Savage's application occurred on December the 13th and accordingly the appeal was taken to this Court in time.

The second point raised by the respondent is that Savage was not an "elector" as required of a person making the application for a compliance audit. This objection was not taken at the Council level nor in any written material filed with this Court. It is rejected.

The third issue involves the standard of review. I agree with Mr. Justice Culver in his decision in Chapman vs. City of Hamilton and Larry DiIanni, A Third Party, released approximately a month ago. I agree with him that the statute in question here
grants this Court the widest possible power of review on appeal. I would add that this particular decision that I am dealing with here on December the 13th was made in camera and with no record and no reasons given. These circumstances in my view provide a further reason why the court should not exercise or show deference towards that decision.
It is implicit, in my view, in a deferential or more limited approach, that the reviewing court must have some record of the reasons or process that brought about the decision. Where that is completely lacking, as here, there is nothing to show deference to. For all I know, Council may have misconceived its statutory duty entirely or applied the wrong test. The record of the proceedings in June may lend support to that rather pessimistic view.

Accordingly, it is my view that the approach here is that I should consider anew whether Savage has established reasonable grounds to believe that Wayne Thomson may have violated the Act.

I have considered the material and in my view he has established that. There are a number of points he raises, some with little merit but some with more merit. In particular, as I have pointed out to counsel, there is the issue about the dinner held at the Italia Club a month before the election, and this does not appear apparently either as a donation nor a cost of the Thomson campaign. It may well be that an auditor might consider that it should have been one or the other. Further, there is the issue of newspaper ads placed by various groups on behalf of Thomson in the months or weeks preceding the election. This, as well, is a circumstance that in my view an auditor might very well choose to investigate. This proceeding today is not of course an audit but is rather an appeal to determine whether an audit should be ordered. As I say, I find that there are reasonable grounds to believe, established by Mr. Savage's material.

Now the next issue as argued by the intervenor is that even if reasonable grounds exist, the question remains should a compliance audit be ordered? Assuming without deciding that the council or the Court may still reject such an application on the basis of other considerations such as costs or mootness, there is nothing before me to establish
either that these types of considerations played any role in the December decision of Council nor that they should play a role in my decision. As to costs, Niagara Falls does not claim that the cost is prohibitive and places no material before me about that. As to mootness, the Act applies to losing candidates as well as winners. Further, in my view, Savage's material raises some important issues that have bearing on future campaigns in particular, as I said, the accounting for third party ads and benefits such as the Italia Club barbecue. In my view, the application is not moot.

Further, and related to this, the intervenor alleges that Savage is a mischief maker with a
vendetta against Mr. Thomson. I think that this Act, in permitting these type of proceedings to be launched by a single elector, positively invites applications by interested, biased and mischievous applicants. The filter for this kind of application is the need for that applicant to establish reasonable grounds and I think that is what Justice Trafford was saying in the decision that he gave in the case of the Queen vs. Hall.

In my view, provided the person who is making the application establishes such reasonable grounds, his motives for doing so are not relevant to this Court's decision.

Finally, the appellant's factum is mostly devoted to an attempt to show conflict and bias and in my view these issues need not be considered here. The view I take of this, as I have already said, is that it is a very wide appeal where I consider de novo whether reasonable grounds exist. Even if Council's decision was completely without any tainting circumstances, the question on appeal for me would still be the same, - are there reasonable grounds to believe that there was a violation of the Act in regard to election financing?

The intervenor argues that the appellant does not specifically make the reasonable grounds argument an issue in her factum. However, in my view, it is implicit in the appellant's whole appeal that he is contending that reasonable grounds existed and
exist. I note that the intervenor responded to the question of reasonable grounds in his affidavit at paragraph eight.

I have found that reasonable grounds existed and as I say the question of conflict and bias need not be considered. Accordingly, in the result, the appeal is allowed and a compliance audit is ordered pursuant to s.81 of the Municipal Elections Act
with regard to the campaign finances for the 2003 Municipal elections of Wayne Thomson.

The matter is remitted to the Council of the City of Niagara Falls to appoint an auditor who will conduct an audit as required by s.81.6 of the Act and will report to the parties as required by s.81.7 of the Act.

10-001

TD Canada Trust

COMMERCE CENTRE
43 ELM ST (COMMERCE CTR)
SUDBURY, ON P3E 4R7

Tel: 1-866-222-3456
TTY: 1-800-361-1180

[redacted]

BRIAN BIGGER CAMPAIGN
[redacted]

Statement of Account	
Branch No.	Account No.
3712	[redacted]

Account Type
BUSINESS CHEQUING ACCOUNT - CAD COMMUNITY PLAN PLUS

Statement From - To
SEP 30/15 - OCT 30/15
Page 1 of 2

DESCRIPTION	CHEQUE/DEBIT	DEPOSIT/CREDIT	DATE	BALANCE
BALANCE FORWARD			SEP30	1,400.19
CHQ#00027-[redacted]	1,248.80		OCT08	151.39
MONTHLY PLAN FEE	4.95		OCT30	146.44

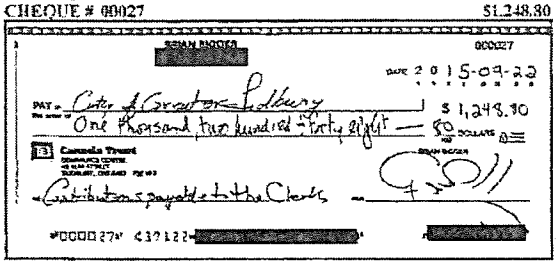
1 CHQ ENCLOSED NEXT STATEMENT DATE IS NOV 30/15
MONTHLY AVER. CR. BAL. $433.05
MONTHLY MIN. BAL. $146.44
DEP CONTENT- CASH 0 ITEMS 0 UNC BATCH 0

	No.	Amount
Credits	0	0.00
Debits	2	1,253.75

Please ensure that you report in writing any errors or irregularities found within this statement within 30 days of the statement date. If you do not, the statement of account shall be conclusively deemed correct except for any amount credited to the account in error.

Accounts issued by: THE TORONTO-DOMINION BANK

3712 [redacted]
CHEQUE # 00027 $1,248.80



CHEQUE # 00027