COMPLIANCE AUDIT COMMITTEE – WEDNESDAY, JUNE 29, 2011

COMMUNICATIONS

Distributed June 23, 2011		Item No.
C1.	Compliance Audit Committee – Rules of Procedure	1
Distributed at the June 29, 2011 Compliance Audit Meeting		
C2.	Mr. Michael Binetti, dated June 27, 2011.	2
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Please note there may be further Communications.

VAUGHAN

C1

COMPLIANCE AUDIT COMMITTEE

Rules of Procedure

Background:

At its meeting of June 30, 2009, Vaughan City Council adopted Item 28 of the Committee of the Whole, Report Number 35, thereby establishing a three (3) member compliance audit committee and to delegate to such committee Council's powers and functions respecting compliance audit applications as are more particularly set out in Appendix 1, to these Rules of Procedures.

1. Definitions:

1. "Act" means *The Municipal Elections Act, 1996, S.O., 1996, c.32.*

2. "Applicant" - The applicant who submitted the Application requesting a compliance audit.

3. "Application" – An Application made to the City Clerk pursuant to s. 81 (2) of the *Municipal Elections Act, 1996.*

4. "Candidate" – The Candidate whose election campaign finances are the subject of an Application for a compliance audit.

5. "Chair" – The Compliance Audit Committee Chair selected under s. 6 of these Rules of Procedure.

6. "Closed Meeting" – A meeting or part of a meeting that is closed to the public for reasons outlined in Section 239 (2) of *the Municipal Act, 2001.*

7. "Committee" – The Compliance Audit Committee of the City of Vaughan.

8. "Council" – The Council of the City of Vaughan.

9. "*MEA*" – The *Municipal Elections Act, S.O., 1996, c. 32.*

10. "Meeting" - Any regular, special or other meeting of the Committee.

11. "Member" - Individuals appointed to the Compliance Audit Committee by the Council of the City of Vaughan, or their alternatives selected pursuant to these procedures.

12. "Minutes" - The record, without note or comment, of the resolutions and decisions of the Committee.

13. "Secretary" - The City Clerk for the City of Vaughan or a Member of the City Clerk's staff as designated by the City Clerk.

2. Rules:

1. The rules in this procedure shall be observed in all Meetings of the Committee.

2. The Committee is a statutory Committee governed by the *Act.*

3. Matters not dealt within the Rules of Procedure:

If these rules do not provide for a matter of procedure that arises during a meeting, the practice shall be determined by the Chair who may do whatever is necessary and permitted by law to enable the Committee to effectively consider the matter before it.

4. Calling of a Meeting:

When the Secretary receives an Application, the Secretary will advise all three Members of the Compliance Audit Committee and request confirmation within 24 hours of their availability to sit on the Committee.

If one or more members are not available to sit on the Committee, the Secretary shall canvass the three Alternate members for their availability. The Secretary shall select such number or Alternate members as are required to sit on the Committee through a random selection process.

5. Committee Chair:

1. At its first meeting the Committee shall elect one of its members as Chair for the term of the Council that appointed the Member and until a successor is appointed. The Secretary shall administer the process for selecting the Chair at the first meeting and as required thereafter.

2. When the Chair of the Committee is absent due to illness or otherwise, the Committee may appoint another member as Acting Chair. The Acting Chair shall have all the powers of the Chair while presiding.

3. If the Chair of the Committee resigns as a member of the Committee or resigns as the Chair of the Committee, the Committee shall appoint another Committee Member as Chair for the balance of the term of Council and until the successor is appointed.

4. The Chair shall serve as the principle spokesperson for the Committee.

5. The Chair is the liaison between the Members and the Secretary of the Committee, as required, including any communication and clarification on minutes or correspondence submitted and on matters of policy and process

6. The Chair shall facilitate meeting discussions and identify the order of proceedings and speakers.

7. The Chair shall put to vote all motions which are regularly moved and seconded and announce the result of the vote.

8. The Chair shall ensure the observance of order and decorum among the Committee members and attendees/audience.

6. Meetings:

1. The Committee shall meet at the Secretary's request.

2. The Secretary shall call a meeting in accordance with Section 15 when an Application is received or when requested to do so by the chair or a majority of the Committee members.

3. Meetings of the Committee shall be held at Vaughan City Hall or such other location, as the Secretary deems appropriate.

4. Committee meetings shall commence at a time and date as set by the Secretary, and shall be adjourned on a vote of the Committee.

5. A majority of the Committee members constitutes a quorum at Meetings of the Committee.

6. Meetings of the Committee shall be open to the public except as provided in accordance with Section 239 of the *Municipal Act, 2001.*

7. The Applicant, the Candidate and, where applicable, the auditor shall be given an opportunity to address the Committee.

8. Addresses to the Committee shall relate only to an Application currently before the Committee and shall be no more than five minutes in length.

7. Confidentiality:

Members shall ensure that confidential matters disclosed to them and materials provided to them during a closed Meeting are kept confidential, subject to a determination being made under applicable law.

8. Delegation by Committee Secretary:

The Secretary of the Committee may delegate administrative responsibility to a Deputy Secretary.

9. Agenda:

1. Before each meeting, the Secretary shall provide an agenda to each member of the Committee.

2. The agenda shall include a copy of any written submissions made by the Applicant or the Candidate.

3. A copy of the agenda shall be published on the City of Vaughan's website www.vaughan.ca and the election website, www.vaughanvotes.ca

10. Lack of Quorum:

If no quorum is present thirty minutes after the time fixed for a Meeting of the Committee, or the resumption of a meeting after an adjournment, or should a quorum at a meeting be lost for a period of thirty consecutive minutes, the Secretary shall record the names of the Members present and the Meeting shall stand adjourned until the next regular Meeting day scheduled by the Secretary.

11. Meeting Procedures:

1. Opening Statement

Where the agenda includes consideration of an application, the Chair will read an opening statement outlining the procedure and format of the Committee Meeting.

2. Statements from Committee Members

After reading the opening statement, the Chair will entertain any statements from Committee Members.

3. Motions

Following opening statements and before considering the substance of the agenda items the Committee members may make preliminary motions with respect to any business properly before the Committee, including:

a) Disclosure of Pecuniary Interest;
b) Adoption of Minutes; or
c) Other Procedural Matters.

4. Committee Business

Prior to consideration of an item on the Committee agenda, the Chair will identify for those present the agenda item to be considered.

5. Introduction and recording of Applicant and Candidate

Prior to consideration of an application, the Chair shall request the applicant and candidate to identify themselves, and provide their name and mailing address to the Secretary for the record.

6. Presentation by Applicant or Applicant's Agent:

1. The Applicant or the Applicant's agent may address the Committee;

2. The Committee may ask questions of the Applicant; and

3. The Candidate will be permitted to view any documents submitted by the Applicant.

7. Presentation by Candidate or Candidate's Agent:

1. The Candidate or the Candidate's agent may address the Committee. The Candidate may respond to the content of the Applicant's address to the Committee.

2. The Committee may ask questions of the Candidate; and

3. The Applicant will be permitted to view any documents submitted by the Candidate.

12. Rules of Debate:

1. When two or more Committee Members wish to speak, the Chair shall designate the member who first requested to speak as the member who speaks first.

2. A Committee Member may ask a question only:

(i) of a Member who has already spoken on the matter under discussion;
(ii) of the Chair;
(iii) of an official of the City of Vaughan; and
(iv) of any other person addressing the Committee pursuant to the application; or

(v) for the purpose of obtaining information relating to the matter then under discussion.

13. Voting:

1. Every Member present at a Meeting of the Committee when a question is put shall vote on the question, unless prohibited by statute, in which case the fact of the prohibition shall be recorded in the Minutes of the Meeting.

2. The matter put to vote shall be in the form of a motion addressing the matter then under consideration.

3. A member who refuses to vote shall be deemed to have cast a "no" vote.

4. In the case of a tie vote, the motion or question shall be deemed to have been lost.

5. Decisions must not be made until the Applicant and the Candidate have been given the opportunity to be heard.

6. Generally, the Committee should render its decision at each meeting but the Committee may defer its decision after a full hearing, if further deliberation is required.

14. Motions:

1. All motions must be introduced by a mover and seconder before the Chair may put the question or motion on the floor for consideration. If no Member seconds the motion, the motion shall not be on the floor for consideration and therefore it shall not be recorded in the Minutes.

2. Any Member may propose a motion on the matter then under consideration which the Secretary shall record in writing.

3. After a motion is properly moved and seconded, it shall be deemed to be in the possession of the Committee, but may be withdrawn by the mover at any time before decision.

4. If there is more than one motion concerning a matter, the Secretary shall record all motions in writing and read the various motions to the Members before the vote is taken.

5. A motion to amend shall relate to the subject matter of the main motion, shall not pose a direct negative to the question, and shall be put to a vote in reverse order in which the amendments were made. Any further amendments must be made to the original motion as amended.

15. Notice:

1. Public notice shall constitute posting the agenda on the City of Vaughan's website www.vaughan.ca and the election website www.vaughanvotes.ca.

2. The Secretary shall give notice of a Committee Meeting to the Committee by way of e-mail, telephone or in writing by mail, as may be appropriate to ensure timely communication.

3. Where an Application will be considered at a meeting, the Secretary shall give reasonable notice to the Applicant and Candidate of the time, place and purpose of a meeting and of the fact that if either party fails to attend the meeting the Committee may proceed in the party's absence and the party will not be entitled to further notice concerning the meeting. The written notice shall include a copy of the Application. The Candidate shall be requested to respond to the Application in writing. Written responses shall be submitted to the Secretary a minimum of two days prior to the Committee Meeting at which the Application will be considered.

4. Every Application shall be provided to the Committee within ten days of its' receipt by the Clerk, and a copy of the Application shall be provided to the City Council.

5. Upon a decision being made in an Application, the Secretary will forward notice of the Committee's decision to the Applicant and the Candidate at the last known mailing addresses in the records of the City Clerk.

16. Committee Decisions:

1. In accordance with Section 81(5) of the *Act*, within thirty days of receiving of the Application, the Committee will decide whether to grant or reject it.

2. If the Committee decides to grant the Application, it shall, by resolution, appoint an auditor licensed under the *Public Accounting Act, 2004* to conduct a compliance audit of

the candidate's election campaign finances. The selection of an auditor shall be administered under the City of Vaughan's usual procurement policies and practices.

3. Within ten days of receiving the report, the Secretary shall forward the report to the Committee.

4. At the request of the Committee, the Secretary may assist the Committee in locating and contacting available auditors to undertake the audit.

5. In accordance with Section 81(14) of the *Act*, within thirty days of receipt of an auditor's report, the Committee will consider the report and may commence a legal proceeding against the candidate for any apparent contravention of a provision of the *Act* relating to election campaign finances.

6. The Committee may recover the costs of conducting the compliance audit from the applicant if there were no apparent contraventions and if there appears to be no reasonable grounds for having made the Application.

17. Grant Exceptions from Procedures:

The Committee may waive any rule of procedure in this procedure, as it considers appropriate, to ensure that the real questions at issue are determined in a just manner.

18. Minutes:

1. The Secretary shall prepare Minutes of each meeting of the Committee and shall provide Members with a copy of the Minutes, as soon as the Minutes are available.

2. The Committee Members shall each review and sign the Minutes, to confirm that the Minutes reflect the Committee's actions.

3. The signed minutes will be posted on the City of Vaughan's website www.vaughan.ca and the election website www.vaughanvotes.ca.

C 2
COMMUNICATION
Compliance Audit Committee
June 29/2011
ITEM # - 2

Affleck Greene McMurtry

Affleck Greene McMurtry LLP

Barristers and Solicitors

Michael I. Binetti
Email: mbinetti@agmlawyers.com
Direct Line: (416) 360-0777

June 27, 2011 **URGENT**

File No. 2777-001

SENT VIA E-MAIL (jeffrey.abrams@vaughan.ca)

Mr. Jeffrey A. Abrams
City Clerk
City of Vaughan
2141 Major Mackenzie Dr
Vaughan, ON L6A 1T1

Dear Mr. Abrams:

Re: Compliance Audit Request - Rosanna DeFrancesca

We are the lawyers for Rosanna DeFrancesca. We were retained over this past weekend in connection with the Compliance Audit request submitted on June 23, 2011 for which a City of Vaughan Compliance Audit Committee meeting has been scheduled for Wednesday, June 29, 2011.

In light of the six-days' notice of the Compliance Audit Committee meeting, we hereby request an adjournment of that meeting in respect of the request for a compliance audit of our client's returns to at least July 8, 2011 (nine days) to permit our client to fully respond to the allegations. It is simply not possible to adequately put forward her case on such short notice.

We are confident that this request will not hinder the Committee's ability to render a decision within the 30-days required under the *Municipal Elections Act*, which is Monday, July 25, 2011. If the meeting were held on July 8, 2011, the Committee would still have more than two full weeks to render a decision.

We note that the Rules of Procedure for the Compliance Audit Committee, as posted on the Vaughan Votes website (www.vaughanvotes.ca), contemplate "reasonable notice to the Applicant and Candidate of the time, place and purpose of a meeting" (see subsection 15(3)). In light of the voluminous Application for a Compliance Audit consisting of some 146 pages of submissions and documents, we do not think six-days' notice is reasonable.

It is especially unreasonable in light of the requirement under the above-referenced Rules of Procedure that our client deliver written responses two days prior to the meeting, which is today.

Given the above, and by virtue of Section 17 of the Rules of Procedure, we reiterate our request for an adjournment of the June 29th meeting to July 8, 2011.

We look forward to hearing from you.

Sincerely,
Affleck Greene McMurtry LLP
Per:

Michael Binetti

Subject: FW: Compliance Audit Request - Rosanna DeFrancesca
Importance: High
Attachments: Abrams, 2011-06-27.pdf

Additional Communication for CAC

J. A. Abrams

Jeffrey A. Abrams
City Clerk
City of Vaughan
2141 Major Mackenzie Drive
Vaughan, ON L6A 1T1
Tel: (905) 832-8585 Ext. 8281
Fax:(905) 832-8535
jeffrey.abrams@vaughan.ca

VAUGHAN

From: Michael Binetti [mailto:mbinetti@agmlawyers.com]
Sent: June-27-11 2:17 PM
To: Abrams, Jeffrey
Subject: Compliance Audit Request - Rosanna DeFrancesca
Importance: High

Dear Mr. Abrams,

Please see the attached correspondence.

Kindly confirm receipt.

Sincerely,
Michael Binetti

Affleck Greene McMurtry

Michael I. Binetti
mbinetti@agmlawyers.com

Direct: 416 360 0777
Tel: 416 360 2800
Fax: 416 360 5960
www.agmlawyers.com

Affleck Greene McMurtry LLP · 365 Bay Street, Suite 200 · Toronto, Ontario M5H 2V1

ERIC K. GILLESPIE PROFESSIONAL CORPORATION

Barristers & Solicitors

C 3
COMMUNICATION
Compliance Audit Committee
June 29/2011
ITEM # - 1

Suite 600
10 King Street East
Toronto, Ontario
M5C 1C3

ERIC K. GILLESPIE, LL.B.
Telephone No.: (416) 703-5400
Direct Line: (416) 703-6362
Facsimile No.: (416) 703-9111
Email: egillespie@gillespielaw.ca

FACSIMILE TRANSMISSION

TO	FIRM	FACSIMILE NO.
Mr. Jeffrey Abrams	Secretary, Compliance Audit Committee	(905) 832-8535

From: ERIC K. GILLESPIE
Firm: Eric K. Gillespie Professional Corporation

Date: June 27, 2011

Re: **City of Vaughan vs. Di Biase**

Our File No.: 00473

PAGES (including cover sheet): 15
If you do not receive all pages, please phone ANNA at (416) 703-5400

MESSAGE: Our letter dated June 27, 2011 with attachment.

ERIC K. GILLESPIE PROFESSIONAL CORPORATION
Barristers & Solicitors

Suite 600
10 King Street East
Toronto, Ontario M5C 1C3

ERIC K. GILLESPIE, LLB
Telephone No.: (416) 703-5400
Direct Line: (416) 703-7034
Facsimile No.: (416) 703-9111
Email: egillespie@gillesielaw.ca

June 27, 2011

Via Email and Fax : (905) 832-8535
jeffrey.abrams@vaughan.ca

Mr. Jeffrey Abrams
Secretary, Compliance Audit Committee
City of Vaughan
2141 Major Mackenzie Drive
Vaughan, Ontario
L6A 1T1

To Whom It May Concern:

Re: Request for Compliance Audit of Mr. Michael Di Biase

We are the solicitors for Mr. Michael Di Biase. We have been retained to respond to the request for a compliance audit made to the City of Vaughan's Compliance Audit Committee (the "Committee") by Ms. Carrie Liddy (the "Applicant") on June 21, 2011.

We also acted as Mr. Di Biase's co-counsel in the matter of *Vaughan (City) v. Di Biase*, [2011] O.J. No. 1364 (QL)(O.C.J.) decided by the Honourable Justice P. J. Wright, a copy of which we attach (the "Decision").

It is our submission that the application does not constitute a proper request upon which a compliance audit may be ordered. Section 81 of the *Municipal Elections Act, 1996* (the "*Act*") provides, in part:

> **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) An application for a compliance audit shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office; and it shall be in writing and shall set out the reasons for the elector's belief.**

The Applicant does not identify what provision of the *Act* she claims to have been contravened; rather she states simply, "ALL sections". This is, with respect, clearly incorrect in that there is no suggestion in the body of the application that the entire *Act* has been contravened. Rather, it is suggested that this is simply a means of avoiding the point that the Applicant has not been able to identify *any* specific provision of the *Act* that has been breached.

The substance of the Applicant's complaint is, however, understood, and the balance of this submission is provided in response thereto, and in the alternative to our primary submission that the application does not identify a provision that may have been contravened, and should not, therefore, be considered.

The issues raised by the Applicant are largely issues identified and adjudicated upon by Justice Wright in the Decision:

> **21** Two (2) re-counts followed the 2006 Mayoral Election. The second re-count was conducted by Justice Howden of the Ontario Superior Court pursuant to a judicial order of that court. Substantial costs were incurred in the post election litigation which lead (sic) to the re-count order. It is the receipt and the expenditure of money by Mr. Di Biase in this post election re-count litigation that is the subject of the charges before the court.

As also noted by the Court and as is the case before the Committee, an important principle that the Court and in turn the Committee must have regard for is that:

> **22** Like anyone charged with an offence Mr. Di Biase is presumed to be innocent. ...

In relation to the issue of how monies spent and debts incurred regarding post election re-count expenses should be accounted for the Court found:

> **25** Central to the prosecution's case is the requirement that Mr. Di Biase be found to have been engaged in the post election litigation and its associated costs as a "candidate" thereby invoking the regulatory provisions of section 66, 67 and 68 of the *M.E.A.*
>
> **26** Mr. Di Biase asserts that he initiated and pursued his post election litigation as a voter and not as a candidate. He further asserts that as a voter he is not bound by the regulatory provisions of the *M.E.A.* that would apply to a candidate. With these submissions I agree.

The balance of the Decision provides the Court's reasons for this conclusion. As a result, there was a clear determination by the Court that re-count expenses were not incurred in Mr. Di Biase's capacity as candidate but instead as a voter. The Decision was not appealed.

The 2010 filing of Mr. Di Biase correctly reflects the Decision.

As set out in the statement from Lanno Torelli LLP sent to the Committee today, the 2006 Di Biase campaign financial statements reflected certain outstanding obligations amounting to a reported deficit of $74,822.60. A significant portion of this deficit related to re-count expenses. A smaller portion related to non-recount expenses. Almost all of the deficit was in fact subsequently resolved either by settlement or by payments made by Mr. Di Biase in a manner consistent with the Decision.

Clause 79(3)(b) of the *Act* requires that the debits to be applied in calculating the surplus or deficit of the current (2010) campaign include:

> **79(3)(b) any deficit from a previous election campaign of the candidate if that campaign,**
> **(i) related to an office on the same council or local board as the present campaign, and**
> **(ii) was in the previous regular election or a subsequent by-election.**

Mr. Di Biase ran for an office on the same council in 2006 (Mayor) and in 2010 (Regional Councillor). Accordingly, it was necessary to report in his current financial statement the deficit from the previous regular election in 2006.

In our submission, it would have been incorrect to not make the adjustments shown in Note 1 of Mr. Di Biase's March 2010 Financial Statement that the Applicant has identified. To do so would not have taken into account the resolution of matters that transpired after the previous campaign came to a close.

In particular, and in accordance with the Decision, certain amounts reported on the 2006 statements were settled or paid by Mr. Di Biase. It was, therefore, necessary to exclude them from the previous deficit. Similarly, other claims that were included in the calculation of that deficit were either abandoned or reduced.

To include them as part of the candidate's deficit as previously shown in the 2006 filing would improperly inflate the candidate's deficit at the start of the 2010 campaign period. Had they remained as part of the 2006 deficit reported on the 2006 statements then they would have remained an obligation to be satisfied from 2010 campaign contributions. This would have resulted in the 2010 campaign reporting a deficit that it did not in fact have. All that Note 1 does is to provide accounting continuity; to make clear the means by which the 2006 deficit was adjusted prior to inclusion in the 2010 Financial Statement. The reversals reflected in Note 1 were in fact both correct and required.

It is important to also recognize that no campaign monies from the 2010 election were used to pay any 2006 expenses, recount or otherwise (see again the Lanno Torelli LLP submission of today's date). The compliance audit request is predicated upon an incorrect assumption to the contrary. The fact is that no such transactions ever occurred.

Consequently, the entries in Note 1 (the sole aspect of Mr. Di Biase's Financial Statement identified by the Applicant) are correct, are also in conformity with the Decision and are in accordance with good accounting practices. Given that the present application is solely based on those entries, then over and above the fact that no provision of the *Act* has been identified as having been violated, there are no improprieties before the Committee and, therefore, no grounds for a compliance audit to be ordered.

Should the Committee have any further questions please contact our offices. We will also be in attendance at the hearing on June 29, 2011 to answer any questions.

Yours very truly,

ERIC K. GILLESPIE
PROFESSIONAL CORPORATION

Eric K. Gillespie
EKG/am

Encl.

Case Name:
Vaughan (City) v. Di Biase

Between
The Corporation of the City of Vaughan, and
Michael Di Biase

[2011] O.J. No. 1364

2011 ONCJ 144

Newmarket Court File No. 4911 999 10-90000058-00

Ontario Court of Justice

P.J. Wright J.

Oral judgment: February 28, 2011.

(89 paras.)

Counsel:

Mr. Tim Wilkin, Prosecutor for the Corporation of the City of Vaughan.

Mr. Eric Gillespie and Mr. David M. Humphrey, for the defendant Michael Di Biase.

P.J. WRIGHT J. (orally):--

The Democratic Process of Voting

1 The institutional, legal and cultural commitment to an open political process in Canada was capped in 1982 by the adoption of the *Canadian Charter of Rights and Freedoms* (*Charter*). Included in *The Charter* is a guarantee of the right of Canadian citizens to vote in elections and to stand for office in those elections.

2 The proclamation of *The Charter* marked a defining moment in our Canadian history. Since 1982 courts in this country have consistently confirmed the right to vote and the concurrent right to ensure that every vote is counted and that every vote and voter is counted equally.

3 To do so guarantees the continuance in Canada of a "free and democratic society", which are the very words enshrined in our *Canadian Charter of Rights and Freedoms*.

The Costs of Elections

4 It is a matter of common sense and fundamental understanding that in our democratic process of elections money received and spent prior to an election has clear objectives: To assist the voters with election issues and to persuade voters to vote for candidates in whom they have confidence to govern.

5 Equally so - it is a matter of common sense and fundamental understanding that once the election passes and the votes cast are fixed and final, money received and spent in post election activities to identify errors in the voting process has an entirely different objective: to ensure that each vote is counted and that each vote and voter is counted equally.

Our Laws

6 Our laws in Canada encourage and support these resolves in our democratic process.

Election Day November 13, 2006 - City of Vaughan

7 The events which occurred on Election Day on November 13, 2006 in the City of Vaughan and more particularly the post election aftermath which followed for months thereafter bring into sharp focus the democratic institution of the right to vote, to have those votes count and to have those votes and voters count equally.

8 On November 13, 2006, 58,806 residents in the City of Vaughan cast their votes for Mayoral candidates Michael Di Biase or Linda Jackson. After the voting was complete the clerk for the City of Vaughan announced that Linda Jackson had received 90 votes more than Michael Di Biase.

The Re-counts

9 Two re-counts followed this very close result. The second re-count was ordered by the Ontario Superior Court of Justice. Justice Howden of that court supervised and conducted that re-count during which he made an alarming discovery - *104 votes cast by citizen of Vaughan had not been counted - this in an election decided by only 90 votes.*

10 Why is happened and how this happened is not the issue for determination by this court. The context of that judicially ordered re-count however, while not be determinative of these proceedings is nevertheless significant and impacts directly on the democratic right to vote and to ensure that votes and voters are counted and counted equally. As a consequence of the re-count generated by Mr. Di Biase's application and in which this flawed process was discovered, Justice Howden ordered the City of Vaughan to pay to Michael Di Biase more than $183,000 in costs related to the post election re-count litigation. This judicially ordered re-count was necessary to restore confidence with the electorate in the voting process that occurred in The City of Vaughan on November 13, 2006.

11 It is from this post election period and in particular the very expensive litigation associated with the judicially ordered re-count that issues have arisen for determination by this court.

Charges

12 It is alleged that Michael Di Biase expended money and received contributions in relation to post election litigation costs in a manner that violated the *Municipal Election Act Ontario* as

amended *Municipal Elections Act*, 1996, S.O. 1996, c. 32 (*M.E.A.*). The specifics of these allegations are set out in counts 3 to 8 and count 20 of the information before this court.

Position of the Parties

The Defendant

13 The Defendant principally raises two (2) defences. The first defence proceeds on the basis that Mr. Di Biase's involvement in the post election re-count proceedings and litigation was as a voter and not as a candidate. As such, the regulatory provisions of the M.E.A. relating to the conduct of a candidate were not engaged by Mr. Di Biase. At its core the defence asserts that the regulatory provisions in the *M.E.A.* have no application to Mr. Di Biase in the post election re-count litigation proceedings.

14 The second defence proceeds through a review of each of the seven (7) charges Mr. Di Biase faces under the *M.E.A.* and concludes that the prosecution has not proven that Mr. Di Biase is guilty of any of the seven (7) charges.

The Prosecution

15 The prosecution argues that Mr. Di Biase was a mayoral candidate in the 2006 Municipal Election in Vaughan as a candidate and not as a voter in the post election re-count litigation proceedings that followed. As a candidate Mr. Di Biase's conduct was governed by the regulatory provisions of the *M.E.A.* as it relates to candidates.

16 The prosecution rejects the notion that Mr. Di Biase's involvement in the post election re-count litigation proceedings was as a voter and not a candidate.

17 The prosecution further asserts that the evidence established that Mr. Di Biase is guilty of the seven (7) charges he faces under the *M.E.A.* and rejects the defence arguments to the contrary.

Ruling

18 This case proceeded by way of an agreed statement of fact. It is the application of the law to the agreed facts that is in issue. I have carefully considered all of the evidence, the law, and the very thoughtful submissions of counsel - each of whom I thank for the professional manner in which they presented this case and assisted this court.

19 For reasons which I will now articulate, I have concluded that either of the defences advanced are sufficient to allow me to find the defendant, Michael Di Biase, not guilty of all seven (7) charges against him, specifically counts 3, 4, 5, 6, 7, 8, and 20 of the information. All charges against Mr. Di Biase are dismissed.

Analysis

Introduction

20 Mr. Di Biase is a teacher by profession. He has served as an elected official in the City of Vaughan for a long period of time. In 1985 he was first elected councillor. In 1988 he was elected Regional Councillor. In 2002 he was appointed Mayor of the City of Vaughan. In 2003 he was elected Mayor of the City of Vaughan. In 2006 he was defeated by Linda Jackson in the Mayoral race by 90 votes.

21 Two (2) re-counts followed the 2006 Mayoral Election. The second re-count was conducted by Justice Howden of the Ontario Superior Court pursuant to a judicial order of that court. Substantial costs were incurred in the post election litigation which lead to the re-count order. It is the receipt and the expenditure of money by Mr. Di Biase in this post election re-count litigation that is the subject of the charges before the court.

22 Like anyone charged with an offence Mr. Di Biase is presumed to be innocent. That presumption of innocence remained with Mr. Di Biase throughout the trial and could only be displaced by evidence that established Mr. Di Biase's guilt beyond a reasonable doubt.

23 In order to succeed on counts 3, 4, and 5 the prosecution must prove that the post election litigation costs were "campaign expenses" under section 67 of the *M.E.A.*

24 In order to succeed on count 6, 7 and 8 the prosecution must prove that the post election funds received and used to offset the post election litigation costs were "contributions" under section 66 of the *M.E.A.*

25 Central to the prosecution's case is the requirement that Mr. Di Biase be found to have been engaged in the post election litigation and its associated costs as a "candidate" thereby invoking the regulatory provisions of section 66, 67 and 68 of the *M.E.A.*

26 Mr. Di Biase asserts that he initiated and pursued his post election litigation as a voter and not as a candidate. He further asserts that as a voter he is not bound by the regulatory provisions of the *M.E.A.* that would apply to a candidate. With these submissions I agree.

Strict Interpretation of the *M.E.A.*

27 There is considerable ambiguity in the provisions of the *M.E.A.* related to "expenses" and to "contributions".

28 Even Mr. Wilkin, as prosecutor endorsed this notion when he remarked:

> ".... this *M.E.A.* is not pretty legislation ..."

and pointed out as well:

> "... the *M.E.A.*'s lack of detail creates problems ..."

I agree with both of Mr. Wilkin's observations.

29 But the *M.E.A.* is not just complicated and lacking in detail - it does create genuine ambiguity - with multiple interpretations being possible.

30 As an example the court costs of over 183,000 dollars ordered by Justice Howden in the second re-count, to be paid by the City of Vaughan to Mr. Di Biase, only served to underscore this ambiguity.

31 To proceed against Mr. Di Biase in relation to count 5 the prosecution asserted that the City of Vaughan's payment of over 183,000 dollars in court costs - which were paid directly to Cassels LLP constituted a payment of campaign "expenses".

32 Section 69(1)(c) of the *M.E.A.* requires that payment for all "expenses" made from the campaign be made from the campaign account yet here the City of Vaughan paid a portion of those ex-

penses - over 183,000 dollars to Cassels LLP directly, in the same manner that the prosecution says Mr. Di Biase otherwise violated *M.E.A.* in relation to the substance of count 5.

33 Surely the City of Vaughan would not have paid over 183,000 dollars directly to Cassels LLP if it considered the payment to have been in respect of campaign "expenses" of a candidate but rather would have paid those funds into the campaign account as required under the *M.E.A.*

34 The manner in which the City of Vaughan paid over 183,000 dollars directly to Cassels LLP would actually support rather than contradict Mr. Di Biase's position as a voter and would contradict rather than support the prosecution's position that Mr. Di Biase was a candidate in so far as "expenses" and "contributions" are concerned in count 5.

35 If there is ambiguity in relation to the provisions of the *M.E.A.* in this regard that ambiguity must be resolved in favour of Mr. Di Biase so as not to preclude his right as a voter or the right of any voter to have access to the courts and to ensure the validity of the election process and proper counting of votes.

36 To interpret the *M.E.A.* otherwise would be in conflict with the well established principles of strict interpretation. *Morguard Properties v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Berardinelli v. Ontario Housing Corporation* [1979] 1 S.C.R. 275.

37 In short, the general rule is this. In construing criminal and quasi - criminal statutes they should, where there is uncertainty or ambiguity of meaning, be construed in favour of, rather than against, a defendant *Regina v. McIntosh* [1995] 1 S.C.R. 686.

38 The strict interpretations must apply in this case.

39 I reject the prosecution's interpretation of the *M.E.A.* which would, in effect, curtail the right of a voter (who may have even been a candidate) to fund essential post election litigation costs. Contrary to our democratic institution to ensure that all votes are counted and that all votes are counted equally. It would impose impractical constraints on campaign expenses and contributions and such restrictions would otherwise make it impossible for a voter, who may have been a candidate, to fund the complex and very expensive litigation called for in the *M.E.A.* as undertaken by Mr. Di Biase.

40 To accept the prosecution's interpretation would be to deny a voter who was candidate the very right otherwise given to all voters. Clearly that cannot be correct. The right of voters - a vital aspect of our democratic process is engaged. If the legislature had intended to deny a voter, who is also a candidate, the same rights available to a voter it would have said so expressly. There is no such express restriction or restraint in the M.E.A.

41 In reviewing the *M.E.A.* carefully I have concluded that a fair and balanced interpretation of that legislation allows for just the type of assertion made by Mr. Di Biase namely, that he proceeded in post election litigation as a voter and not as a candidate.

The Purposive Interpretation of *M.E.A.*

42 The *M.E.A.* must be interpreted "to give effect to its purpose and to achieve a coherent result, not absurd results", *R. v. Bell Express Vu Limited* Partnership [2002] 2 S.C.R. 559.

43 The legislative purposes central to this case are set out in section 58, 63 and 83 of the *M.E.A.*

44 These are the sections of the *M.E.A.* under which the post election litigation was initiated by Mr. Di Biase.

45 These are the sections of the *M.E.A.* which provide a voter with access to the courts to ensure the integrity of the electoral process. If there were any doubt about this purpose one need look no further than the comments made by Justice Howden, when in ordering the judicial re-count in this case he referred to *Haig v. Canada,* [1993] 2 S.C.R. 995:

> "The right to vote is of fundamental importance to Canadians and our Canadian democracy. *Every effort should be made to interpret the statute (M.E.A.) to enfranchise the voter", Di Biase v. City of Vaughan.*

46 If as the prosecution suggests, litigation seeking a re-count by Mr. Di Biase could only be undertaken by him as a candidate and not a voter, it would offend a number of constructs associated with the purposive interpretation of the *M.E.A.* and the judicial authority associated with that interpretation.

47 Firstly, Mr. Di Biase as a candidate would have to have anticipated and then face the reality of his litigation costs post election exceeding 500,000 dollars.

48 Secondly, Mr. Di Biase as a candidate would then have to raise over 500,000 dollars from a minimum of 650 new contributors, all of whom would have to be prepared to contribute the maximum allowable contribution of 750 dollars each and he would have to do so in a very short period of time.

49 It is a practical absurdity to suggest that post election litigation and the cost associated with it could be funded in this fashion.

50 It is also an absurdity to suggest that the legislature intended that a wealthy candidate, who was also a voter, would be free to fund such post election litigation on his own. Whereas a candidate of more modest means, who is also a voter, such as Mr. Di Biase would be caught by the restrictions applicable to candidates. The purpose of the *M.E.A.* is to ensure that every vote, properly cast in a very close election, be respected and that public confidence in the electoral process be preserved. That is exactly what Mr. Di Biase did as a voter. The judicial re-count confirmed Mr. Di Biase's concern as a voter. Justice Howden found that 104 voters had been improperly disenfranchised. This in an election decided by only 90 votes. This was intolerable. While the judicial re-count did not change the outcome of the vote, the post election litigation and costs which lead to the re-count clearly advanced the underlying objectives and purposes of the *M.E.A.* and went a considerable distance in restoring confidence to protect the right to vote and to enfranchise the voters as Mr. Justice Howden stated in his judgment when he ordered the re-count in this case.

Rule 5 - Extension

51 Rule 5 of section 68 of the *M.E.A.* allows a candidate to extend the campaign period and access campaign surpluses to offset "expenses related to a re-count".

52 Rule 5 is permissive only and not mandatory.

53 If Rule 5 had been engaged by Mr. Di Biase it could bring Mr. Di Biase under the regulatory provisions of sections 66, 67, and 68 of the *M.E.A.* as it relates to "expenses" and "contributions" regarding the post election litigation costs that were incurred.

54 Mr. Di Biase asserted that he extended the campaign period but under Rule 4 and not Rule 5. Rule 4 is designed to offset:

> "A deficit at the time the election period would otherwise end."

Mr. Di Biase has never asserted that he never engaged Rule 5 to extend the campaign period.

55 While the prosecution initially argued that Mr. Di Biase did extend the campaign period under Rule 5 - it resiled from that position at the end of the trial and agreed that Mr. Di Biase had extended the campaign period under Rule 4 and not under Rule 5. Rule 5 speaks to re-count expenses. Rule 4 does not. Rule 4 speaks to deficits at the time the election period ends.

56 A proper interpretation of Rule 5 is that it has no application to the conduct of Mr. Di Biase. He did not engage Rule 5. This interpretation buttresses my finding that Mr. Di Biase incurred his post election expenses - not as a candidate - but as a voter.

Contributions, Expenses, Election Campaign and Election Campaign Period

57 "Campaign contributions" are defined in sections 66 of the *M.E.A.* "Campaign expenses" are defined in section 67 of the *M.E.A.* "Election Campaign Period" is not defined but is referred to in section 68 of the *M.E.A.* "Election Campaign" should be given its ordinary dictionary definition as "the period before the election when candidates are attempting to influence the voters and ending when the poles are closed" (Oxford Concise Dictionary).

58 The only provision in the *M.E.A.* which specifically and statutorily permits for the extension of the election campaign to allow a candidate access to surplus and/or an additional contribution to cover the cost of litigation after an election is over is Rule 5 contained within section 68.

59 As noted earlier, Rule 5 can only be invoked by the candidate if he chooses to do so. Mr. Di Biase did not and the prosecution agreed.

60 Of significance there is no reference in the "campaign contribution" provisions of section 66 of the *M.E.A.* to include payments toward costs of post election litigation by a candidate. The implied exclusionary rule would have required the Legislature to have said so expressly in the *M.E.A.* if it intended so. It did not.

61 The definition of "contributions" in section 66 of the *M.E.A.* does not include payments toward the cost of post election litigation initiated or pursued by a candidate after Election Day.

62 Finally, the *M.E.A.* does not impose a requirement that a candidate, who incurs post litigation expenses or costs, must extend his/her election campaign period so as to bring those costs into the campaign expenses provision of the *Act*.

63 It may be open to extend the definition of expenses to include "expenses related to a re-count" and "expenses related to proceedings of a controvert election - section 83", including the costs of a lawyer or scrutiniser, on a re-count for example. Such an extension would, in short, be in relation to costs other than legal fees and disbursements incurred by an unsuccessful candidate pursuing post election litigation costs but most certainly would not apply to the costs of an unsuccessful candidate, who chooses to pursue court action in his capacity as a voter, in relation to vote count irregularities, as Mr. Di Biase did.

64 My findings in this regard are fortified by the fact that there is an absence of a parallel extended definition in the "contributions" provisions of section 66 to that set out in the "expense" provision of 67 of the *M.E.A.* to show that the funding of such an "expense" is not a "contribution".

65 The plain wording of section 67 of the *M.E.A.* is determinative. The definition of campaign expenses section 67 (1) of the *M.E.A.* including the extended definition under section 67 (2) of the *M.E.A.* relates to costs incurred by a candidate "for use in his or her election campaign".

66 Mr. Di Biase pursued his post election litigation in a capacity as a voter and not as a candidate. The *M.E.A.* gave Mr. Di Biase the option to choose to treat his litigation costs as expenses of a candidate by invoking Rule 5. He chose not to do so. Mr. Di Biase's re-count and controvert post election litigation costs do not therefore fall within the definition of "campaign expenses" section 67 (1) of the *M.E.A.* or extended definition of "campaign expenses" under section 67 (2) of the *M.E.A.* The definition of campaign contributions in section 66 relate to funds accepted by a candidate "for his or her election campaign".

67 Mr. Di Biase pursued his post election litigation as a voter and not as a candidate. The funds paid toward the post election litigation were all outside the ambit of the contribution and expense provisions set out in sections 66 and 67 of the *M.E.A.*

Return of Contributions as soon as Possible - Section 66 and 69(1)(m) of the *M.E.A.* - Counts 6 and 7

68 In order to prove the offences set out in counts 6 and 7 the evidence must prove:

1. The payments to Stamm Research were contributions under section 66 of the *M.E.A.*;
2. Mr. Di Biase failed to return such contributions, namely 5,000 dollars, to Anacond Contracting Inc. which were paid to Stamm Research on behalf of Mr. Di Biase (count 6) and 9,230 dollars to Land Mark Consulting and Development Inc., which sums were paid to Stamm Research on behalf of Mr. Di Biase (count 7).

"Contribution" - Section 66

69 I have already determined that Mr. Di Biase's post election litigation costs were incurred by him as a voter and not a candidate and that money received by Mr. Di Biase to offset post election litigation expenses were similarly received by him as a voter and not a candidate. I therefore find that the payments made by Anacond (count 6) and Land Mark (count 7) were not "contributions".

"As Soon As Possible" Section 69(1)(m)

70 The *M.E.A.* in section 69(1) provides:

> "A candidate shall ensure that 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".

71 This case proceeded by way of an agreed upon statement of facts which set out the evidence before this court. There is no evidence that anyone, including the defendant or the City of Vaughan, demanded that Stamm recognize these payments as "contributions" and that Stamm return them to Anacond and Land Mark. There is no evidence suggesting and no reason to believe that Stamm

would have simply returned these payments if requested to do so. The agreed statement of facts provide that on or about November 4, 2008, the amounts paid by Anacond and Land Mark were re-paid by Di Biase rather than returned by Stamm. There is no evidence to suggest that Di Biase was in a position to return or repay those amounts before then.

72 The evidence respecting Mr. Di Biase's campaign finances is found in the various financial statements filed by Mr. Di Biase. Those financial statements show that during the material times his campaign finances were in a deficit position.

73 The alleged over contribution was received directly by Stamm Research an entity over which there is no evidence Mr. Di Biase exercised any control.

74 I adopt the reasoning of Justice Culver in Chapman v. Hamilton City, [2005] O.J. No. 1944, where he articulated the test for determining whether and over contribution has been returned as soon as possible for purposes of section 96(1)(m) of the *M.E.A.* in these words:

> "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."

75 In each case therefore "as soon as possible" depends upon the facts.

76 There is no evidence that Mr. Di Biase failed to return the alleged over contributions as soon as possible.

Limitation Issues - Counts 3, 5, and 20

77 The *Municipal Elections Act* provides in section 92(4):

> "no prosecution for a contravention of any of sections 69 to 79 shall be commenced more than one (1) year after the facts on which it is based first came to the informant's knowledge".

78 Mr. Di Biase faces three (3) charges that engage the one (1) year limitation provisions of section 92(4), namely, count 3, count 5 and count 20 set out in the information.

79 It is agreed by counsel that the informant is the City of Vaughan council.

80 The charges set out in counts 3, 5, and 20 were laid and the prosecution of these charges commenced September 3, 2009. The real issue is the date the facts upon which the prosecution related to these three (3) charges *first* came to the knowledge of the informant.

81 The defence says that date was April 23, 2008 which would place the commencement of the prosecution outside the one (1) year limitation. The prosecution says the date was May 25, 2009 following receipt of a compliance audit report, which would place the commencement of the prosecution inside the one (1) year limitation.

82 The information necessary to be available to the informant must reasonably be, and is expected to be, accurate and reliable and constitute essential and material averments (*Regina v. Fingold*, [1999] O.J. No. 369 (Gen. Div.). Once reasonably reliable information has come to light to the knowledge of the informant within the limitation period, an inquiry to check out and confirm the credible and persuasive nature of the information and knowledge regarding the contravention and

perpetrator may be carried out. The inquiry must occur *within* the limitation period as must the commencement of the charges.

83 Here the facts upon which the charges set out in counts 3, 5, and 8 first came to the informant's knowledge - April 23, 2008. The facts came in the form of sworn financial statements and court proceedings in which the City of Vaughan participated directly. Indeed, they were subsequently admitted as part of the agreed statement of facts. Alone they provided trustworthy, reliable and a complete basis for constituting the knowledge necessary to trigger the one (1) year limitation period set out in section 92(4) of the *M.E.A.* The fact that the City of Vaughan decided to conduct further investigations and to obtain a compliance report - which they received May 25, 2009 - cannot be used as a ground for delaying the commencement of the limitation period (*Regina v. Fingold*, supra ; also *St. Germain v. Bussen*, [2008] O.J. No. 408 (S.C.J).

84 *Indeed, the agreed statements of facts herein provide that the compliance audit report confirmed the accuracy of all the information and knowledge known to the informant, the City of Vaughan council, April 23, 2008.*

85 Section 92(4) makes no reference to steps which must be taken under the *M.E.A.* - such as obtaining a compliance audit report - as a condition of qualification for the requirement to commence an action within the one (1) year period prescribed by section 92(4) for those offences specified and which in this case involve offences set out in counts 3, 5, and 20. Nor is there any provision in the *M.E.A.* which would allow for or permit a form of judicial exemption to stop the limitation clock from running as suggested, by the prosecution, so that the charging body, The City of Vaughan, could obtain an Auditor's Compliance Report.

86 To suspend the limitation period of one (1) year set out in section 92(4) of the *M.E.A.* while awaiting receipt of an Auditor's Compliance Report in the circumstances of this case, when there was reliable trustworthy facts upon which the prosecution was based that first came to the knowledge of the informant sixteen and a half months before action is commenced does not comport with the integrity of section 92(4) of the *M.E.A.*

87 Suspending the limitation periods for an indefinite period would have the effect of creating serious prejudice to the candidate, electorate and the electors and could undermine confidence in the electoral system as investigations and charges remained unresolved while candidates and voters faced the prospect of going to the polls again in the unsettled state.

88 The limitation provisions of section 92(4) do operate here and the prosecution of counts 3, 5, and 20 are statute barred as having been commenced more than one (1) year after the facts upon which they were based first came to the informant's knowledge.

Conclusion

89 For reasons given, I find Mr. Di Biase not guilty on counts 3, 4, 5, 6, 7, 8 and 20 and all those charges against him are dismissed.

cp/e/qllxr/qljxr/qlana

Lanno Torelli LLP
CHARTERED ACCOUNTANTS

7625 Keele Street, Concord, ON L4K 1Y4
Telephone: (905) 669-7412
Toronto Line: (416) 969-8207
Fax: (905) 669-7416

Joseph C. Lanno, CA
Domenic Torelli, CA
Paul Bagnariol, CA
Anthony Giordano, CA

June 27, 2011

C 4
COMMUNICATION
Compliance Audit Committee
June 29/2011
ITEM # - 1

Jeffery A. Abrams
City Clerk and Returning Officer
City of Vaughan
2141 Major Mackenzie Drive
Vaughan, ON
L6A 1T1

Re: Michael DiBiase compliance Audit Application

Dear Mr. Abrams,

We have been asked to review the claim filed by Carrie Liddy on June 21, 2011.

The applicant claims, in paragraph two of page one, that the 2010 financial statements "accounts for the payment of $54,938.31 and $17,764.29 towards recount expenses claimed as part of the 2006 deficit". This is incorrect. The financial statements of the previous campaign reflected a deficit of $74,822.60 and accounts payable of $76,339.53. Prior to the start of the 2010 campaign period, accounts payable of the 2006 campaign period of $54,938.31 were settled with creditors and were no longer payable and $17,764.29 were paid by the candidate personally. As these amounts are no longer payable the carry forward deficit reported in Part I of Box E has been adjusted to reflect this. A summary of these amounts is attached.

The applicant claims, at the bottom of page one and continuing at the top of page two, that the 2010 financial statements "reports moneys collected as a candidate in the 2010 election to pay the 2006 campaign recount expenses". This is incorrect. The adjustments in Note 1 were to remove amounts related to the 2006 campaign that were no longer payable, either by way of settlement by the creditor or payment by the candidate. No funds from the 2010 campaign contributions were used to settle the liabilities of the 2006 campaign. The statement of campaign period income and expenses only reflects transactions related to the 2010 campaign.

Yours truly,
LANNO TORELLI LLP
CHARTERED ACCOUNTANTS

Anthony Giordano

SUMMARY OF AMOUNTS REPORTED IN 2010 FIANCIAL STATEMENTS

Recovery of expenses

Fasken Martineau Invoice #193317 - 2006 Recount (Settled)	43,488.31
Adjustment of accrued accounting and legal fees to actual amounts invoiced	6,130.00
Reversal of 2006 election sign confiscation fees	5,320.00
	54,938.31

Payment of recount expenses by Candidate

Stamm Research Associates Invoice #001-07 - 2006 Recount	18,231.22
Application of remaining 2006 campaign cash balance	(466.93)
	17,764.29

7625 Keele Street
Concord, Ontario
L4K 1Y4
Phone: 905-669-7412
Fax: 905-669-7416

LANNO TORELLI LLP
CHARTERED
ACCOUNTANTS

Fax

To:	Jeffery A. Abrams	**From:**	Anthony Giordano
Attention:			
Fax:	905-832-8535	**Pages:**	3
Phone:	905-832-8585	**Date:**	June 27, 2011
Re:	Michael DiBiase Compliance Audit Application	**CC:**	

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C 5
COMMUNICATION
Compliance Audit Committee
June 29/2011
ITEM # – 1

SUPPLEMENTARY
AFFIDAVIT OF CARRIE LIDDY

I, CARRIE LIDDY, of the City of Vaughan in the Regional Municipality of York, MAKE OATH AND SAY AS FOLLOWS:

I depose this Supplementary Affidavit in further support of my Application requesting a compliance audit regarding the election campaign finances of Micheal DiBiase pursuant to Section 81 of the *Municipal Elections Act, R.S.O. 1996.*

Issue #1

In this case a review of the Michael DiBiase Financial Statement shows the following donations:

a. Name – 611428 Ontario Limited

Address - P.O. Box 663, 11333 Dufferin St., Maple, L6A 1S5
President or Business Manager - Lucia Milani
Cheque Signatory – Lucia Milani
Amount - $750.00

b. Name – 1714486 Ontario Limited

Address – 11333 Dufferin St., Maple, L6A 1S5
President or Business Manager – Cam Milano
Cheque Signatory – Cam Milani
Amount - $750.00

9. A review of corporate searches for this corporation (copy of which is attached as **Exhibit "B")** reveals that Lucia Milani is shown as an Officer or Director of 611428 Ontario Limied.

THIS AFFIDAVIT BEGINS AT #9

10. A review of corporate searches for this corporation (copy of which is attached as **Exhibit "C"**) reveals that Cam Milani is shown as an Officer or Director of 1714486 Ontario Limied.

11. A further review of these corporations reveals that these two corporations share a common address. Furthermore, these two Officers or Directors are in fact related as mother and son.

12. In further investigation, I discovered that in fact at least one other candidate also received a contribution from 611428 Ontario Limited. The other candidate was very helpful in providing me with a photocopy of the contribution cheque (copy of which is attached as **Exhibit "D"**) to verify the signatory. The photocopy in fact reveals that Cam Milani is the signatory of the contribution cheque of this donation.

13. Based on this information, there appear to be reasonable grounds to believe that these corporations are associated corporations as defined under section 256 of the Income Tax Act. These donations appear to create over-contributions totaling $750.00, in contravention of section 71 (1) of the Act. Based on the fact these corporations are both shown in the Di Biase Financial Statement as sharing a common address, and based upon the information of Cam Milani being the son of Lucia Milani and having signing authority of both corporations, it would appear that the candidate knew or ought to have known that these corporations may be or are associated. As

A result the over-contributions should have been returned prior to or at least at the time of filing Di Biase statement. I note similar cheque was returned by another candidate, Richard Lorello, for the same two corporations given the candidate was of the opinion they were related corporations.

14. Attached as Exhibit "E" is a copy of Lucia Milani's signature on the Roseanna DeFrancesca audit application. The signatures are distinct and Cam Milani being the signature on Lucia Milani corporation brings about substantive evidence these are related corporations. Based on the signing authorities, the immediate family relationship, another candidate returning one of the two cheque based on the issue the corporations are related, and both corporations having the same address, there is reasonable grounds that the candidate has contravened section 69(1) (m) of the MEA. An audit must be called if there are reasonable ground that the MEA has been contravened.

Issue #2

15. As a result of the outcome of the recount application filed by Di Biase, subsequent to the 2006 election, the candidate applied to the courts for a cost settlement. A cost agreement was ordered by Justice Howden and in the order, the City of Vaughan was ordered to pay Di Biase $183,863.54. In the same cost order, Di Biase was ordered to pay the previous Mayor Linda Jackson $1,820.00.

16. The 2010 claim for carry forward of recount expense and offsetting candidate donations does not include these amounts. This contravenes the MEA, as it is failure to claim money received. Attached as Exhibit "F"

17. The 2010 recount expenses claimed is $75,000. Attached is Exhibit "F" that outlines the recount expenses submitted to the courts by the candidate. The expenses are listed as being $372,244.76. The final financial statement Di Biase submitted for his 2006 campaign lists the recount expenses as $107,582.45. Attached as Exhibit "G".

18. The candidate has failed to report the proper expense and proper donations or recovery amounts and this then contravenes several sections of the MEA and necessitates a full audit of both the donations and expenses with regards to the recount deficit claimed on the 2010 financial return.

Issue #3

19. On the 2010 return filed by the candidate, Di Biase claims "recovery of expenses as a result of the settlement of liabilities , from immediately preceding election" in the amount of $54,938.31. The candidate fails to outline the source of the donations and fails to detail the source, or amount recovered from each donor. This then contravenes several sections of the MEA and necessitates a full audit and full disclosure on the source and amount of each donor.

20. Di Biase then lists $17,764.29 as "recount expenses, from immediately preceding election, paid by candidate". This amount is not reported on the 2006 return and does not reconcile with the court ordered cost settlement, nor the recount expenses claimed on the court cost submissions to court, nor with the 2006 final return. Di Biase then claims $2,120.00 as deficit carry forward and this amount is then recovered from Di Biase 2010 donations. Attached as Exhibit "G"

A full audit is required. This then contravenes several sections of the MEA. Using campaign donations for personal expenses is a contravention of the MEA as is failure to report.

Issue #4

21. The ruling of Justice Wright para 47 outlines an amount of $500,000 was paid by Di Biase. Attached as Exhibit "H". Again a different amount is used in another court case, and this amount is not reconciled on the 2010 return. This then contravenes the MEA given the failure to properly report the recount expenses, and the misrepresentation of the costs as $75,000.

Further para 66 states "The MEA gave Mr Di Biase the option to choose to treat his litigation costs as expenses of a candidate by invoking rule 5. He chose not to do so. He chose not to do so. Mr Di Biase's re-count and controvert post election litigation costs do not therefore fall within the definition of "campaign expense" section 67 (1) if the MEA or extended definition of "campaign expenses" under section 67 (2) of MEA." Based on the ruling of Justice Wright, it has already been determined that these expenses are not campaign expenses. As such, the Audit Committee has no choice but to proceed with charges against Di Biase.

22. Attached as Exhibit "I" is the ruling of Justice Kenkel . It agrees with the ruling of Justice Wright regarding the statutory limitations of the MEA. The audit committee has responsibility for two roles under the Act, those being: 1) call on audit on the finances if it is responsible that the MEA has been contravened. The test is a low standard as outlined by Justice Favret. The audit committee must

appoint an auditor in this case, given the reasonable chance contraventions have occurred. 2) the audit committee must then lay charges, when it is *first* known that contraventions have occurred. This is outlined in both Justice Wright and Justice Kenkel's rulings attached. The audit committee must immediately lay charges under the MEA and prosecute the candidate given the existing rulings and the filing of the 2010 filings that contravene this ruling. The audit committee must not wait for the results from the audit. As stated during the trial of Linda Jackson, the charges can be amended upon receipt of the audit.

Issue #5

23. The Audit Committee of the City of Vaughan is both a committee of council and an administrative tribunal established under the statutes that govern administrative tribunals in Ontario. It is a firm and clear legislated rule that applicants that seek justice with an administrative tribunal in Ontario HAVE TO BE HEARD. As such, this committee has been improperly convened. The Vaughan City Clerk was made aware immediately after and several times following, the setting of the date for this hearing, that I could not attend. The Clerk made no effort to seek my availability prior to setting the hearing date and made no attempt to resolve the conflict after being notified I could not attend. The Clerk relied on other committee procedures, such as the Committee of Adjustment, that I note has already been held to contravene several sections of the Municipal Act by Amberley Gavel, the legal firm hired by the Association of Municipalities of Ontario under the closed meeting sections of the Municipal Act. The ruling is available upon request of the Audit committee.

24. I am requesting that this committee re-convene a public meeting at a time when I can attend and within the thirty days designated under the MEA to reach a decision, in order that I may satisfy my rights to be heard. Failure to do so, and depending on the outcome of the Audit committee's ruling, I intend on appealing this matter to the regular courts and in any event due to the newly enacted saving provision in the MEA, I may go directly to court at any time for any matter.

Declared before me)
at the City of Vaughan)
in the Regional Municipality)
of York this 29th day)
of Jun 20 11)

Signature of Declarant

Jeffrey A. Abrams
City Clerk, City of Vaughan
A Commissioner, etc.

Exhibit B

Request ID: 013289129
Transaction ID: 44710631
Category ID: (C)CC/E

Province of Ontario
Ministry of Government Services

Date Report Produced: 2011/06/27
Time Report Produced: 10:16:58
Page: 1

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

This is exhibit "B" to the Affidavit/Declaration of CARRIE LIDDY sworn before me this 29th day of June, 20 11.

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name	Incorporation Date
611428	611428 ONTARIO LIMITED	1985/01/22

Jurisdiction	Corporation Type	Corporation Status	Former Jurisdiction
ONTARIO	ONTARIO BUSINESS CORP.	ACTIVE	NOT APPLICABLE

Registered Office Address	Date Amalgamated	Amalgamation Ind.
	NOT APPLICABLE	NOT APPLICABLE
44 UPLANDS AVNEUE, BOX 790	New Amal. Number	Notice Date
	NOT APPLICABLE	NOT APPLICABLE
THORNHILL ONTARIO CANADA L3T 4A5		Letter Date
		NOT APPLICABLE

Mailing Address	Revival Date	Continuation Date
	NOT APPLICABLE	NOT APPLICABLE
11333 DUFFERIN STREET		
MAPLE ONTARIO CANADA L6A 1S5	Transferred Out Date	Cancel/Inactive Date
	NOT APPLICABLE	NOT APPLICABLE
	EP Licence Eff.Date	EP Licence Term.Date
	NOT APPLICABLE	NOT APPLICABLE

Number of Directors Minimum	Number of Directors Maximum	Date Commenced in Ontario	Date Ceased in Ontario
UNKNOWN	UNKNOWN	NOT APPLICABLE	NOT APPLICABLE

Activity Classification

FINANCE/INSURANCE INDUSTRIES INCL. HOLDING & INVES

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
611428	611428 ONTARIO LIMITED

Corporate Name History	Effective Date
611428 ONTARIO LIMITED	1985/01/22

Current Business Name(s) Exist: NO

Expired Business Name(s) Exist: NO

Administrator:
Name (Individual / Corporation)

LUCIA
MILANI

Address

11641 DUFFERIN STREET

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
1987/07/08	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
DIRECTOR		Y

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
611428	611428 ONTARIO LIMITED

Administrator:
Name (Individual / Corporation)

LUCIA

MILANI

Address

11641 DUFFERIN STREET

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
1987/07/08	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
OFFICER	PRESIDENT	Y

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
611428	611428 ONTARIO LIMITED

Last Document Recorded

Act/Code	Description	Form	Date
CIA	ANNUAL RETURN 2006	1C	2007/07/12 (ELECTRONIC FILING)

THIS REPORT SETS OUT THE MOST RECENT INFORMATION FILED BY THE CORPORATION ON OR AFTER JUNE 27, 1992, AND RECORDED IN THE ONTARIO BUSINESS INFORMATION SYSTEM AS AT THE DATE AND TIME OF PRINTING. ALL PERSONS WHO ARE RECORDED AS CURRENT DIRECTORS OR OFFICERS ARE INCLUDED IN THE LIST OF ADMINISTRATORS.

ADDITIONAL HISTORICAL INFORMATION MAY EXIST ON MICROFICHE.

The issuance of this certified report in electronic form is authorized by the Ministry of Government Services.

Exhibit C

Request ID: 013289022
Transaction ID: 44710354
Category ID: (C)CC/E

Province of Ontario
Ministry of Government Services

Date Report Produced: 2011/06/27
Time Report Produced: 10:07:57
Page: 1

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

This is exhibit "C" to the Affidavit/Declaration of Carrie Hood sworn before me this 29th day of June, 20 11

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name	Incorporation Date
1714486	1714486 ONTARIO LIMITED	2006/10/26

Jurisdiction
ONTARIO

Corporation Type	Corporation Status	Former Jurisdiction
ONTARIO BUSINESS CORP.	ACTIVE	NOT APPLICABLE

Registered Office Address

11333 DUFFERIN STREET
PO BOX 663

MAPLE
ONTARIO
CANADA L6A 1S5

Mailing Address

268 MARKHAM RD.

SCARBOROUGH
ONTARIO
CANADA M1J 3C5

Date Amalgamated	Amalgamation Ind.
NOT APPLICABLE	NOT APPLICABLE
New Amal. Number	**Notice Date**
NOT APPLICABLE	NOT APPLICABLE
	Letter Date
	NOT APPLICABLE
Revival Date	**Continuation Date**
NOT APPLICABLE	NOT APPLICABLE
Transferred Out Date	**Cancel/Inactive Date**
NOT APPLICABLE	NOT APPLICABLE
EP Licence Eff.Date	**EP Licence Term.Date**
NOT APPLICABLE	NOT APPLICABLE

Number of Directors Minimum	Number of Directors Maximum	Date Commenced in Ontario	Date Ceased in Ontario
00001	00005	NOT APPLICABLE	NOT APPLICABLE

Activity Classification

NOT AVAILABLE

Request ID: 013289022
Transaction ID: 44710354
Category ID: (C)CC/E

Province of Ontario
Ministry of Government Services

Date Report Produced: 2011/06/27
Time Report Produced: 10:07:57
Page: 2

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
1714486	1714486 ONTARIO LIMITED

Corporate Name History	Effective Date
1714486 ONTARIO LIMITED	2006/10/26

Current Business Name(s) Exist: NO

Expired Business Name(s) Exist: NO

Administrator:
Name (Individual / Corporation)

CAM
MILANI

Address

11333 DUFFERIN STREET
BOX 663

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
2006/10/27	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
DIRECTOR		Y

Request ID: 013289022
Transaction ID: 44710354
Category ID: (C)CC/E

Province of Ontario
Ministry of Government Services

Date Report Produced: 2011/06/27
Time Report Produced: 10:07:57
Page: 3

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
1714486	1714486 ONTARIO LIMITED

Administrator:
Name (Individual / Corporation)

CAM
MILANI

Address

11333 DUFFERIN STREET
BOX 663

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
2006/10/27	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
OFFICER	PRESIDENT	Y

Administrator:
Name (Individual / Corporation)

CAM
MILANI

Address

11333 DUFFERIN STREET
BOX 663

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
2006/10/27	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
OFFICER	SECRETARY	Y

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
1714486	1714486 ONTARIO LIMITED

Administrator:
Name (Individual / Corporation)

CAM

MILANI

Address

11333 DUFFERIN STREET
BOX 663

MAPLE
ONTARIO
CANADA L6A 1S5

Date Began	First Director	
2006/10/27	NOT APPLICABLE	
Designation	**Officer Type**	**Resident Canadian**
OFFICER	TREASURER	Y

Certified a true copy of the data as recorded on the Ontario Business Information System.

Director
Ministry of Government Services
Toronto, Ontario

CORPORATION PROFILE REPORT

Ontario Corp Number	Corporation Name
1714486	1714486 ONTARIO LIMITED

Last Document Recorded

Act/Code	Description	Form	Date
CIA	ANNUAL RETURN 2009	1C	2010/08/25

THIS REPORT SETS OUT THE MOST RECENT INFORMATION FILED BY THE CORPORATION ON OR AFTER JUNE 27, 1992, AND RECORDED IN THE ONTARIO BUSINESS INFORMATION SYSTEM AS AT THE DATE AND TIME OF PRINTING. ALL PERSONS WHO ARE RECORDED AS CURRENT DIRECTORS OR OFFICERS ARE INCLUDED IN THE LIST OF ADMINISTRATORS.

ADDITIONAL HISTORICAL INFORMATION MAY EXIST ON MICROFICHE.

Exhibit D

This is exhibit "D" to the Affidavit/Declaration of CARRIE LIDDY sworn before me this 29th day of June, 2011

611428 ONTARIO LIMITED
P.O. BOX 663, 11333 DUFFERIN ST.
MAPLE, ONTARIO L6A 1S5

0993

DATE 2011/01/24 (YYYY/MM/DD)

PAY to the order of Rosanna DeFrancesca 2010 Campaign | $ 750.00 CR

Seven hundred 00/100 DOLLARS

HSBC Bank Canada
70 YORK STREET
TORONTO, ONTARIO M5J 1S9

RE:

611428 ONTARIO LIMITED

PER

⑈000⑈

Exhibit E

VAUGHAN

October 25, 2010 Municipal Elections
City of Vaughan

RECEIVED
JUN 23 2011
1:13 p.m.
CITY OF VAUGHAN
CLERKS DEPARTMENT

APPLICATION FOR A COMPLIANCE AUDIT

Name of Applicant: Lucia Milani

Address: 11641 Dufferin St. PO Box 663, Maple, ON L6A 1S5

State the location or description of the property that qualifies the applicant as a voter in Vaughan: 11 Dufferin St.

Telephone: 905-417-9591 E-mail Address: milanigroup@bellnet.ca

I believe the following candidate has contravened the *Municipal Elections Act, 1996,* relating to election campaign finances.

Candidate _Rosanna De Francesca_____ (name) for the office of: (*check one*)

☐ Mayor ☐ Local and Regional Councillor ☐ Councillor Ward __3___

SECTION/PROVISION OF THE *MEA*	COMMENTS
See Attached	See Attached
	This is exhibit "E" to the Affidavit/Declaration of CHARLIE LIDDY sworn before me this 29th day of June, 20 11.

Please add any other information that you feel is relevant by attaching additional sheets as necessary
NOTE: City Council may recover costs from an Applicant if a finding is made that there were no reasonable grounds for the Application.

Declaration of Applicant

I, the undersigned applicant, am entitled to vote for members of Vaughan City Council according to the *Municipal Elections Act 1996.* I have reasonable grounds for believing that the candidate has contravened a provision of the *Municipal Elections Act, 1996*, relating to election campaign finances. I believe the facts and information submitted above to be true and I understand that City Council may be entitled to recover costs from me. I hereby request a compliance audit of the candidate's campaign finances.

Date: June 23, 2011

Signature: Lucia Milani

The personal information on this form is collected under the authority of the *Municipal Elections Act, 1996,* and will be used for the purpose of the compliance audit process and will be available for public inspection in the office of the City Clerk, City of Vaughan until the next municipal election. Questions about this collection of personal information should be directed to the City Clerk, 2141 Major Mackenzie Drive, ON L6A 1T1, 905-832-8504.

Total number of pages of the application : 20 Pages (not including this cover letter) + Exhibits

Exhibit F

COURT FILE NO.: CV-06-082191
DATE: 20070917

This is exhibit "F" to the Affidavit/Declaration of CHARLIE LIDDY sworn before me this 29 day of June, 20 11.

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michael Di Biase (Applicant)
v.
Corporation of the City of Vaughan, John Leach and Linda Jackson (Respondents)

BEFORE: THE HONOURABLE MR. JUSTICE P.H. HOWDEN

COUNSEL: S. Makuch, J. Ayres, and N. Auty, for the Applicant

G. Rust-D'Eye, for the City of Vaughan and John Leach

A. Jeanrie, for Linda Jackson

COSTS ENDORSEMENT

[1] On April 11, 2007, I delivered Reasons for Judgment on an application by Michael Di Biase seeking an order declaring invalid the election of Linda Jackson for the office of Mayor of Vaughan. He sought a new mayoral election. In the alternative, he requested a full manual recount or a recount of disputed ballots, all under the authority of the *Municipal Elections Act (MEA)*. Mr. Di Biase brought a second application seeking judicial review of certain decisions of the City clerk acting as Chief Electoral Officer, and claiming similar relief to that sought under the *MEA*. The applications were heard together on April 3 and 4, 2007. Preliminary motions were heard on March 28.

[2] The applicant was successful in obtaining an order for a recount, including a manual recount of 1656 ballots which were received by the vote tabulating machines (VTMs), but were not counted for any candidate. He succeeded on one of the alternate remedies requested in the

MEA application. The principal relief sought by him – and this was repeatedly emphasized throughout the presentation on behalf of the applicant – was the declaration of invalidity and a new election for mayor. That relief was not granted because the only ground on which the applicant was successful on the evidence adduced before me was the failure of the VTMs to count the 1656 over and under voted ballots, or to return them for correction, as well as the refusal of the clerk to allow a physical inspection of the ballots prior to the municipal recount. I found that the computer programming resulted in a likely disenfranchisement of a significant number of voters for the office of mayor, and that a recount would suffice to remedy the problem because the ballots were all available. There was no evidentiary support for the other four grounds advanced by the applicant on the *MEA* application nor for the grounds for the judicial review application which, save for the refusal of inspection of the 1656 votes, was dismissed.

[3] The result of the ensuing recount following my decision was remarkably similar to the results on election night and at the municipal recount – a plurality in favour of the respondent Linda Jackson of 90 votes[1]:

		Vote Increase Over Municipal Recount Totals
L. Jackson	28,448	(+46)
M. Di Biasc	28,358	(+50)
		(+96)

[4] Therefore, 96 additional votes resulted from the last recount as a result of this court's order, but they were divided almost equally. Of course, before the recount it was not known and

[1] Election Night: Jackson, 28,396
Di Biase, 28,306
Plurality, 90
First recount: Jackson, 28,402
Di Biase, 28,308; Plurality, 94

could not have been predicted how many additional votes would arise for each candidate from the 1656 votes not counted on election night. I found that the number of potential ballots in question vastly exceeded the plurality of the winner after the municipal recount, hence the need for the second recount. There is no question that Mr. Di Biase was successful on a secondary category of relief in the *MEA* application but in the end, he failed both in gaining a second election and in winning the recount.

[5] The evidential base for the two applications was similar. The judicial review application relied on somewhat different grounds, but, because of the range of Mr. Di Biase's objections in the *MEA* application, the evidential base required for the judicial review application was within the ambit of the evidence under the *MEA* application.

[6] The applicant claims for fees and disbursements in the following amounts (without GST):

(i)	Preparation, research and hearing of application (partial indemnity):	$201,369.50	
(ii)	City's motion to strike or summarily dismiss the application (partial indemnity):	$ 62,072.50	
(iii)	Post-hearing attendances for recount:	$ 19,078.50	
(iv)	For post-hearing matters and cost submissions (partial indemnity):	$ 4,129.50	
	Total fees claimed:		$286,650.00
(v)	For disbursements:		$ 85,594.76
Total			**$372,244.76**

The item (iii) claim for substantial indemnity costs on the recount is made against the City and City clerk only. Items (i), (ii), (iv) and (v) are claimed against all three respondents.

[7] The respondent Linda Jackson seeks costs against the applicant and/or the respondents City of Vaughan and John Leach (the clerk) on a substantial indemnity basis. Ms. Jackson's claim is broken down as follows:

(a)	Preliminary matters regarding initial litigation announced by the applicant's then counsel, conferences and telephone conference before Shaughnessy J.:	$ 2,730.00	
(b)	On the municipal recount:	$33,744.75	
(c)	On the two applications including preliminary motions:	$99,555.00	
(d)	On final recount:	$24,639.50	
	Total fees claimed:		$160,669.25
(e)	For disbursements:		$ 4,642.35
	Total:		**$165,311.60**

[8] In the alternative, she claims on a partial indemnity basis the following for all but the final recount:

For fees:	$90,686.50
For disbursements:	4,642.39
Total:	**$95,328.89**

Including item (d), Ms. Jackson's alternate cost claim is $115, 326 for fees plus disbursements.

[9] The respondents City and the City clerk take the position that this is not an appropriate case for a costs award and each party should bear their own costs. The following grounds are cited in support of this position:

(i) success was divided in respect of both the applicant Di Biase and the respondent Jackson;

(ii) the case raised two issues which were novel and of public importance;

(iii) where the two major contestants took opposite positions on the validity of the election and the recount issues, the City did not have the option to concede or settle the proceedings by agreeing to a new election or a recount;

(iv) the following factors of the civil rule on costs, Rule 57.01 apply to the applicant's conduct, described as a "scattershot" approach:

(e) the conduct of any party that tended to ... lengthen unnecessarily the duration of the proceeding,

(g) a party's denial of or refusal to admit anything that should have been admitted.

[10] On receiving the submissions, I directed that both Jackson and Di Biase had the right to respond to the briefs of the City and each other and that the City should respond to the cross-claims on behalf of both Mr. Di Biase and Ms. Jackson, particularly as to quantum and the scale of costs. I did not foreclose the City's right to counter in reply the submissions on behalf of the applicant or the respondent Ms. Jackson regarding entitlement to costs.

[11] I have received written submissions from all parties, both their initial and reply briefs.

[12] I have no difficulty in reaching the conclusion, having considered all of the relevant submissions, that both the applicant Michael Di Biase and the respondent Linda Jackson are entitled to costs. The judicial review application was, I find, a surplus proceeding which added nothing substantial to the applicant's position, the relevant evidence, or the relief granted. No party claimed costs due to the bringing of the judicial review application or its dismissal.

[13] I found that an administrative decision made by the clerk to accept the restrictive programming of the VTMs ran counter to his report to Council when the decision to rent the VTMs was before it.

> In the clerk's evidence by affidavit on this application, no explanation whatever is provided for his unilateral decision to accept programming of the machines so that an over-voted ballot would not be returned or replaced for a correction and would not be counted as a vote.

This was the same official who, prior to the election, had reported to council favouring rental of the machines on the grounds that the VTMs would return over-voted ballots to allow the voter an opportunity to enter a valid ballot, thus saving otherwise lost votes. The clerk's report to council in favour of renting the VTMs in question was in line with the well known democratic principles promoting enfranchisement of voters in *Haig v. Canada* [1993] S.C.R. 995 (S.C.C.) at paras. 129 - 131. It was the clerk's turn away from his own reasoning and his ill-informed decision to accept computers programmed to not count and not return over or under voted ballots without notice to voters which resulted in the court-ordered recount. Neither candidate was responsible for that decision of the City and its chief administrative officer, who then proceeded to compound the problem by refusing the right of candidates' representatives to view the actual 1656 ballots in question. The City could advance no explanation or authority to explain this administrative decision.

[14] Though the failure of the applicant on all but one of his several attacks on the election result, including his principal attempt to invalidate the whole election, should properly affect the quantum of costs, it does not take away from his success on his alternate request for a recount which the City and Jackson resisted throughout.

[15] I do not see this case as one of divided result. The applicant succeeded on a secondary request, and the City and City clerk failed to substantiate consistency with *MEA* principle. The application was allowed to the extent of a recount by the VTMs and examination and rulings on the 1656 missed ballots. Close to 100 of these were counted in the end, more than Ms. Jackson's plurality. The major preliminary motion, in time and impact if successful, was the motion by the City for summary dismissal, on which the City was not successful. In fact, I found that the motion was probably not appropriate in the circumstance of this case because of the tight time restrictions in the *MEA* and the direction in subsection 83(5) that such applications are to be dealt with summarily in any event. I stated:

> Therefore, the purpose of the summary disposition will be fulfilled, in any event, with the added benefit to the public and the candidates that *bona fide* issues clouds over a close election are aired and deliberated conditionally.

In my view, the costs sought by the applicant in regard to this motion are grossly excessive and I will deal with that in the course of my award. The application under the *MEA* succeeded in obtaining a recount over the resistance of the City and City clerk supported by Ms. Jackson, and in face of a failed and unnecessary motion by the City to dismiss summarily where summary treatment was mandated in any event by statute.

[16] The law applied to this case was not novel. Neither was the involvement of VTMs and their programming issues, and the consonance of such programming with principles of law. This case was well within the legal principles found in *Haig v. Canada* [1993] S.C.J. No. 84, *Montgomery v. Balkissoon* [1998] O.J. No. 1569 (Ont. C.A.) and *Devine v. Scarborough* [1995] O.J. No. 511. This case provided a wider, more detailed set of legal and factual issues than the prior cases. It resulted in a fully considered set of rules for the recount (attached as a schedule to my ruling on the carrying out of the recount released on April 17, 2007), which I am surprised

have not been published as a resource to municipal officials and lawyers facing judicially ordered recounts in the future. They were developed from helpful submissions by counsel for all parties. In any event, this is not a case for refusal of costs on the ground of novelty of law.

[17] The City's reliance on the inappropriateness of its settling the matter is also not a reason to deny costs to the candidates. In this case, the City took a strong position in opposition to the application, including any recount. I raised the possibility of a recount myself prior to hearing the application, but I was informed in no uncertain terms that the City saw no reason for one, despite the knowing decision of the clerk (for which the City is responsible in law) to not see to the proper programming of the VTMs as he himself had assured City Council.

[18] I will consider the conduct of the parties in respect of quantum issues. In view of the qualified success of the *MEA* application over the respondents' strong opposition following rejection of the preliminary dismissal motion, I do not see the applicant's conduct as precluding him from entitlement to costs.

[19] I am informed that there were offers to settle in this matter. On March 23, the applicant offered to withdraw the application if a joint press release containing four statements proposed by the applicant was issued by all parties. In a later letter, one of those statements was removed, referring to the VTM programming as being contrary to rulings of the Supreme Court of Canada. Neither version was accepted by the date of expiry of the offer, March 27, 2007. The respondent Jackson's offer before the hearing, I am told, was a proposal involving withdrawal of the application without costs. Finally, on March 27, 2007, the applicant presented another offer to settle, again requiring a joint press release including an admission that the use of the VTMs resulted in irregularities regarding the counting of ballots.

[20] The respondent City does not agree with the portrayal of the settlement proposals by the applicant. First, as to the March 23 proposal, counsel for the City submits that it would have "had the Municipality and its clerk declaring that the operation of the vote tabulators disenfranchised a significant number of voters, going far beyond the range of legitimate issues as ultimately determined by this Honourable Court." The City was ready to accept other paragraphs of the March 23 proposal. The offending clause stated, "The calibration of these vote tabulators caused an unfortunate occurrence whereby a significant number of voters were disenfranchised."

[21] I agree with and accept the City's submission in regard to the March 23 offer. This clause, coupled with the following clause of the applicant's proposal, if accepted in their generality, would have cast a huge shadow of doubt and uncertainty over the entire municipal election and not only for the office of mayor. In the end, the court found that 1656 ballots required manual checking and a recount of all ballots cast for mayor by the machines was warranted. The recount remedied the only problem found by the court and in the end no one was disenfranchised. The City could not have accepted the March 23 proposal and satisfy its citizens that the chief city official on council, i.e. the mayor, as well as others who succeeded on the same ballots, would have the political, democratic and moral authority to act in that capacity.

[22] As for the March 27 proposal, I have severe doubts as to its *bona fide* nature. It was put forward with an expiry date one day later, at 5:00 p.m. on March 28. I can understand perfectly well that it was unrealistic to expect the City Council to be called and to consider that proposal within such a short time period. An extension of one day was sought and was not granted by the applicant. No explanation for this refusal was given in reply by the applicant. I do not consider

the March 27 offer to be a *bona fide* attempt to settle this matter or to be a Rule 49 offer, carrying the costs consequences flowing from it.

The Applicant Michael Di Biase

[23] The applicant asks for costs of the court proceedings on a partial indemnity basis. Only for the recount itself does the applicant seek costs on a substantial indemnity scale. The applicant seeks costs against the City, City clerk and/or Ms. Jackson in regard to the court proceedings.

[24] As to the applicant's claim for costs against the respondent Linda Jackson, I see no basis in law or fact for this request. I found that the recount resulted from the following decisions of the City clerk:

(i) "to accept programming of the machines so that an over-vote would not be returned or replaced for a correction and would not be counted as a vote", despite his earlier report to council that the VTMs should be used because it "returns the ballot to the poll worker ... and the voter is then given the chance to vote on another ballot";

(ii) to set a minimum threshold for a vote to count for a candidate arbitrarily, without consideration of the importance of enfranchising voters and without graphic notice to voters that their votes would not count if less than 10% of the designated voting space was used; and

(iii) to refuse to allow inspection by candidates' representatives of the 1656 ballots in question.

[25] The applicant has failed to show any reason to award costs against the respondent Linda Jackson. Her counsel supported the City's unsuccessful motion to dismiss summarily, it is true; however, she did not bring that motion and her counsel did not delay or extend proceedings in making his very brief submissions in support of the City. Throughout each step of the election and recount process, Ms. Jackson was the successful party. It was not due to any action within

her responsibility or authority that the applicant's alternative request for a recount was granted. The applicant's principal request to invalidate the election was refused. Ms. Jackson had understandably, and on solid grounds, opposed that request.

[26] The applicant's request for costs against the City and City clerk on a partial indemnity basis on the *MEA* application and related court proceedings, and for the recount on a substantial indemnity basis, is granted, subject to reduction on two grounds. First, as can be seen from the large discrepancy between the claims by both mayoral candidates on a relatively complex two to three day hearing, the costs claimed by the applicant are beyond reason, beyond other parties' legitimate expectations and obviously excessive. Second, in my ruling on the City's motion to dismiss, I made the following statement which was directed to the applicant quite specifically. That direction was that he should consider carefully proceeding on grounds being relied on by him that had little or no evidentiary support. As the motion was preliminary, it was not possible for me to go beyond ruling that there appeared to be some evidence on one particular issue. However, the applicant had full knowledge of his case well before the hearing. My direction read as follows:

> I should add that while I have not discarded as an issue the final one mentioned (discriminatory conduct against Jewish voters in locating polling stations), it, as well as the alleged irregularities arising from paper and ballot jams, may well be answered by the City's material. However, on a summary motion such as this, I go no further except to remind the applicant to consider carefully what he asks for on the hearing of the application and the court's jurisdiction to award costs for protracting proceedings unnecessarily.

[27] The applicant's counsel proceeded to maintain his request to invalidate the entire election and to order a new election for mayor, and to rely on several grounds for which, in the end, there was clearly no evidentiary support. In doing so, he caused the respondents to expend time before

and after the court's warning to answer those complaints. The same state of affairs should have been evident to the applicant prior to the cross-examinations when he knew, or should have known, that all but one ground lacked support in the evidence.

[28] In relation to the voter identity and polling location issues, the applicant's conduct in proceeding on them in order to fulfill his aim of invalidating the election was close to frivolous. On the voter identity issue, I found there to be no evidence to support it. Only one person gave evidence in support and that evidence was answered by the respondents. There was no evidence of any voter having been deprived of the vote for lack of proof of identity. As to the allegation of discriminatory location of polling stations, the applicant proceeded to press this most serious charge despite the fact that he based it on information from two individuals, both of whom he knew to have refused to attend to be cross-examined by the counsel for the other parties. Their evidence could therefore not be used to support the application. The only other evidence founded by the applicant was from one rabbi, whose evidence was at best contradictory and at worst valueless. No one was required to enter a "House of Worship" of any religious institution in order to vote.

[29] The other ground which was unsuccessful related to ballots and paper jams. Again, the applicant's evidence failed to show anything more than that problems did occur, but they were dealt with without loss of any vote. In the case of paper and ballot jams, the applicant's evidence simply ignored that it was the memory cards in the machines which held the vote count and no evidence was produced to question the accuracy of those memory cards, or to show the loss of any ballots as a result of any ballot or paper jam.

[30] In my view, this proceeding was unnecessarily protracted both at the evidential stage and at the hearing by the applicant's refusal to desist from what he had threatened to attempt before the municipal recount, that is, to somehow void the election and secure another electoral opportunity for himself. The problem was that from at least two months after the election, when his evidence supporting the voter-discrimination ground was known to have disappeared, and the lack of evidence on all but the computer-programming ground would reasonably have been clear, the applicant simply lacked a case for anything but a limited recount. That the applicant himself was aware of his problem is apparent from his failure to bring forward an immediate application to void the election as he said (through his initial counsel) that he would. In fact, after putting forward that suggestion, he participated fully in the municipal recount of an election result that he was alleging was invalid. The City and the clerk, as well as Ms. Jackson, did oppose further inspection of the affected ballots and any further recount. In these circumstances, the City and its taxpayers rightly should pay a portion of the applicant's costs on the application, but not the full request.

[31] First, regarding the court-ordered recount, the applicant shall recover from the City his costs on a substantial indemnity basis in the amount sought, $20,000. I will deal with the City's objection to an award of costs for the recount later.

[32] Second, as to the costs of the applicant up to and including the cross-examinations, I am, of course, aware that commencement of a proceeding including all interviews and organizing of evidence is more costly than responding on much the same body of evidence. I see no reason for more than one counsel on the cross-examinations and the amount claimed is grossly excessive, well beyond the legitimate expectations of the respondents and bounds of fairness. A significant

portion results from the scorched earth attempt by the applicant to try to substantiate his primary aim of invalidating the entire election on any ground and from duplication of work. The applicant shall have costs on a partial indemnity basis of $50,000, not the $128,000 claimed.

[33] Regarding preparation and hearing of the motion to strike and hearing of the application, the applicant requests the following:

J. Ayres (171.5 hours)	$ 60,025
S. Makuch (101.4 hours)	$ 35,490
N. Auty (116.6 hours)	$ 26,235
S. Leisk (6.4 hours)	$ 1,890
A Hamilton (1.2 hours)	$ 270
Law Clerks	$ 60
	$123,960
For legal research	$ 7,098
Total	**$131,058**

[34] In my view, the applicant proceeded to protract the proceedings after the preparation and pleading phase by continuing his groundless quest for a declaration invalidating the election and by his scattershot approach and refusal to admit or concede any ground, however unsupported it was (Rule 57.01 (e) and (g)). In addition, the costs requested on the City's motion are simply beyond reasonable expectations and well beyond what is fair and reasonable in all the circumstances. The preparation and hearing time for all parties was unnecessarily extended and unnecessarily costly. The applicant's costs in this respect shall be reduced by two-thirds. Therefore, for fees on the unsuccessful City motion to strike and on the hearing of the application, the applicant's costs are fixed at $40,000 on a partial indemnity basis.

[35] The applicant's post-hearing claim for costs submissions, correspondence and telephone, and advice are granted, in the sum of $9,000 (rounded).

[36] The disbursements are to a great extent occasioned by information required from the VTM provider and for providing transcripts and records for the court. I will not allow the $20,731.22 expense to Stamm Research as he was not qualified as an expert witness in the field proposed by counsel.

[37] In summary, the applicant's costs to be paid by the City are fixed as follows:

Preparation and cross-examinations:	$ 50,000.00	
Hearing (March 28, 29 for ruling on motion, April 3, 4, and 11 for judgment):	$ 40,000.00	
Post hearing costs:	$ 9,000.00	
Recount:	$ 20,000.00	
Total fees:		$119,000.00
Disbursements:		$ 64,863.54
Total:		**$183,863.54**

The Respondent Linda Jackson

[38] As counsel for Ms. Jackson submits, a review of the cases involving electoral issues discloses that the court has sought to at least partially indemnify candidates for their legal expenses. In some cases it has been on a substantial or full indemnity basis. As I have found regarding the applicant, the City reasonably would have expected such an order.

O'Donohue v. Silva [1995] CanLII 623 (Ont. C.A.);
Devine v. Scarborough (1995) O.J. No. 511 (O.C.J. (Prov. Div.));
Harris v. City of Ottawa (1994) O.J. No. 3134 (Ont. Ct. Gen. Div.);
Janigan v. Harris (1989) 70 O.R. (2d) 5 (H.C.).

I see no reason for an award of substantial indemnity costs in Ms. Jackson's favour. It is well known that candidates raise money for their campaigns, that they have a strong personal interest in running, and that they stand to gain personal benefit. That said, I recognize that they also, of

course, undertake a public duty for community benefit. *Re Chapman et al* (1986) 53 O.R. (3d) 189 (Dist. Ct.), *Janigan v. Harris, supra.*

[39] There was no specific criticism of the reasonableness of this respondent's Bill of Costs. It was submitted by the City that a ceiling of $25,000 should be imposed. This is simply not the law, nor should I second-guess successful counsel unless the number of compensable hours is grossly excessive. The overarching principles are those of fair and reasonable amount of costs for the work required, considering the complexity of the proceeding and the reasonable expectations of the parties. *Minalu v. Simms* [2006] O.J. No. 603, citing *Zesta Engineering Limited v. Cloutier* (2002) 21 C.C.E.L. (3d) 161 (Ont. C.A.); *Stellarbridge Management Inc. v. Magna International (Canada) Inc.* (2004) 71 O.R. (3d) 763 (Ont. C.A.); Rule 57.01(1)(0.a) and (0.b); *Boucher v. Public Accountants Council (Ontario)* (2004) O.J. No. 2634 (Ont. C.A.).

[40] Ms. Jackson's costs are granted in the following amounts on a partial indemnity basis:

A. The following shall be paid by the applicant Di Biase:

Preliminary correspondence, telephone meetings re the applicant's notice to seek injunctive relief on ground of invalidating election and attendance on Shaughnessy J. (telephone conference):	$ 1,820.

B. The following costs are to be paid by the respondents and City of Vaughan and the clerk:

Fees on application under *MEA* and *Judicial Review Act*, Including pleadings, preparation, organization of evidence and cross-examinations, facta, preparation for hearing and hearing on March 28, 29 for ruling, April 3, 4 and 11 for judgment, and Bill of Costs submissions:	$66,370.00
Disbursements:	$ 4,642.39

[41] As to the costs for the two recounts, Ms. Jackson was successful in both. Mr. Di Biase requested costs as well for his participation in the court-ordered recount and I awarded them. It is suggested by the City that the court lacks jurisdiction to award costs beyond the proceedings in court, relying on *Martini v. Toronto (City)* [1990] 70 O.R. (2d) 637 (C.A.) where the Court of Appeal varied a Divisional Court order by deleting from the cost order "the non-judicial proceedings", i.e. the recounts. No reason or analysis was provided to support this conclusion. In *O'Donohue v. Silva, supra,* the Court of Appeal stated that the "appeal court judge is vested with a discretion and is entitled to determine to what extent the costs should be paid by the municipality." In that case, the appeal court judge had awarded costs including costs of the recount which the Court of Appeal did not see fit to vary for jurisdictional reasons.

[42] In the absence of a definitive statement based on some reasoned analysis from the Court of Appeal in support of the City's proposition and on review of the apparent difference in the appellate precedents, I conclude that I have jurisdiction on an application under the *MEA* to include a costs order in regard to the recount ordered by the court. It is a part of the legal procedures, processes and remedies provided for under that *Act* whereby a candidate can contest an electoral result and obtain from the court a recount on proper grounds, and it is reasonable and necessary that the candidates engage legal counsel for that purpose.

[43] For the court-ordered recount, the respondent Jackson shall have her costs of $24,639.50, plus fees of $66,370, plus disbursements of $4,642.39.

Conclusion

[44] It is ordered that the respondent City and City clerk are responsible for payment of the costs so fixed in favour of the respondent Linda Jackson in the sum of $91,009.50 plus disbursements of $4,642.39, a total of $95,651.89.

[45] It is ordered that the applicant shall pay Ms. Jackson's costs fixed at $1,820.

[46] It is further ordered that the City and City clerk shall pay the applicant's costs fixed in the sum of $119,000 plus disbursements of $64,863.54, totaling $183,863.54.

HOWDEN J.

DATE: September 17, 2007

Exhibit G

STATEMENT OF CAMPAIGN PERIOD INCOME AND EXPENSES

FROM January 10, 2006 TO December 31, 2007

FOR CANDIDATE Michael DiBiase

INCOME

	$
Candidate's Surplus from Immediately preceding election released by Clerk	3,996.31
Contributions (from Schedule 1)	280,750.00
Fund-Raising Activities (from Schedule 2, Part III)	
Interest Income	260.72
Other (provide full details):	
TOTAL CAMPAIGN PERIOD INCOME	285,007.03 A

EXPENSES

	Expenses Subject to Limitation	Expenses Excluded from Limitation	Total
Accounting & Audit	N/A	5,980.00	5,980.00
Advertising	48,001.39		48,001.39
Bank Charges	105.10		105.10
Brochures	20,580.17	N/A	20,580.17
Fund-Raising Expenses	N/A	118,080.93	118,080.93
Interest on Loans	N/A		
Inventory Contributed to Candidate's Campaign(from Schedule 3)		N/A	
Meetings Hosted		N/A	
Nomination Filing Fee	N/A		
Office Expenses	13,525.59		13,525.59
Recount Expenses	N/A	107,582.45	107,582.45
Salaries & Benefits/Professional Fees			
Signs	33,896.00	N/A	33,896.00
Voting Day Party/Appreciation Notices	N/A	12,078.00	12,078.00
Other (provide full details):			
TOTAL CAMPAIGN PERIOD EXPENSES	116,108.25	243,721.38	359,829.63 B

EXCESS (DEFICIENCY) OF INCOME OVER EXPENSES (A-B) (74,822.60)

This is exhibit "G" to the Affidavit/Declaration of CARRIE HIDDY sworn before me this 29th day of June, 20 11.

Form V5

STATEMENT OF CAMPAIGN PERIOD INCOME AND EXPENSES

FROM January 1, 2006 TO December 31, 2006

FOR CANDIDATE Michael DiBiase

INCOME

	$
Candidate's Surplus from immediately preceding election released by Clerk	3,996.31
Contributions (from Schedule 1)	258,400.00
Fund-Raising Activities (from Schedule 2, Part III)	
Interest Income	
Other (provide full details):	260.72
TOTAL CAMPAIGN PERIOD INCOME	262,657.03 A

EXPENSES

	Expenses Subject to Limitation	Expenses Excluded from Limitation	Total
Accounting & Audit	N/A	1,980.00	1,980.00
Advertising	48,001.39		48,001.39
Bank Charges	105.10		105.10
Brochures	20,580.47	N/A	20,580.47
Fund-Raising Expenses	N/A	118,080.93	118,080.93
Interest on Loans	N/A		
Inventory Contributed to Candidate's Campaign(from Schedule 3)		N/A	
Meetings Hosted		N/A	
Nomination Filing Fee	N/A		
Office Expenses	15,020.75		15,020.75
Recount Expenses	N/A	75,000.00	75,000.00
Salaries & Benefits/Professional Fees			
Signs	33,896.00	N/A	33,896.00
Voting Day Party/Appreciation Notices	N/A	12078.00	12078.00
Other (provide full details):			
TOTAL CAMPAIGN PERIOD EXPENSES	117,603.71	207,138.93	324,742.64 B
EXCESS (DEFICIENCY) OF INCOME OVER EXPENSES (A-B)			(62,085.61)

FORM V5

Ontario Ministry of Municipal Affairs and Housing

Financial Statement – Auditor's Report

Form 4

Municipal Elections Act, 1996 (Section 78)

Instructions

All candidates must complete Boxes A, B, C, D and E and Schedule 1. All candidates must complete Schedules 2, 3 and 4 as appropriate. Candidates who receive contributions or incur expenses in excess of $10,000 must also attach an Auditor's Report.

All surplus funds (after any refund to the candidate or his or her spouse) shall be paid immediately over to the clerk who was responsible for the conduct of the election.

For the campaign period from (day candidate filed nomination)	YYYY	MM	DD		YYYY	MM	DD
	2010	09	07	to	2010	12	31

☒ Primary filing reflecting finances to December 31 (or 45th day after voting day in a by-election)

☐ Supplementary filing including finances after December 31 (or 45th day after voting day in a by-election)

Box A: Name of Candidate and Office

Name of Candidate			
Last Name	First Name	Middle Initial	
DiBiase	Michael		
Mailing Address			
Suite/Unit No.	Street No.	Street Name	
	166	Riverview Avenue	
City/Town		Province	Postal Code
Woodbridge		ON	L4L 2L6
Telephone No. (incl. area code)		Fax No.	Email Address
Business	Home		
416-358-0400	905-851-3558		dibiase@rogers.com
Name of office for which the candidate sought election			Ward Name or No. (if any)
Local and Regional Councillor			
Name of Municipality			
City of Vaughan			

Box B: Summary of Campaign Income and Expenses

1.	My spending limit (as issued by clerk) was	$ 152,650.95
2.	Surplus (or deficit) from previous election See Note 1	$ (2,120.00)
3.	Total contributions received (from Schedule 1)	$ 140,276.24
4.	My total campaign expenses that were subject to the spending limit were (from Box C)	$ 121,289.36
5.	My total campaign expenses that were not subject to the spending limit were (from Box C)	$ 6,761.92
6.	Total of all campaign expenses (from Box C)	$ 128,051.28
7.	Election campaign surplus/deficit from current election (from Box E)	$ 10,104.96
8.	Contributions refunded to candidate or spouse (from Box E)	$ (10,104.96)
9.	Amount paid to clerk (from Box E)	$

Box C: Statement of Campaign Period Income and Expenses

From YYYY	MM	DD	To YYYY	MM	DD	For Candidate
2010	09	07	2010	12	31	Michael DiBiase

INCOME

Candidate's surplus from immediately preceding election released by the clerk	+	$	
Contributions from candidate	+	$	32,426.24
Contributions from spouse of candidate	+	$	
All other contributions	+	$	107,850.00
Revenue from fund-raising functions not deemed a contribution (from Schedule 2, Part III)	+	$	
Interest income	+	$	
Other (provide full details)			
1.	+	$	
2.	+	$	
3.	+	$	
Total Campaign Period Income	=	$	140,276.24 C1

EXPENSES (Note: Include the value of contributions of goods and services)

Expenses Subject to Spending Limit			
Advertising	+	$	34,269.72
Bank charges	+	$	140.00
Brochures	+	$	38,068.59
Interest on loan	+	$	
Inventory contributed to candidate's campaign (Schedule 3)	+	$	
Meetings hosted	+	$	15,570.60
Nomination filing fee	+	$	
Office expenses	+	$	914.97
Phone and/or Internet	+	$	2,711.50
Salaries and benefits/honoraria/professional fees	+	$	
Signs	+	$	12,974.64
Other (provide full details)			
1. Insurance	+	$	729.00
2. Flyers & distribution	+	$	11,613.51
3. Rent	+	$	4,296.83
Subtotal	=	$	121,289.36 C2
Expenses Not Subject to Spending Limit			
Accounting and audit	+	$	2,260.00
Costs of fund-raising function (from Schedule 2, Part IV)	+	$	
Expenses related to compliance audit	+	$	
Expenses related to controverted elections	+	$	
Expenses related to recounts	+	$	
Voting day party / appreciation notices	+	$	4,501.92
Expenses related to candidate's disability (provide details)			
1.	+	$	
2.	+	$	
3.	+	$	
Other (provide full details)			
1.	+	$	
2.	+	$	
3.	+	$	
Subtotal	=	$	6,761.92 C3
Total Campaign Period Expenses (C2) + (C3)	=	$	128,051.28 C4
Excess (Deficiency) of Income over Expenses (C1) – (C4)	=	$	12,224.96

Box D - Statement of Assets and Liabilities as at December 31 , 2010

Assets

Cash	+ $ 14,484.96	
Accounts receivable	+ $	
Value of inventory retained (from Schedule 4)	+ $ 90.00	
Other (provide full details)		
1.	+ $	
2.	+ $	
3.	+ $	
Total Assets	=	$ 14,574.96

Liabilities and Excess (Deficiency) of Income over Expenses

Accounts payable	+ $ 4,380.00	
Borrowings, overdraft	+ $	
Other (provide full details)		
1.	+ $	
2.	+ $	
3.	+ $	
Total Liabilities	=	$ 4,380.00

Box E - Statement of Determination of Surplus or Deficit and Disposition of Surplus

Part I – Determination of Surplus or Deficit

Amount of excess (deficiency) of income over expenses (from Box C)	+	$ 12,224.96	E1
Deduct: Any deficit carried forward by the candidate from immediately preceding election if the offices are with respect to the same jurisdiction	See Note 1	$ (2,120.00)	E2
Surplus (or deficit) for the campaign period (E1) – (E2)	=	$ 10,104.96	
Deduct: Any refund of contributions to the candidate or spouse (only if there is a surplus)	–	$ (10,104.96)	
Total Determination	=	$ 0.00	E3

Part II – Disposition of Surplus

If line E3 shows a surplus, the amount must be paid in trust, at the time the financial statements are filed, to the municipal clerk who was responsible for the conduct of the election.

Surplus paid to the municipal clerk of the municipality of _____

Box F - Declaration

I, MICHAEL DI BIASE, a candidate in the municipality of VAUGHAN, hereby declare that to the best of my knowledge and belief that these financial statements and attached supporting schedules are true and correct.

Declared before (clerk or commissioner)
in the City of Vaughan
on (yyyy/mm/dd) 2011/03/29.

Signature of Clerk or Commissioner

2011/03/04.
Date Filed in the Clerk's Office (yyyy/mm/dd)

Michael Di Biase
Signature of Candidate

Jeffrey A. Abrams
City Clerk, City of Vaughan
A Commissioner, etc.

Note 1

Deficit carried forward by the candidate from immediately preceding election, if the offices are with respect to the same jurisdiction.	(74,822.60)
Recovery of expenses as a result of the settlement of liabilities, from immediately preceding election	54,938.31
Recount expenses, from immediately preceding election, paid by candidate	17,764.29
Deficit carried forward by the candidate	(2,120.00)

Exhibit H

COURT FILE No.: Newmarket Courthouse 4911 999 10-90000058-00
Citation: *Corporation (City of Vaughan) v. Di Biase*, 2011 ONCJ 144

ONTARIO COURT OF JUSTICE

This is exhibit "H" to the Affidavit/Declaration of CARRIE LIDDY sworn before me this 29th day of June 20 11

B E T W E E N :

THE CORPORATION OF THE CITY OF VAUGHAN

— AND —

MICHAEL DI BIASE

Before Justice Peter J. Wright
Written Judgment following the Oral Ruling delivered in Court February 28, 2011

Mr. Tim Wilkin ..... Prosecutor for the Corporation of the City of Vaughan
Mr. Eric Gillespie & Mr. David M. Humphrey ..... for the defendant Michael Di Biase

Wright J.:

The Democratic Process of Voting

[1] The institutional, legal and cultural commitment to an open political process in Canada was capped in 1982 by the adoption of the *Canadian Charter of Rights and Freedoms* (*Charter*). Included in *The Charter* is a guarantee of the right of Canadian citizens to vote in elections and to stand for office in those elections.

[2] The proclamation of *The Charter* marked a defining moment in our Canadian history. Since 1982 courts in this country have consistently confirmed the right to vote and the concurrent right to ensure that every vote is counted and that every vote and voter is counted equally.

[3] To do so guarantees the continuance in Canada of a "free and democratic society", which are the very words enshrined in our *Canadian Charter of Rights and Freedoms*.

The Costs of Elections

[4] It is a matter of common sense and fundamental understanding that in our democratic process of elections money received and spent prior to an election has clear objectives: To assist the voters with election issues and to persuade voters to vote for candidates in whom they have confidence to govern.

[5] Equally so – it is a matter of common sense and fundamental understanding that once the election passes and the votes cast are fixed and final, money received and spent in post election activities to identify errors in the voting process has an entirely different objective: to ensure that each vote is counted and that each vote and voter is counted equally.

Our Laws

[6] Our laws in Canada encourage and support these resolves in our democratic process.

Election Day November 13, 2006 – City of Vaughan

[7] The events which occurred on Election Day on November 13, 2006 in the City of Vaughan and more particularly the post election aftermath which followed for months thereafter bring into sharp focus the democratic institution of the right to vote, to have those votes count and to have those votes and voters count equally.

[8] On November 13, 2006, 58,806 residents in the City of Vaughan cast their votes for Mayoral candidates Michael Di Biase or Linda Jackson. After the voting was complete the

[12] It is alleged that Michael Di Biase expended money and received contributions in relation to post election litigation costs in a manner that violated the *Municipal Election Act Ontario* as amended *Municipal Elections Act*, 1996 S.0 1996, c32 (*M.E.A.*). The specifics of these allegations are set out in counts 3 to 8 and count 20 of the information before this court.

Position of the Parties

The Defendant

[13] The Defendant principally raises two (2) defences. The first defence proceeds on the basis that Mr. Di Biase's involvement in the post election re-count proceedings and litigation was as a voter and not as a candidate. As such, the regulatory provisions of the M. E. A. relating to the conduct of a candidate were not engaged by Mr. Di Biase. At its core the defence asserts that the regulatory provisions in the *M.E.A.* have no application to Mr. Di Biase in the post election re-count litigation proceedings.

[14] The second defence proceeds through a review of each of the seven (7) charges Mr. Di Biase faces under the *M.E.A.* and concludes that the prosecution has not proven that Mr. Di Biase is guilty of any of the seven (7) charges.

The Prosecution

[15] The prosecution argues that Mr. Di Biase was a mayoral candidate in the 2006 Municipal Election in Vaughan as a candidate and not as a voter in the post election re-count litigation proceedings that followed. As a candidate Mr. Di Biase's conduct was governed by the regulatory provisions of the *M.E.A.* as it relates to candidates.

[16] The prosecution rejects the notion that Mr. Di Biase's involvement in the post election re-count litigation proceedings was as a voter and not a candidate.

[17] The prosecution further asserts that the evidence established that Mr. Di Biase is guilty of the seven (7) charges he faces under the *M.E.A.* and rejects the defence arguments to the contrary.

Ruling

[18] This case proceeded by way of an agreed statement of fact. It is the application of the law to the agreed facts that is in issue. I have carefully considered all of the evidence, the law, and the very thoughtful submissions of counsel – each of whom I thank for the professional manner in which they presented this case and assisted this court.

[19] For reasons which I will now articulate, I have concluded that either of the defences advanced are sufficient to allow me to find the defendant, Michael Di Biase, not guilty of all seven (7) charges against him, specifically counts 3, 4, 5, 6, 7, 8, and 20 of the information. All charges against Mr. Di Biase are dismissed.

Analysis

Introduction

[20] Mr. Di Biase is a teacher by profession. He has served as an elected official in the City of Vaughan for a long period of time. In 1985 he was first elected councillor. In 1988 he was elected Regional Councillor. In 2002 he was appointed Mayor of the City of Vaughan. In 2003 he was elected Mayor of the City of Vaughan. In 2006 he was defeated by Linda Jackson in the Mayoral race by 90 votes.

[21] Two (2) re-counts followed the 2006 Mayoral Election. The second re-count was conducted by Justice Howden of the Ontario Superior Court pursuant to a judicial order of that court. Substantial costs were incurred in the post election litigation which lead to the re-count order. It is the receipt and the expenditure of money by Mr. Di Biase in this post election re-count litigation that is the subject of the charges before the court.

[22] Like anyone charged with an offence Mr. Di Biase is presumed to be innocent. That presumption of innocence remained with Mr. Di Biase throughout the trial and could only be displaced by evidence that established Mr. Di Biase's guilt beyond a reasonable doubt.

[23] In order to succeed on counts 3, 4, and 5 the prosecution must prove that the post election litigation costs were "campaign expenses" under section 67 of the *M.E.A.*

[24] In order to succeed on count 6, 7 and 8 the prosecution must prove that the post election funds received and used to offset the post election litigation costs were "contributions" under section 66 of the *M.E.A.*

[25] Central to the prosecution's case is the requirement that Mr. Di Biase be found to have been engaged in the post election litigation and its associated costs as a "candidate" thereby invoking the regulatory provisions of section 66, 67 and 68 of the *M.E.A.*

[26] Mr. Di Biase asserts that he initiated and pursued his post election litigation as a voter and not as a candidate. He further asserts that as a voter he is not bound by the regulatory provisions of the *M.E.A.* that would apply to a candidate. With these submissions I agree.

Strict Interpretation of the *M.E.A.*

[27] There is considerable ambiguity in the provisions of the *M.E.A.* related to "expenses" and to "contributions".

[28] Even Mr. Wilkin, as prosecutor endorsed this notion when he remarked:

> "....this *M.E.A.* is not pretty legislation..."

and pointed out as well:

> "...the *M.E.A.*'s lack of detail creates problems..."

I agree with both of Mr. Wilkin's observations.

[29] But the *M.E.A.* is not just complicated and lacking in detail – it does create genuine ambiguity – with multiple interpretations being possible.

[30] As an example the court costs of over 183,000 dollars ordered by Justice Howden in the second re-count, to be paid by the City of Vaughan to Mr. Di Biase, only served to underscore this ambiguity.

[31] To proceed against Mr. Di Biase in relation to count 5 the prosecution asserted that the City of Vaughan's payment of over 183,000 dollars in court costs – which were paid directly to Cassels LLP constituted a payment of campaign "expenses".

[32] Section 69 (1) (c) of the *M.E.A.* requires that payment for all "expenses" made from the campaign be made from the campaign account yet here the City of Vaughan paid a portion of those expenses – over 183,000 dollars to Cassels LLP directly, in the same manner that the prosecution says Mr. Di Biase otherwise violated *M.E.A.* in relation to the substance

of count 5.

[33] Surely the City of Vaughan would not have paid over 183,000 dollars directly to Cassels LLP if it considered the payment to have been in respect of campaign "expenses" of a candidate but rather would have paid those funds into the campaign account as required under the *M.E.A.*

[34] The manner in which the City of Vaughan paid over 183,000 dollars directly to Cassels LLP would actually support rather than contradict Mr. Di Biase's position as a voter and would contradict rather than support the prosecution's position that Mr. Di Biase was a candidate in so far as "expenses" and "contributions" are concerned in count 5.

[35] If there is ambiguity in relation to the provisions of the *M.E.A.* in this regard that ambiguity must be resolved in favour of Mr. Di Biase so as not to preclude his right as a voter or the right of any voter to have access to the courts and to ensure the validity of the election process and proper counting of votes.

[36] To interpret the *M.E.A.* otherwise would be in conflict with the well established principles of strict interpretation. *Morguard Properties v. City of Winnipeg,* [1983] 2 S.C.R. 493; *Berardinelli v. Ontario Housing Corporation* [1997] 1 S.C.R. 275.

[37] In short, the general rule is this. In construing criminal and quasi – criminal statutes they should, where there is uncertainty or ambiguity of meaning, be construed in favour of, rather than against, a defendant *Regina vs McIntosh* [1995] 1 S.C.R. 686..

[38] The strict interpretations must apply in this case.

[39] I reject the prosecution's interpretation of the *M.E.A.* which would, in effect, curtail the right of a voter (who may have even been a candidate) to fund essential post election litigation costs. Contrary to our democratic institution to ensure that all votes are counted and that all votes are counted equally. It would impose impractical constraints on campaign expenses and contributions and such restrictions would otherwise make it impossible for a voter, who may have been a candidate, to fund the complex and very expensive litigation called for in the *M.E.A.* as undertaken by Mr. Di Biase.

[40] To accept the prosecution's interpretation would be to deny a voter who was candidate the very right otherwise given to all voters. Clearly that cannot be correct. The right of voters – a vital aspect of our democratic process is engaged. If the legislature had intended to deny a voter, who is also a candidate, the same rights available to a voter it would have said so expressly. There is no such express restriction or restraint in the M.E.A.

[41] In reviewing the *M.E.A.* carefully I have concluded that a fair and balanced interpretation of that legislation allows for just the type of assertion made by Mr. Di Biase namely, that he proceeded in post election litigation as a voter and not as a candidate.

The Purposive Interpretation of *M.E.A.*

[42] The *M.E.A.* must be interpreted "to give effect to its purpose and to achieve a coherent result, not absurd results", *R. v. Bell Express Vu Limited* Partnership [2002] 2 S.C.R. 559.

[43] The legislative purposes central to this case are set out in section 58, 63 and 83 of the *M.E.A.*

[44] These are the sections of the *M.E.A.* under which the post election litigation was initiated by Mr. Di Biase.

[45] These are the sections of the *M.E.A.* which provide a voter with access to the courts to ensure the integrity of the electoral process. If there were any doubt about this purpose one need look no further than the comments made by Justice Howden, when in ordering the judicial re-count in this case he referred to *Haig v. Canada,* [1993] 2 S.C.R. 995:

> "The right to vote is of fundamental importance to Canadians and our Canadian democracy. *Every effort should be made to interpret the statute (M.E.A.) to enfranchise the voter", Di Biase v. City of Vaughan.*

[46] If as the prosecution suggests, litigation seeking a re-count by Mr. Di Biase could only be undertaken by him as a candidate and not a voter, it would offend a number of constructs associated with the purposive interpretation of the *M.E.A.* and the judicial authority associated with that interpretation.

[47] Firstly, Mr. Di Biase as a candidate would have to have anticipated and then face the reality of his litigation costs post election exceeding 500,000 dollars.

[48] Secondly, Mr. Di Biase as a candidate would then have to raise over 500,000 dollars from a minimum of 650 new contributors, all of whom would have to be prepared to contribute the maximum allowable contribution of 750 dollars each and he would have to do so in a very short period of time.

[49] It is a practical absurdity to suggest that post election litigation and the cost associated with it could be funded in this fashion.

[50] It is also an absurdity to suggest that the legislature intended that a wealthy candidate, who was also a voter, would be free to fund such post election litigation on his own. Whereas a candidate of more modest means, who is also a voter, such as Mr. Di Biase would be caught by the restrictions applicable to candidates. The purpose of the *M.E.A.* is to ensure that every vote, properly cast in a very close election, be respected and that public confidence in the electoral process be preserved. That is exactly what Mr. Di Biase did as a voter. The judicial re-count confirmed Mr. Di Biase's concern as a voter. Justice Howden found that 104 voters had been improperly disenfranchised. This in an election decided by only 90 votes. This was intolerable. While the judicial re-count did not change the outcome of the vote, the post election litigation and costs which lead to the re-count clearly advanced the underlying objectives and purposes of the *M.E.A.* and went a considerable distance in restoring confidence to protect the right to vote and to enfranchise the voters as Mr. Justice Howden stated in his judgment when he ordered the re-count in this case.

Rule 5 – Extension

[51] Rule 5 of section 68 of the *M.E.A.* allows a candidate to extend the campaign period and access campaign surpluses to offset "expenses related to a re-count".

[52] Rule 5 is permissive only and not mandatory.

[53] If Rule 5 had been engaged by Mr. Di Biase it could bring Mr. Di Biase under the regulatory provisions of sections 66, 67, and 68 of the *M.E.A.* as it relates to "expenses" and "contributions" regarding the post election litigation costs that were incurred.

[54] Mr. Di Biase asserted that he extended the campaign period but under Rule 4 and

not Rule 5. Rule 4 is designed to offset:

> "A deficit at the time the election period would otherwise end."

Mr. Di Biase has never asserted that he never engaged Rule 5 to extend the campaign period.

[55] While the prosecution initially argued that Mr. Di Biase did extend the campaign period under Rule 5 – it resiled from that position at the end of the trial and agreed that Mr. Di Biase had extended the campaign period under Rule 4 and not under Rule 5. Rule 5 speaks to re-count expenses. Rule 4 does not. Rule 4 speaks to deficits at the time the election period ends.

[56] A proper interpretation of Rule 5 is that it has no application to the conduct of Mr. Di Biase. He did not engage Rule 5. This interpretation buttresses my finding that Mr. Di Biase incurred his post election expenses – not as a candidate – but as a voter.

Contributions, Expenses, Election Campaign and Election Compaign Period

[57] "Campaign contributions" are defined in sections 66 of the *M.E.A.* "Campaign expenses" are defined in section 67 of the *M.E.A.* "Election Campaign Period" is not defined but is referred to in section 68 of the *M.E.A.* "Election Campaign" should be given its ordinary dictionary definition as "the period before the election when candidates are attempting to influence the voters and ending when the poles are closed" (Oxford Concise Dictionary).

[58] The only provision in the *M.E.A.* which specifically and statutorily permits for the extension of the election campaign to allow a candidate access to surplus and/or an

additional contribution to cover the cost of litigation after an election is over is Rule 5 contained within section 68.

[59] As noted earlier, Rule 5 can only be invoked by the candidate if he chooses to do so. Mr. Di Biase did not and the prosecution agreed.

[60] Of significance there is no reference in the "campaign contribution" provisions of section 66 of the *M.E.A.* to include payments toward costs of post election litigation by a candidate. The implied exclusionary rule would have required the Legislature to have said so expressly in the *M.E.A.* if it intended so. It did not.

[61] The definition of "contributions" in section 66 of the *M.E.A.* does not include payments toward the cost of post election litigation initiated or pursued by a candidate after Election Day.

[62] Finally, the *M.E.A.* does not impose a requirement that a candidate, who incurs post litigation expenses or costs, must extend his/her election campaign period so as to bring those costs into the campaign expenses provision of the *Act*.

[63] It may be open to extend the definition of expenses to include "expenses related to a re-count" and "expenses related to proceedings of a controvert election – section 83", including the costs of a lawyer or scrutiniser, on a re-count for example. Such an extension would, in short, be in relation to costs other than legal fees and disbursements incurred by an unsuccessful candidate pursuing post election litigation costs but most certainly would not apply to the costs of an unsuccessful candidate, who chooses to pursue court action in his capacity as a voter, in relation to vote count irregularities, as Mr. Di Biase did.

[64] My findings in this regard are fortified by the fact that there is an absence of a parallel extended definition in the "contributions" provisions of section 66 to that set out in the "expense" provision of 67 of the *M.E.A.* to show that the funding of such an "expense" is not a "contribution".

[65] The plain wording of section 67 of the *M.E.A.* is determinative. The definition of campaign expenses section 67 (1) of the *M.E.A.* including the extended definition under section 67 (2) of the *M.E.A.* relates to costs incurred by a candidate "for use in his or her election campaign".

[66] Mr. Di Biase pursued his post election litigation in a capacity as a voter and not as a candidate. The *M.E.A.* gave Mr. Di Biase the option to choose to treat his litigation costs as expenses of a candidate by invoking Rule 5. He chose not to do so. Mr. Di Biase's re-count and controvert post election litigation costs do not therefore fall within the definition of "campaign expenses" section 67 (1) of the *M.E.A.* or extended definition of "campaign expenses" under section 67 (2) of the *M.E.A.* The definition of campaign contributions in section 66 relate to funds accepted by a candidate "for his or her election campaign".

[67] Mr. Di Biase pursued his post election litigation as a voter and not as a candidate. The funds paid toward the post election litigation were all outside the ambit of the contribution and expense provisions set out in sections 66 and 67 of the *M.E.A.*

Return of Contributions as soon as Possible – Section 66 and 69 (1) (m) of the *M.E.A.* – Counts 6 and 7

[68] In order to prove the offences set out in counts 6 and 7 the evidence must prove:

1. The payments to Stamm Research were contributions under section 66 of the *M.E.A.*;

2. Mr. Di Biase failed to return such contributions, namely 5,000 dollars, to Anacond Contracting Inc. which were paid to Stamm Research on behalf of Mr. Di Biase (count 6) and 9,230 dollars to Land Mark Consulting and Development Inc., which sums were paid to Stamm Research on behalf of Mr. Di Biase (count 7).

"Contribution" – Section 66

[69] I have already determined that Mr. Di Biase's post election litigation costs were incurred by him as a voter and not a candidate and that money received by Mr. Di Biase to offset post election litigation expenses were similarly received by him as a voter and not a candidate. I therefore find that the payments made by Anacond (count 6) and Land Mark (count 7) were not "contributions".

"As Soon As Possible" Section 69 (1) (m)

[70] The *M.E.A.* in section 69 (1) provides :

> "A candidate shall ensure that 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".

[71] This case proceeded by way of an agreed upon statement of facts which set out the evidence before this court. There is no evidence that anyone, including the defendant or the City of Vaughan, demanded that Stamm recognize these payments as "contributions" and that Stamm return them to Anacond and Land Mark. There is no evidence suggesting and no reason to believe that Stamm would have simply returned these payments if requested to do so. The agreed statement of facts provide that on or about November 4, 2008, the amounts

paid by Anacond and Land Mark were repaid by Di Biase rather than returned by Stamm. There is no evidence to suggest that Di Biase was in a position to return or repay those amounts before then.

[72] The evidence respecting Mr. Di Biase's campaign finances is found in the various financial statements filed by Mr. Di Biase. Those financial statements show that during the material times his campaign finances were in a deficit position.

[73] The alleged over contribution was received directly by Stamm Research an entity over which there is no evidence Mr. Di Biase exercised any control.

[74] I adopt the reasoning of Justice Culver in Chapman v. Hamilton City where he articulated the test for determining whether and over contribution has been returned as soon as possible for purposes of section 96 (1) (m) of the *M.E.A.* in these words:

> "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."

[75] In each case therefore "as soon as possible" depends upon the facts.

[76] There is no evidence that Mr. Di Biase failed to return the alleged over contributions as soon as possible.

Limitation Issues – Counts 3, 5, and 20

[77] The *Municipal Elections Act* provides in section 92 (4):

> "no prosecution for a contravention of any of sections 69 to 79 shall be

commenced more than one (1) year after the facts on which it is based first came to the informant's knowledge".

[78] Mr. Di Biase faces three (3) charges that engage the one (1) year limitation provisions of section 92 (4), namely, count 3, count 5 and count 20 set out in the information.

[79] It is agreed by counsel that the informant is the City of Vaughan council.

[80] The charges set out in counts 3, 5, and 20 were laid and the prosecution of these charges commenced September 3, 2009. The real issue is the date the facts upon which the prosecution related to these three (3) charges *first* came to the knowledge of the informant.

[81] The defence says that date was April 23, 2008 which would place the commencement of the prosecution outside the one (1) year limitation. The prosecution says the date was May 25, 2009 following receipt of a compliance audit report, which would place the commencement of the prosecution inside the one (1) year limitation.

[82] The information necessary to be available to the informant must reasonably be, and is expected to be, accurate and reliable and constitute essential and material averments (*Regina v. Fingold*, [1999] O.J. No. 369 (Gen. Div.). Once reasonably reliable information has come to light to the knowledge of the informant within the limitation period, an inquiry to check out and confirm the credible and persuasive nature of the information and knowledge regarding the contravention and perpetrator may be carried out. The inquiry must occur *within* the limitation period as must the commencement of the charges.

[83] Here the facts upon which the charges set out in counts 3, 5, and 8 first came to the informant's knowledge – April 23, 2008. The facts came in the form of sworn financial

statements and court proceedings in which the City of Vaughan participated directly. Indeed, they were subsequently admitted as part of the agreed statement of facts. Alone they provided trustworthy, reliable and a complete basis for constituting the knowledge necessary to trigger the one (1) year limitation period set out in section 92 (4) of the *M.E.A.* The fact that the City of Vaughan decided to conduct further investigations and to obtain a compliance report – which they received May 25, 2009 – cannot be used as a ground for delaying the commencement of the limitation period (*Regina v. Fingold,* supra ; also *St. Germain v. Bussen*, [2008] O.J. No. 408 (S.C.J).

[84] *Indeed, the agreed statements of facts herein provide that the compliance audit report confirmed the accuracy of all the information and knowledge known to the informant, the City of Vaughan council, April 23, 2008.*

[85] Section 92 (4) makes no reference to steps which must be taken under the *M.E.A.* – such as obtaining a compliance audit report – as a condition of qualification for the requirement to commence an action within the one (1) year period prescribed by section 92 (4) for those offences specified and which in this case involve offences set out in counts 3, 5, and 20. Nor is there any provision in the *M.E.A.* which would allow for or permit a form of judicial exemption to stop the limitation clock from running as suggested, by the prosecution, so that the charging body, The City of Vaughan, could obtain an Auditor's Compliance Report.

[86] To suspend the limitation period of one (1) year set out in section 92 (4) of the *M.E.A.* while awaiting receipt of an Auditor's Compliance Report in the circumstances of this case, when there was reliable trustworthy facts upon which the prosecution was based

that first came to the knowledge of the informant sixteen and a half months before action is commenced does not comport with the integrity of section 92 (4) of the *M.E.A.*

[87] Suspending the limitation periods for an indefinite period would have the effect of creating serious prejudice to the candidate, electorate and the electors and could undermine confidence in the electoral system as investigations and charges remained unresolved while candidates and voters faced the prospect of going to the polls again in the unsettled state.

[88] The limitation provisions of section 92 (4) do operate here and the prosecution of counts 3, 5, and 20 are statute barred as having been commenced more than one (1) year after the facts upon which they were based first came to the informant's knowledge.

Conclusion

[89] For reasons given, I find Mr. Di Biase not guilty on counts 3, 4, 5, 6, 7, 8 and 20 and all those charges against him are dismissed.

Exhibit I

ONTARIO COURT OF JUSTICE
(Central East Region)

This is exhibit "I" to the Affidavit/Declaration of CRAIG LIDDY sworn before me this 29th day of June, 20 11.

BETWEEN:

THE CORPORATION OF THE CITY OF VAUGHAN

Respondent

and

LINDA D. JACKSON

Applicant/Accused

RULING WITH RESPECT TO THE S.92(4) LIMITATION UNDER THE *MEA*

Counsel for the City of Vaughan	Mr. Timothy Wilkin
Counsel for the Defence	Mr. Morris Manning Q.C.

KENKEL J.,

Introduction

1. Ms. Jackson is charged with 40 counts alleging contraventions of the *Municipal Elections Act* S.O. 1996 c.32 (*MEA*) in relation to campaign financing.

2. Ms. Jackson submits that the proceedings against her were commenced outside the limitation period set in s.92(4) of the *MEA*. She applies to have the Information quashed or the proceedings stayed.

3. At that time Section 92(4) of the *MEA* contained a one year limitation period for prosecutions in relation to alleged contraventions of sections 69 to 79. The Act (since amended) barred proceedings commenced "more than one year *after the facts on which it is based first came to the informant's knowledge.*" (emphasis added)

4. The central issue in this application is: When do facts "first come to an informant's knowledge" within the meaning of that section? The applicant submits that the facts on

which these charges are based first came to the knowledge of the City of Vaughan Council at the time they received a detailed affidavit of complaint from a resident. The City submits that it's not until the complaint was investigated by an auditor and a compliance audit submitted to Council that the facts on which the charges were based could be said to have come to Council's knowledge within the meaning of s.92(4).

Chronology

5. Date	Event
November 13, 2006	Ms. Jackson elected Mayor of the City of Vaughan.
April 2, 2007	Ms. Jackson's campaign financial statement and auditor's report was filed by M. Campese.
May 14, 2007	Two residents of the City of Vaughan filed a detailed application to the city clerk pursuant to s.81 of the *MEA* seeking a compliance audit of Ms. Jackson's campaign finances.
May 22, 2007	Council for the City of Vaughan (Council) deferred consideration of the compliance audit noting that Ms. Jackson had given notice under s.68(1)(5) of the *MEA* that she would file a supplementary report.
December 31, 2007	Time provided by s.68 *MEA* to file a supplementary report expired.
February 19, 2008	Madam Justice Favret of the Ontario Court of Justice allowed the resident's appeal and ordered a compliance audit pursuant to s.81 of the *MEA*.
March 28, 2008	The same two residents made a second application to Vaughan for a compliance audit including further information from the supplementary statements filed.
March 31, 2008	Vaughan Council appointed an auditor and directed a compliance audit,
June 18, 2008	Council received the compliance audit report confirming apparent contraventions of the *MEA*.
June 24, 2008	Council passed Bylaw No.205-2008 retaining legal counsel to act as prosecutor and instructing counsel to prosecute Ms. Jackson for alleged breaches of the *MEA*.

August 29, 2008	Ms. Jackson brought an application in the Superior Court of Justice to *inter alia* quash the bylaws authorizing the prosecution.
March 11, 2009	Mr. Justice Lauwers of the Superior Court of Justice dismissed Ms. Jackson's application.
April 17, 2009	The Information was sworn.

Analysis

6. Both parties agree that the prosecution bears the burden of proving compliance with the statutory limitation beyond a reasonable doubt.

7. Both parties agree that the true informant for the purpose of s.92(4) is the Council for the City of Vaughan.

8. The applicant submits that there are three points where the facts on which the proceedings were based could reasonably be considered to have "come to the knowledge" of Council:

- April 2, 2007 when the Applicant filed her financial statement and auditor's report dated April 2, 2007 for the period ending December 31, 2006.
- May 14th, 2007 when two residents of the City of Vaughan filed a detailed application to the city clerk pursuant to s.81 of the *MEA* seeking a compliance audit of Ms. Jackson's campaign finances.
- March 28, 2008 when the same residents made a second application for a compliance audit

9. The applicant submits that the words in section 92(4) should be given their plain meaning. The information upon which the charges were based was first brought to the attention of Council in May of 2007. By March of 2008 Council had received detailed complaints regarding both the initial and supplementary financial statements. Council did not decide whether to act on those complaints until ordered to do so by the Ontario Court of Justice. While the audit process was completed quickly once ordered, it's the Respondent's position that by the time Council passed a bylaw authorizing that charges be laid on June 24, 2008 they were already out of time.

10. The Respondent submits that the *MEA* sets out a multi-step code of procedure in s.81 dealing with complaints regarding candidate's campaign finances. Council may commence legal proceedings only after receiving and considering the results of a compliance audit ordered under that section. Council did not receive the necessary information until June 18th, 2008 and the Information was sworn within a year of that date.

11. In *R. v. Fingold* [1999] OJ No.369 (GenDiv) Justice Keenan considered a limitation period under the provincial *Securities Act* with identical wording:

> No proceedings under this Part shall be commenced in a court more than one year after the facts upon which the proceedings are based first came to the knowledge of the Commission.

12. With respect to what constitutes "facts" in this context, His Honour found at para.56:

> I agree that "facts" must mean more than mere rumour or gossip ... It must be information obtained by an identifiable source which might reasonably be expected to have such information and obtained in circumstances which would tend to support the accuracy and reliability of the information given. Similarily "knowledge" does not require proof or verification to constitute knowledge ... One cannot deny knowledge when information under oath supported by documentary evidence by a person who has firsthand knowledge is received.

13. In this case a Vaughan resident filed a sworn affidavit alleging that there were reasonable grounds to believe that there had been multiple contraventions of the *Municipal Elections Act.* The complaint was very detailed alleging specific breaches of campaign financing rules as shown in publicly filed financial statements. This went far beyond mere rumour or gossip and is precisely the kind of evidence Justice Keenan identified in *Fingold* . Many of the allegations made in the original affidavit now are the subject of charges before the court.

14. The respondent submits that under the *MEA* a complaint triggers the five stage statutory audit procedure set out by the Court of Appeal in *Jackson v. Vaughan* [2010] OJ No.588 at para.28:

1. Where an application for a compliance audit is made, council must consider the application within 30 days and decide whether to to grant or reject it ... s.81(11)
2. If council refuses an application for a compliance audit, the applicant can appeal to the Ontario Court of Justice s.81(3.3)
3. ... The auditor must promptly conduct an audit ... s.81(6)
4. The council must consider the compliance report within 30 days of receiving it and determine whether to commence legal proceedings against the candidate s.81(10) ...
5. The last stage is the legal proceeding itself ....

15. The respondent submits that it's not until that investigative process is complete that council can be said to have knowledge of the facts on which the proceeding is based. They submit that the one year limitation begins at that point.

16. In my view this argument was rejected in *Fingold* at paras. 59 to 61:

> ... In order to trigger the commencement of the limitation period, it is not necessary that the Commission have acquired all the details of evidence and the particulars that are to be introduced in evidence at trial.
>
> The limitation period ... is a one year period during which the Commission must investigate and determine that there is sufficient evidence of the commission of an offence to justify prosecution. The Commission must analyse and verify the original information and determine whether there is sufficient credible and cogent evidence to justify a prosecution ...
>
> *The process of evidence gathering, verification and analysis is to take place during the limitation period. That process is not to be used as any ground for delaying the commencement of the limitation period which is to be objectively viewed as the point at which information of sufficient cogency to amount to the facts upon which the prosecution is based first came to the knowledge of the Commission. (emphasis added)*

17. If the Respondent is correct that council did not have knowledge of the facts on which the proceedings were based until the compliance audit was considered then there would be no time limit to the investigative phase other than the s.81(6) requirement that the auditor act promptly. If the one year limitation started at the end of that process then it would be rendered largely redundant by the s.81(10) requirement that council decide within 30 days of the receipt of the report whether or not to commence legal proceedings.

18. There is nothing about the procedure under the *MEA* that requires the limitation provision as it then was to be interpreted so differently from the identically worded provision in the provincial *Securities Act* at the time of the *Fingold* case. On the contrary, in my view the *Fingold* interpretation is consistent with other *MEA* provisions and consistent with the purpose of the legislation.

19. This intepretation of the 92(4) limitation provision is consistent with Justice Wright's ruling on the same issue in *The Corporation of the City of Vaughan v. DiBiase* (OCJ) delivered orally February 28, 2011, written reasons released today March 4, 2011.

20. I disagree with the Respondent that interpreting the one year time limit as running from the receipt of cogent facts is unworkable and leaves a council with insufficient time to act. Upon receipt of the complaining affidavit Council was required to decide whether to grant or reject the application within 30 days. We know that the compliance audit took less than three months. Council then had 30 days in which to consider the compliance audit, obtain legal advice and decide whether to commence legal proceedings. Interpreting the 12 month limitation period as was done in *Fingold* leaves ample time for the completion of the various investigative steps required under the *MEA* set out in para.14 above.

21. The Respondent advises that in other similar proceedings compliance audits have taken over a year. It's not plain though whether that indicates a problem with a one year limitation or whether it shows the dangers of considering the investigative phase to be unrestricted by the limitation period. Even if it is the former, the fact that the limitation period now in s.94.2 of the *MEA* has been extended to 4 years does not assist in the interpretation of the original provision.

22. I agree with the Respondent that the filing of the financial statements did not start the limitation clock. *Fingold* requires actual knowledge by council, not constructive knowledge and it wasn't until a resident analyzed those documents and provided a detailed affidavit that council was notified of apparent contraventions.

23. The affidavit seeking a compliance audit was supported by references to publicly filed financial statements and audits. It was cogent and detailed evidence which alerted Council to apparent contraventions of the *MEA* in relation to Ms. Jackson's campaign finances. I find that the limitation period with respect to all of these matters began at that point. While Council was required to follow the investigative process set out in the *MEA*, had Council acted in accordance with their statutory duty there was ample time for that process to take place. As Justice Keenan noted in *Fingold,* the fact that an investigative process follows the receipt of such a complaint cannot be used as a ground for delaying the start of the limitation period.

24. Vaughan City Council did not act on the May 2007 application for a compliance audit within 30 days as required under the *MEA.* Nothing was done in that regard until a compliance audit was ordered by the Ontario Court of Justice on February 19, 2008. Council appointed an auditor on March 31, 2008 in relation to both complaints. That failure to act in accordance with the provisions of the *MEA* appears to be the kind of unnecessary delay to which the limitation period is addressed.

25. Although council received the auditor's report June 18th, 2008 no charges were laid in relation to the apparent contraventions identified until April 17, 2009, almost two years after the matter was brought to the attention of Council.

Conclusion

26. I find that the prosecution has failed to prove compliance with the statutory limitation period set out in the *Municipal Elections Act* for the period in question.

27. Accordingly, these proceedings are statute barred. The Information before the court must be quashed and proceedings stayed.

Delivered at Newmarket,
March 4, 2011

Hon. Justice Joseph F. Kenkel