

**COMPLIANCE AUDIT COMMITTEE – WEDNESDAY, JUNE 29, 2011**

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**COMMUNICATIONS**

**Distributed June 23, 2011**

**C1. Compliance Audit Committee – Rules of Procedure**

**Item No.**

**1**

**Distributed @ the June 29, 2011 Compliance Audit Committee**

**C2. Mr. Michael Binetti, dated June 27, 2011.**

**2**

**C3. Mr. Eric K. Gillespie, dated June 27, 2011.**

**1**

**C4. Mr. Anthony Giordano, dated June 27, 2011.**

**1**

**Please note there may be further Communications.**

COMPLIANCE AUDIT COMMITTEERules 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.*

**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.

**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.

- (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.

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 *MEA*, 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 *MEA* 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](http://www.vaughan.ca) and the election website [www.vaughanvotes.ca](http://www.vaughanvotes.ca).



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

Affleck Greene McMurtry LLP

Barristers and Solicitors

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

June 27, 2011

**URGENT**

File No. 2777-001

SENT VIA E-MAIL ([jeffrey.abrams@vaughan.ca](mailto: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](http://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.

Affleck Greene McMurtry LLP

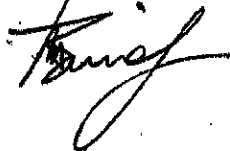
Barristers and Solicitors

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 29<sup>th</sup> 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](mailto:jeffrey.abrams@vaughan.ca)



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**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



**Michael I. Binetti**  
[mbinetti@agmlawyers.com](mailto:mbinetti@agmlawyers.com)

Direct: 416 360 0777  
Tel: 416 360 2800  
Fax: 416 360 5960  
[www.agmlawyers.com](http://www.agmlawyers.com)

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

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**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.

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**ERIC K. GILLESPIE PROFESSIONAL CORPORATION**  
Barristers & Solicitors

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

**ERIC K. GILLESPIE, LL.B.**  
Telephone No.: (416) 703-5400  
Direct Line: (416) 703-7034  
Facsimile No.: (416) 703-9111  
Email: [egillespie@gillespie-law.ca](mailto:egillespie@gillespie-law.ca)

June 27, 2011

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

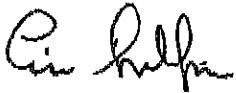
It is important to also recognize that no campaign monies from the 2010 election were used to pay any 2006 expenses, recount or otherwise (see again the Lanno Torcelli LLP submission of today's date). The compliance audit request is predicated upon an incorrect assumption to the contrary. The fact is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

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

C4  
COMMUNICATION  
Compliance Audit Committee  
June 29/2011  
ITEM # - 1

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	<u>5,320.00</u>
	<u>54,938.31</u>

**Payment of recount expenses by Candidate**

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

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

**LANNO TORELLI LLP  
CHARTERED  
ACCOUNTANTS**

# Fax

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<b>To:</b>	Jeffery A. Abrams	<b>From:</b>	Anthony Giordano
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**Attention:**

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<b>Fax:</b>	905-832-8535	<b>Pages:</b>	3
<b>Phone:</b>	905-832-8585	<b>Date:</b>	June 27, 2011
<b>Re:</b>	Michael DiBiase Compliance Audit Application	<b>CC:</b>	

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