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0Superior Court of Justice
Divisional Court
130 Queen Street West, Rm. 174
M5H 2N5
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Facsimile Transmittal

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| From: | Julia Bryan | Date: July 19, 2010 |
| RE: | Holyday v. City of Toronto et al. | |
| Court File No.: 37/10 | | Pages (including coversheet): 2 |
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NOTE: Attached is a dated copy of the back sheet for Reasons for Judgment from Justices McCombs, Swinton and Wilton-Siegel with regard to the above-noted matter. Please, update your copies accordingly.

If you have any questions please feel free to contact the Divisional Court office at 416-327-5100.

CITATION: *Holyday v. City of Toronto*, 2010 ONSC 3355
DIVISIONAL COURT FILE NO.: 37/10
DATE: 20100719

**ONTARIO
SUPERIOR COURT OF JUSTICE**

DIVISIONAL COURT

McCOMBS, SWINTON and WILTON- SIEGEL JJ.

BETWEEN:

DOUGLAS HOLYDAY

Applicant

- and -

**CITY OF TORONTO, SANDRA BUSSIN, ADRIAN
HEAPS AND GIORGIO MAMMOLITI**

Respondents

REASONS FOR JUDGMENT

Swinton J.

RELEASED: July 19, 2010



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DIVISIONAL COURT

McCOMBS, SWINTON and WILTON-SIEGEL JJ.

BETWEEN :

DOUGLAS HOLYDAY

Applicant

)
)
) *George Rust-D'Eye and Raivo Uukkivi*, for
) the Applicant

- and -

**CITY OF TORONTO, SANDRA BUSSIN,
ADRIAN HEAPS and GIORGIO
MAMMOLITI**

Respondents

)
)
) *Alan Lenczner Q.C. and Emily Graham*, for
) the Respondents City of Toronto, Sandra
) Bussin and Adrian Heaps

- and -

**TORONTO PARTY FOR A BETTER
CITY**

Intervenor

)
) *Peter R. Greene and Michael I. Binetti*, for
) the Respondent Giorgio Mammoliti

)
) *Murray Maltz*, for the Intervenor Toronto
) Party for a Better City

)
) **HEARD at Toronto: May 17, 2010**

Swinton J.:

Overview

[1] The applicant, Douglas Holyday, is a member of the Toronto City Council. He has brought this application for judicial review to challenge four resolutions of the City Council, confirmed by by-law, approving the expenditure of city funds to reimburse legal expenses of three members of City Council. At issue is the City's authority to reimburse city councillors for legal expenses incurred in relation to compliance audits of campaign finances and defamation actions.

Factual Background

[2] One of the by-laws authorizes reimbursement to Councillors Adrian Heaps and Giorgio Mammoliti for their legal expenses arising out of requests by electors for compliance audits. The second relates to Mr. Heaps' expenses in defending a defamation action, and the third relates to Councillor Sandra Bussin's expenses in pursuing a defamation action.

The Compliance Audits

[3] Mr. Mammoliti and Mr. Heaps ran for municipal office in the 2006 election and were elected as councillors.

[4] Subsection 8(1) of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32 ("MEA") allows an elector to apply for a compliance audit of a candidate's election campaign finances if he or she believes, on reasonable grounds, that the candidate has contravened the Act. The finances of both Mr. Mammoliti and Mr. Heaps were the subject of requests for compliance audits in relation to the 2006 municipal election.

[5] In Mr. Heaps' case, the arms-length Compliance Audit Committee established by City Council dismissed the request for a compliance audit. This decision was upheld by the Ontario Court of Justice in July 2007. Mr. Heaps incurred legal fees of \$45,330.40 in responding to the request for a compliance audit.

[6] Mr. Mammoliti also incurred legal expenses as a result of an application for a compliance audit of his election expenses. He incurred legal fees of \$36,598.87 and \$15,487.50 for the fees of an appraisal service.

[7] At a meeting on May 26 and 27, 2008, City Council adopted a motion inviting members of council who incurred legal and related expenses as a result of campaign audits to submit applications for reimbursement to the Executive Committee of City Council for recommendation to Council. This decision was made despite a legal opinion from the City Solicitor dated November 9, 2007, stating that the courts had held that a municipal council lacks the authority to reimburse a member of council for legal costs incurred for activity outside the office of councillor. This opinion was reiterated in a report dated August 21, 2008 to the Executive Committee.

[8] A decision was made by City Council, in its meeting of September 24 and 25, 2008, to reimburse the two councillors' legal expenses, and Council approved By-law 1043-2008 on September 25, 2008 authorizing the payments. The decision was made after consideration of a report from the City Solicitor stating that the expenses were reasonable. However, the report also referred to the November 9, 2007 advice, stating:

That report explained that courts have established that municipalities lack jurisdiction to reimburse councillors for legal expenses incurred outside of the office of councillor such as expenses incurred as a candidate for municipal council.

[9] The City treated the payments as a taxable benefit. Therefore, on behalf of Mr. Mammoliti, it paid \$52,031.37 to counsel for fees and remitted \$22,320.63 to the Canada Revenue Agency for income tax, for a total benefit of \$74,402.00 to him. For Mr. Heaps, the total benefit amounted to \$54,757.70, which includes \$19,427.30 withheld for income tax.

The Heaps Defamation Action

[10] Mr. Heaps was the subject of a defamation action brought by his opponent in the 2006 election. The action arose because Mr. Heaps distributed an article published in a newspaper endorsing his candidacy. The action settled in mediation.

[11] Mr. Heaps personally paid legal fees of approximately \$54,000.00. In December 2009, pursuant to By-Law No. 1262-2009, City Council approved payment to him of \$36,000.00 for his legal expenses in defending the action.

[12] Mr. Heaps has refused to accept this payment, and informed members of City Council of this decision.

The Bussin Defamation Action

[13] Ms. Bussin, while serving as a member of Council, brought an action for defamation against a publication known as the *Ward 32 News* and named individuals because of an article accusing her of having received improper campaign donations in 2006 from a property developer and members of his family. The donations were said to be in return for arranging a decision in the developer's favour from the Ontario Municipal Board in relation to a particular development. In fact, Ms. Bussin had been actively engaged in opposing the development.

[14] On August 6, 2009, City Council approved a resolution that she be reimbursed for legal expenses incurred in relation to the defamation proceeding. This was confirmed in By-Law No. 749-2009. Before adopting this resolution, the City obtained a legal opinion from outside counsel Borden, Ladner, Gervais that commented on the merits of the action, as well as issues relating to the public interest.

[15] A Statement of Claim was issued on August 27, 2009. The action is being defended, and it is currently in the court system. In total, the City has reimbursed Ms. Bussin \$7,700.96 for legal expenses to date.

The Issues

[16] The applicant, supported by the intervenor, argues that the City of Toronto had no jurisdiction to pass the by-laws. The respondents raise two further issues: whether the application dealing with the payment of Mr. Heaps' defamation action expenses is moot and whether the application to quash By-law 1043-2008 is out of time and statute-barred. I will deal with the respondents' issues first.

Is the application regarding the Heaps defamation action expenses moot?

[17] Although Council passed By-law 1262-2009 to allow the payment of Mr. Heaps' expenses in defending the defamation action, Mr. Heaps has refused to accept any reimbursement. In a letter dated January 25, 2010, he informed City Council that he would not accept payment, and he instructed the City Clerk and the Chief Financial Officer that he would not accept reimbursement for these legal costs in any circumstances. Given that no payment will be made to Mr. Heaps, the respondents argued that the application is moot respecting this payment.

[18] There is no live dispute between the applicant and the City with respect to this payment, as Mr. Heaps has made it clear that he will not accept such a payment. Therefore, the application is moot with respect to the Heaps defamation action expenses. The Court indicated during oral argument that it would not exercise its discretion to hear this part of the application.

Is the application related to the compliance audit expenses out of time?

[19] The respondents argued that the application related to the compliance audits is out of time, since an application to quash a by-law must be brought within one year of its enactment (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A ("COTA"), s. 214(4)). Pursuant to s. 214(4), an application to quash a by-law shall be made within one year after the passing of the by-law. The only exception to this provision is contained in s. 250, which applies to quashing debenture by-laws.

[20] In the case of the compliance audits, the by-law was adopted September 25, 2008, while the application for judicial review was issued January 18, 2010. Therefore, the respondents argued that the application is out of time because of s. 214(4).

[21] However, that provision does not prevent an application for judicial review to quash a by-law on the grounds that it is void (*Wiswell v. Greater Winnipeg (City)*, [1965] S.C.R. 512 at 524). In the present application, the applicant and the intervenor argue that the compliance audit by-laws are void, as the City had no jurisdiction to pass them. The respondents argue that there was jurisdiction. Thus, a determination as to whether the challenge to the by-law is out of time requires a determination of whether the City had jurisdiction to enact the by-law.

Is the by-law relating to the compliance audit expenses *ultra vires* the City of Toronto?

[22] The provisions of COTA must be considered to determine whether the City had the authority to make the impugned payments. Subsection 1(1) of COTA states that the City of Toronto "exists for the purpose of providing good government with respect to matters within its jurisdiction".

[23] Section 2 states that the purpose of the Act is "to create a framework of broad powers for the City", balancing the interests of the Province and the City and recognizing that the City must be able to do specified things in order to provide good government. The section sets out a list of

things that the City must be able to do in order to provide good government. The first item is to "determine what is in the public interest for the City".

[24] Subsection 6(1) is of particular importance, as it provides for a broad interpretation of the City's powers:

The powers of the City under this or any other Act shall be interpreted broadly so as to confer broad authority on the City to enable the City to govern its affairs as it considers appropriate and to enhance the City's ability to respond to municipal issues.

[25] This conferral of broad powers is consistent with the current jurisprudence of the Supreme Court of Canada dealing with the interpretation of municipal powers. The Court has adopted a generous approach to interpretation of those powers (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at paras. 23 and 26). A court's approach should be deferential. In applying a general provision allowing a municipality to act to secure peace, order, good government, health, and general welfare within its territory, the Supreme Court asked whether the enacted provisions regulating the use of pesticides "have a reasonable connection to the municipality's permissible objectives" (at para. 26).

[26] The City relies on s. 83(1) of COTA in support of its by-law to reimburse the legal expenses related to the compliance audits. That provision is found in Part III of the Act, which sets out the general powers of the City and includes matters such as highways, transportation, culture, parks and recreation, and licences, among others.

[27] Section 83 is one of three sections found under the heading "Economic Development". Subsection 82(1) prohibits the City from assisting any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose. Section 83 is a general power to make grants, while s. 84 deals with small business counselling and programs.

[28] Section 83 states, in part:

83(1) Despite any provision of this or any other Act relating to the giving of grants or aid by the City, subject to section 82, the City may make grants, on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, including a fund, within or outside the boundaries of the City for any purpose that council considers to be in the interests of the City.

(2) The power to make a grant includes the power,

- (a) to guarantee a loan and to make a grant by way of loan and to charge interest on the loan;
- (b) to sell or lease land for nominal consideration or to make a grant of land;
- (c) to provide for the use by any person of land owned or occupied by the City upon such terms as may be fixed by council;
- (d) to provide for the use of officers, employees or agents of the City by any person, upon such terms as may be fixed by council;

- (e) to sell, lease or otherwise dispose of at a nominal price, or make a grant of, any personal property of the City or to provide for the use of the personal property on such terms as may be fixed by council; and
- (f) to make donations of foodstuffs and merchandise purchased by the City for that purpose.

[29] The applicant argues that s. 83 does not confer the power to pay the expenses of the compliance audits because of the specific provisions in the Act governing the payment of the expenses of city councillors. Part VI of COTA deals with Practices and Procedures. Sections 222 and 223 explicitly deal with remuneration and expenses.

[30] Subsection 222(2) deals with the expenses of members of city council and reads:

222(2) Despite any Act, the City may only pay the expenses of the members of city council or of a local board of the City, of the officers and employees of the City and of the officers and employees of the local board if the expenses are of those persons in their capacity as members, officers or employees and if,

- (a) the expenses are actually incurred; or
- (b) the expenses are, in lieu of the expenses actually incurred, a reasonable estimate, in the opinion of the council or local board, of the actual expenses that would be incurred.

[31] Section 223 requires an annual report from the treasurer to city council itemizing remuneration and expenses paid in the previous years to

- (a) each member of council in respect of his or her services as a member of the council or any other body, including a local board, to which the member has been appointed by council or on which the member holds office by virtue of being a member of council;
- (b) each member of council in respect of his or her services as an officer or employee of the City or as an officer or employee of another body described in clause (a); and
- (c) each person, other than a member of council, appointed by the City to serve as a member of any body, including a local board, in respect of his or her services as a member of the body.

[32] The applicant argues that the City can only reimburse councillors for expenses incurred in the performance of their duties as councillors because of s. 222(2). Even if there is a general grant power in s. 83, he argues that power must be interpreted in light of the specific provision with its limitations on reimbursement. Therefore, the City cannot reimburse councillors for expenses related to compliance audits, as such audits deal with their conduct during an election campaign, before they were councillors.

[33] The applicant relies on three cases in which the courts have held that a municipality can only reimburse a councillor or officer for expenses incurred in their capacity as councillors or officers. In *Rawana v. Sarnia (City)* (1996), 30 O.R. (3d) 85 (Gen. Div.), MacFarland J. (as she then was) relied on s. 243(1) of the *Municipal Act*, R.S.O. 1990, c. M.45, a section similar to s.

222(2) of COTA. She held that the provision allowed reimbursement of legal costs incurred by councillors where the expenses were incurred while they acted in their capacity as members of council. However, the municipality had no authority to reimburse a councillor for expenses incurred while acting in a personal capacity (at p. 89).

[34] In that case, the councillor had been charged with a criminal offense after he attempted to enforce payment of a personal debt owing to him. He argued that he was only charged because he was a member of city council. Nevertheless, MacFarland J. held that he was not entitled to be indemnified for his legal costs, as he was not acting in an official capacity when he attempted to obtain repayment of the loan. This decision was upheld by the Court of Appeal ((1997), 35 O.R. (3d) 640).

[35] Subsequently, in *Santa v. Thunder Bay (City)* (2003), 66 O.R. (3d) 434 (S.C.), Pierce J. considered s. 279(1) of the *Municipal Act, 2001*, S.O. 2001, c. 25, which deals with the power of a municipality to act as an insurer. It permits the municipality to pay damages or costs awarded against employees or members for expenses incurred by them arising out of acts or omissions done in their capacity as employees or members. Pierce J. concluded that the municipality had no power to reimburse the legal costs of a councillor arising from a compliance audit and a subsequent court application (see para. 54). This decision was upheld by the Court of Appeal ((2004), 49 M.P.L.R. (3d) 290).

[36] The most recent case is *Harding v. Fraser* (2006), 81 O.R. (3d) 708 (S.C.), again a decision of Pierce J. In this case, the municipality sought to pay the legal expenses of the reeve, which were incurred in bringing an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 to determine whether a member of council had a conflict of interest. Only an elector could bring such an application, and therefore, the municipality had no standing to do so. The municipality sought to rely on s. 107 of the *Municipal Act, 2001*, a grant power similar to s. 83 of COTA, in order to pay the reeve's legal expenses. However, the Court held that the City of Thunder Bay could not rely on that provision, because the municipal council had no authority to reimburse the reeve for legal expenses incurred outside the exercise of her office (at para. 34).

[37] Again, the decision was upheld by the Court of Appeal (2007 ONCA 235, 33 M.P.L.R. (4th) 76). The Court of Appeal observed that s. 107(1), as well as s. 444 of the *Municipal Act, 2001*, must be interpreted in light of the *Santa* decision, which held that "a municipality could only reimburse a member of council if it was for activity carried out in the course of the member's office" (at para. 4).

[38] The City seeks to distinguish these cases on the basis that ss. 83 and 222(2) of COTA are not incompatible and can be read together as part of a comprehensive code governing the City's ability to make grants or reimbursements. Counsel argues that the payments for the compliance audits are expressly permitted under s. 83, the general grant-making power. As the objects of COTA are to provide good government to the City of Toronto, this by-law is justified, because it removes barriers that prevent candidates of integrity, but modest means, from running for municipal office.

[39] Counsel seeks to distinguish *Santa, supra* on the basis that no reference had been made to the jurisprudence requiring a generous interpretation of municipal powers. However, I note that this approach to interpretation was expressly discussed in *Harding, supra*.

[40] The problem with the City's argument is that it ignores the wording and context of s. 83, as well as the words and purpose of s. 222(2). Subsection 222(2) expressly states that it applies "despite any Act" and states that the City may "only" pay expenses for councillors if the expenses were incurred in their capacity as members. The three cases discussed above, which each dealt with councillors' or officers' expenses incurred outside their capacity as councillor or officer, suggest that s. 222(2) and its equivalent in the *Municipal Act, 2001* were meant to limit the circumstances in which councillors can seek reimbursement from a municipality's funds. They cannot seek reimbursement for expenses unrelated to their activities and duties as councillors.

[41] The City relies on s. 83, the general grant power. However, that provision is found under the heading "Economic Development". While s. 70 of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F states that headings are inserted in a statute for convenience of reference only and do not form part of it, courts have used headings in the interpretation of a statutory provision (see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at pp. 392-397).

[42] As well, the context in which a provision is found can assist in its interpretation. Here, the purpose of s. 83 is seen from the sections preceding and following it, which deal with grants to business and commercial ventures.

[43] The City relied on *Fourth Generation Realty Corp. v. Ottawa (City)*, 2005 CanLII 16568 (Ont. C.A.), submitting that this case shows the importance of a broad and purposive approach to the interpretation of a municipality's powers. In that case, the Court of Appeal interpreted the power to make grants found in s. 107(1) of the *Municipal Act, 2001*, holding that the provision permitted the City of Ottawa to grant tax relief to non-commercial property owners who had experienced an increase in their 2003 property taxes. Like s. 83 of COTA, s. 107(1) is found under a heading related to economic development services.

[44] The Court of Appeal observed that the language of s. 107(1) is very broad (at para. 31), and the City has the power to make grants if there is a reasonable connection with the municipality's permitted objectives (at para. 33). The Court described a "grant" as in essence, "the giving of a benefit, including money, from a fund" (at para. 55). In the Ottawa case, the City provided a one-time payment to residential taxpayers from a fund created by a reduction in municipal expenditures, a decision that was held to be reasonably connected with the City's permitted objectives.

[45] I note that in the Ottawa case, the by-law contained a preamble stating that it was designed to provide grants to non-commercial homeowners facing unexpected and significant tax increases. The Court of Appeal concluded that the by-law was in the interests of the community, as the evidence demonstrated that the City was facing a tax revolt because of increases in

property taxes, and it had to deal with an explosive situation (at para. 34). Therefore, the Court was satisfied that the by-law served a municipal purpose.

[46] In the present case, there is no indication in the report preceding the adoption of the by-law or in the by-law itself suggesting that City Council was relying on s. 83 of COTA. While City Council has the power to make grants where there is a reasonable connection to the municipality's permitted objectives, there is no indication that council determined that reimbursement of two councillors' expenses for compliance audits relating to their election campaign finances was in the interests of the City. It is not evident on the face of the by-law that this is the case, as there is no preamble, as in the Ottawa case.

[47] In materials filed for this application, the City included an expert opinion from Dr. Meyer Siemiatycki, a professor in the Department of Politics and Public Administration at Ryerson University, opining (at paras. 4 and 5 of his affidavit):

Without the possibility of reimbursement by the City, the possibility of being exposed to significant legal and accountants' fees deters candidates of integrity, but of modest means, from running for municipal office.

Attracting candidates to run for municipal office, including immigrants, minorities, women and others of modest means, is in the public interest because it promotes political inclusivity in municipal politics and protects the overall democratic integrity of municipal elections.

[48] While this may be true, there is nothing in the by-law itself or in the report leading up to it indicating that Council was motivated by a concern for access to the political process for persons of modest means. Nor is there any consideration of whether such a payment is appropriate when it is grossed up and treated as a taxable benefit. Finally, I note that throughout the reports and proceedings leading up to the passage of the by-law, the word "reimbursement" predominates, rather than the term "grant".

[49] Even if s. 83 might in some circumstances be available to permit grants to councillors, it has not been demonstrated with respect to these payments that there is a reasonable connection between the payments to these two councillors and permitted municipal objectives. Therefore, the by-law is not authorized under s. 83.

[50] Given the wording of s. 222(2) and the jurisprudence interpreting the comparable provision in the *Municipal Act*, I conclude that the City did not have jurisdiction to pass the by-law relating to reimbursement of the compliance audit expenses. Therefore, the by-law is void to the extent that it approves these payments and should be quashed.

[51] Given the invalidity of the by-law, there is no limitation period that bars this application for judicial review to quash the by-law.

Is the Bussin payment authorized?

[52] The applicant argues that a defamation action is a personal expense, brought to protect Ms. Bussin's reputation, and therefore, does not constitute an expense incurred in her capacity as a city councillor.

[53] The City defended the payment to Councillor Bussin on the basis that it was authorized under s. 222(2) of COTA. The by-law authorized a payment of the expenses of a sitting councillor, and council made the decision to reimburse her expenses only after obtaining an opinion from outside counsel that the attack on her reputation would likely affect her ability to carry out her duties and undermine public confidence in municipal government.

[54] Given the report from outside counsel on the merits of the action and the negative effect on Ms. Bussin's exercise of her duties as a councillor, I would defer to Council's conclusion that this was an expense incurred in her capacity as a councillor. The City reasonably determined that her legal expenses for this action should be reimbursed. Therefore, the by-law is valid.

[55] However, I note that there is a possibility that Ms. Bussin could succeed in her legal proceeding and obtain a settlement or a judgment through which she receives damages and/or costs. In such a situation, it could not be said that she had incurred expenses in her capacity as councillor if the amount received would cover some or all of her legal fees.

[56] Counsel for the City assured the Court during oral argument that in such a situation, Ms. Bussin would be required to repay her legal expenses. This would appear to be consistent with the draft indemnification policy in the Application Record. While this obligation to repay is not expressly stated in the by-law, it would be wise to include such a condition in the future, given that the City has authority only to reimburse expenses incurred by a councillor.

Conclusion

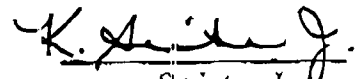
[57] The application for judicial review is granted in part. By-law 1043-2008 is quashed to the extent that it permits the payment of legal expenses for the two compliance audits.

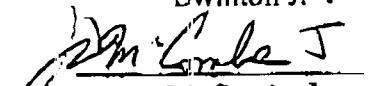
[58] The applicant also seeks an order requiring the City to retrieve funds paid under this by-law from Mr. Heaps and Mr. Mammoliti. In the Notice of Application for Judicial Review, he sought an order from this Court against the individual councillors, requiring that they repay the amounts received.


[59] In my view, such an order is inappropriate. This Court has the responsibility to determine whether the City acted within its powers. However, it has no authority in this application for judicial review to make an order for the payment of money against individual councillors. They have not exercised any statutory power of decision that has been brought into question in this proceeding (see *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2(1)).

[60] Given this conclusion, there is no need to determine the argument raised by Mr. Mammoliti concerning the immunity conferred by s. 391 of COTA.

[61] If the parties cannot agree on costs, they may make brief written submissions through the Divisional Court office within 30 days of the release of this decision.


Swinton J.


McCombs J.


Wilton-Siegel J.

Released: July 19, 2010

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