Court of Appeal File No.: C54125
SCJ Court File No.: CV-09-394259

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TORONTO PARTY FOR A BETTER CITY

Appellant

- and –

THE CITY OF TORONTO, BRIAN ASHTON, SHELLEY CARROLL, RAYMOND CHO, GLENN DE BAEREMAEKER, PAULA FLETCHER, ADAM GIAMBRONE, MARK GRIMES, CLIFF JENKINS, GLORIA LINDSAY LUBY, PAM MCCONNELL, JOE MIHEVC, RON MOESER, HOWARD MOSCOE, CESAR PALACIO, JOE PANTALONE, JOHN PARKER, GORD PERKS, ANTHONY PERRUZZA, KAREN STINTZ, ADAM *VAUGHAN, MICHAEL WALKER, ADRIAN HEAPS AND GIORGIO MAMMOLITI*

Respondents

FACTUM OF THE APPELLANT, TORONTO PARTY FOR A BETTER CITY

(Appeal – Personal liability for *ultra vires* act)

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PART I – OVERVIEW

1. From a legal perspective, this Honourable Court is being asked to resolve the following issue:

> Are individual city councillors who knowingly voted in favour of a by-law (the **"Impugned Councillors"**) that caused the corporate entity known as the City of Toronto (the **"City"**) to commit an *ultra vires* act by allocating entrusted taxpayer money to pay for the personal legal expenses of two other members of the same city council personally liable for the wrongful expenditure and obligated to repay the City?

2. From a public policy perspective, the determination of this legal issue will establish a benchmark for corporate and municipal governance since this Honourable Court is being asked to determine whether elected municipal officials should be held to the same standards that the common law applies to elected directors of corporations which operate under restricted powers rather than as the proverbial "natural person."

3. In the decision, which is the subject matter of the within appeal, the Honourable Justice Hainey determined on July 5, 2011 that the Impugned Councillors who had voted in favour of the *ultra vires* expenditure of $140,000.00, although owing a fiduciary duty to the taxpayers of Toronto, were not liable for the wrongful expenditure because there was no evidence that they had acted with malice or committed a misfeasance of their public office.

4. The appellant submits that His Honour applied the wrong test in assessing whether the Impugned Councillors should have been held personally accountable for their act since he failed to apply the doctrine of *ultra vires*. In the alternative, he improperly required the appellant to prove acts of malice or misfeasance for what amount to a breach of trust caused by the vote of the Impugned Councillors. In the further alternative, he failed to find malice despite wholly rejecting the only evidence submitted to the court by the respondents to justify why the *ultra vires* by-law was passed. Further, on cross examination of the City solicitor, Anna Kinastowski, on the issue of why the councillors passed the by-law, any questions that would shed light on whether there was malice or misfeasance were refused to be answered. Accordingly, it is submitted that the court should draw an adverse inference.

5. The decision of His Honour ignores the basic fundamental principle of Canadian Constitutional law that municipal governments are creatures of provincial statute and are established by special legislation as corporations to exercise powers. Elected municipal representatives do not enjoy any special Crown privileges. As corporate representatives, elected municipal representatives are personally accountable pursuant to the principle of absolute liability, as codified in Ontario's *Legislation Act*, 2006, when they direct their respective corporate entity to commit an *ultra vires* act.

6. The lower court decision further places city councillors across Ontario above the law. Rather than directing municipalities to make decisions within the legislated scope of their powers, elected representatives can now pass by-laws outside the scope of a city's power with impunity.

PART II – THE FACTS

By-law passed to reimburse councillors, September 2008

7. In or about September 2008, Toronto's City Council passed a resolution described as item EX 23.5 reimbursing then fellow councillor, Mr. Adrian Heaps, for the cost of legal fees he incurred in response to a compliance audit of his 2006 election campaign expenses.

Affidavit of Stephen Thiele, sworn December 24, 2009 ("Thiele 2009 Affidavit"), para. 8

8. At the same meeting, Toronto's City Council passed a resolution described as item EX 23.4 to reimburse fellow councillor, Mr. Giorgio Mammoliti, for the cost of legal fees he incurred in response to a compliance audit of his 2006 election campaign expenses.

Thiele 2009 Affidavit, para. 10

9. The City admitted that pursuant to confirmatory By-Law 1043-2008 reimbursement was made to Messrs. Heaps and Mammoliti for their personal legal expenses. The City paid to Mr. Heaps $64,757.70 and to Mr. Mammoliti $74,402. The reimbursement included an income tax component.

Affidavit of Anna Kinastowski, sworn March 10, 2011

10. Prior to the decisions of City Council, the legal department for the City had provided reports to the members of City Council on the issue of reimbursement of legal expenses incurred in relation to compliance audit applications.

11. The first report was made to City Council on or about November 9, 2007. The purpose of this report was to respond to a request by the Executive Committee of the City regarding the legality of establishing a grant program to which candidates from the 2006 municipal election could apply to cover approved extraordinary legal and audit expenses incurred relating to that election. This report definitively provided as follows:

> It is arguable that the power to make grants found in s. 83 of the COTA would encompass the kind of financial assistance contemplated, however the courts have held that the power to make grants must be exercised in a manner reasonably connected to the municipality's permissible objectives."

This report concluded that the "[j]udicial interpretation of the breadth of the grant-making power has been reviewed. The power *does not permit Council to make a*

grant to assist candidates with costs in relation to the compliance audit process." (Emphasis added)

"Feasibility of Establishing a Fund to Reimburse Candidate Compliance Audit Expenses", dated November 9, 2007

12. A second report on or about April 30, 2008 by the City solicitor Anna Kinastowski, certified specialist of municipal law, provided a legal opinion to the Executive Committee in which she concluded:

> "The courts have held that a municipal council lacks the authority to reimburse a member of council for legal costs incurred for activity outside of the office of councillor such as activity relating to the individual's candidacy for that office."

"Reimbursement of Legal Expenses Incurred by Candidates due to Election-related Campaign Finance Court Proceedings", dated April 1, 2008

13. On or about June 12, 2008, the City solicitor provided a further report to the Executive Committee of City Council, in which she explained that she had been directed to review legal bills associated with applications for reimbursement and to report *only* on the reasonableness of the expenses.

Thiele 2009 Affidavit, at para. 14

14. Despite the scope of her task, Ms. Anna Kinastowski volunteered the following legal opinion:

> The courts have held that conduct as a candidate predates the term of office and is not encompassed by the performance of the office of councillor. They have also held that a municipal council lacks authority to reimburse a member of council for legal expenses incurred in relation to activities such as responding to a compliance audit application or dealing

with any other election-related matter as these are outside of the office of councillor. Should Council choose to reimburse the councillor, its actions could be subject to legal challenge on the basis of lack of jurisdiction and *would* be vulnerable. If a court found the reimbursement to be illegal, it could order repayment by the councillor. If this order was not made specifically but the grant was found to be illegal it would be incumbent upon the City to seek reimbursement of the grant. (Emphasis added.)

"Request for Reimbursement of Legal Expenses Incurred by Councillor Heaps in Relation to Compliance Audit Application, dated June 12, 2008

15. On September 22, 2008, Ms. Kinastowski provided yet another report. Addressed to all members of City Council, this report again repeated the voluntarily given legal opinion of June 12, 2008 with respect to reimbursing a fellow councillor for legal expenses incurred in relation to defending a compliance audit application.

Request for Reimbursement of Legal Expenses Incurred by Councillor Mammoliti in Relation to Compliance Audit Application, dated September 22, 2008

16. Ms. Kinastowski admitted that the only opinion or reports before City Council when they voted to pass resolutions reimbursing Messrs. Heaps and Mammoliti for their personal legal expenses were the ones she had provided. There was no second opinion before City Council.

Cross-examination of Anna Kinastowski, Q. 46, p. 12

17. Furthermore, Ms. Kinastowski did not deny that the passing of By-Law 1043-2008 was for the purpose of setting a precedent so members of City Council could assure themselves that in the event they were faced with an application for a compliance audit of their respective election expenses they would be reimbursed by the City.

Cross-examination of Anna Kinastowski, Q. 47, p. 12

18. The respondents justified the passage of By-law 1043-2008 on the grounds that reimbursement of personal legal expenses incurred in the defence of compliance audits was necessary in order to encourage persons with limited economic means to seek elected political office. The respondents provided this justification through the "expert" opinion evidence of Ryerson Professor, Dr. Myer Siemiatycki.

Affidavit of Dr. Myer Siemyatycki, sworn March 17, 2010

19. On July 19, 2010, in a parallel application commenced by Councillor Doug Holyday against the City, the Ontario Divisional Court declared By-law 1043-2008 *ultra vires* as it related to the resolutions to reimburse Messrs. Heaps and Mammoliti for their personal legal expenses.

***Holyday v. Toronto (City)* 2010 ONSC 3355 (CanLII)**

20. The City and respondents in that application sought leave to appeal the decision of the Divisional Court to the Court of Appeal for Ontario. On December 24, 2010, the motion for leave to appeal was dismissed.

Affidavit of Stephen Thiele, sworn April 4, 2011 ("Thiele 2011 Affidavit"), at para. 4

Affidavit of Anna Kinastowski, sworn March 10, 2011 at para. 8

21. Despite the decision of the Divisional Court and the pending motion for leave to appeal Toronto's City Council enacted a new "grant" By-law (By-law 1080-2010) to rectify By-law 1043-2008.

Thiele 2011 Affidavit, para. 5

Kinastowski Affidavit, "Decision Item", Exhibit F

22. Furthermore, the new grant By-law was passed contrary to a legal opinion provided by the City's outside lawyer, Mr. Alan Lenczner, and the City's lawyer, Ms. Kinastowski. Mr. Lenczner stated the City could not retroactively correct a by-law

which was not legally correct in the first place as determined by the Divisional Court. Ms. Kinastowski also stated that a grant must be exercised in a manner reasonably connected to a municipality's permissible objectives and that "courts have held that a councillor's conduct as a candidate pre-dating the term of office is activity outside the office of councillor...so the general COTA powers cannot be used to make the grant." Indeed, the Divisional Court had found that By-law 1043-2008 could not be rectified by a grant of money as it was outside the provisions of COTA, particularly s. 83.

Thiele 2011 Affidavit, at paras. 6 and 7

Cross-examination of Anna Kinastowski dated April 11, 2011, Qs. 57-65, pp. 15-19

Amended Application Record, Memorandum of Ms. Anna Kinastowski dated November 30, 2009, Tab 3D

***Holyday v. Toronto* (City), supra**

23. The City refused to provide the full extent of the opinions to the Appellant despite their disclosure in the public media, and Ms. Kinastowski refused to answer any question concerning the new grant by-law and its purpose when given the opportunity to do so on cross-examination.

Cross-examination of Anna Kinastowski, Qs. 50-59, pp. 13-16

24. On February 7, 2011, By-law 1080-2010 was repealed by the City after it had been threatened to be sued again. The City also then demanded reimbursement from Messrs. Heaps and Mammoliti for the money they had wrongly received, but gave them two years in which to repay the money.

Thiele 2011 Affidavit, at para. 8

Kinastowski Affidavit, "Decision Item", Exhibit F

Cross-examination of Anna Kinastowski, Q. 62, p. 18

City has recovered no money from Heaps and Mammoliti

25. To date no money has been paid to the City by either Messrs. Heaps or Mammoliti. On cross-examination of her affidavit, however, Ms. Kinastowski indicated that in the event of non-payment a legal proceeding would be commenced by the City against Messrs. Heaps and Mammoliti in the *fall of 2011*. No such action has been commenced.

Decision of the lower court

26. The Honourable Mr. Justice Hainey agreed with the parties that City Councillors owed a fiduciary duty to the taxpayers of the City.

Judgment of the Honourable Mr. Justice Hainey, dated July 5, 2011 ("Lower Court Decision") at para. 15

27. His Honour also accepted that the Impugned Councillors who voted in favour of the By-law did not do so for the purposes of encouraging persons of limited economic means to seek elected office and that the opinion of Prof. Siemiatycki should be rejected. His Honour rejected the only evidence put forward by the Respondent as to the reasons for their actions.

Lower Court Decision, at paras. 16 and 28

28. Hainey J. found that the facts of the case were in line with those facts considered by Rosenberg J. on a pleadings motion in *Regional Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* and that his reasoning was applicable to the Impugned Councillors. His Honour then stated as follows:

> Accordingly, in the absence of any evidence that the Respondents who voted in favour of the By-law preferred their own personal interests over their duties to the City of Toronto and its electorate, I find that the

> Respondents did not breach their fiduciary duties to the City of Toronto, its electorate, or its taxpayers. The absence of any evidence that voting in favour of the By-law could be characterized as malicious or as a misfeasance of their public office, in my view, further supports this finding.

Lower Court Decision, at para. 30

PART III – THE LAW

City of Toronto is a statutory creature

29. As a matter of law, the City of Toronto is wholly a creature of statute. It is not created as a form of constitutional government under the Canadian Constitution and therefore has no status as the Crown. The City is organized by statute as a corporation and only possesses those powers which have been granted to it by Ontario's provincial government. Accordingly, the City can only exercise the powers conferred onto it by the Legislative Assembly and thus actions of the City which reach beyond those powers are vulnerable to a declaration of *ultra vires*. The City has no abstract rights. Based on this fundamental legal principle the Divisional Court declared By-law 1043-2008 *ultra vires*.

***Smith v. London* (1909), 20 O.L.R. 133 (Div. Ct.)**

30. Section 125(1) of the *City of Toronto Act, 2006* (**"COTA"**) expressly states that the City is a body corporate.

***City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 125(1)**

31. Section 132(1) of COTA provides that the powers of the corporation are wielded by the members of city council. The members of city council, acting in the capacity of "directors", exercise the powers of the City and are its directing minds.

***City of Toronto Act, 2006, supra*, s. 132(1)**

Councillors jointly and severally liable for *ultra vires* misapplication of taxpayer money

32. Under the common law doctrine of *ultra vires* directors of corporations which have restricted powers under either a statute, a letters patent or a corporate by-law are absolutely liable when they direct their corporations to commit *ultra vires* acts. It is respectfully submitted that the Honourable Mr. Justice Hainey committed a legal error when he failed to deal with the common law doctrine of *ultra vires* in considering whether the individual respondent councillors who voted to direct the City to make an *ultra vires* allocation of funds to Messrs. Mammoliti and Heaps were absolutely personally liable for their decision.

33. The common law doctrine of *ultra vires* was reviewed by the Alberta Court of Appeal in *Angus v. R. Angus Alberta Ltd.* Under the common law doctrine issues of honesty and good faith on the part of the directing minds of the corporation are irrelevant. In *Angus*, the court was among other things required to determine if directors who had authorized the repurchase of shares held by the respondent shareholders was in contravention of the *Companies Act* of Alberta and whether they were jointly and severally liable to reimburse the company for the monies expended in the purchase. At trial, it was determined that the plaintiffs were not entitled to any of the relief which they claimed. The appellate court, however, determined that on the evidence and findings of the trial judge, there was non-compliance with s. 48 of

the *Companies Act*, thus rendering the repurchase of shares illegal and *ipso facto ultra vires*.

***Angus v. R. Angus Alberta Ltd.*, 1988 ABCA 54 (CanLII) at paras. 42 and 47**

34. The appellate court went on to describe that directors owed a duty to the shareholders to act according to law and according to the provisions of the memorandum and articles of association. Misapplication of funds in breach of those duties in furtherance of an *ultra vires* scheme is treated as a breach of fiduciary duty. Moreover the appellate court said as follows:

> The directors are trustees of the money misapplied and their liability for breach of that trust is the same as that of any other trustee. They must recoup the loss or compensate the company for it, with interest.

***Angus, supra*, at para. 49**

35. The court examined this principle, citing the English court decisions in *Cullerne v. The London and Suburban General Permanent Building Society*, *In re Sharpe*, and *In re Lands Allotment Company*. In the latter case, Lindley, L.J. said as follows:

> Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees,…

Meanwhile in the same case, Kay, L.J., concurred and said:

> Then comes the question, what was the position of the directors who made an improper and *ultra vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or *quasi* trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust.

***Angus, supra*, at para. 50**

36. The appellate court found that there is no Canadian case which deviates from this rule of liability. It thus further found that honesty and good faith did not relieve liability to reimburse for the misapplication of funds in a manner and for a purpose which was *ultra vires* the company unless, if at all, the breach occurred under the *Trustee Act*. Ontario's *Trustee Act* does not apply to the case at bar.

***Angus, supra*, at para. 54**

37. The appellate court then cited from Lindley L.J. again, this time from *Cullerne*, as follows:

> Reliance was placed by the counsel for the plaintiff on the judgment of Wickens V.C., in *Pickering v. Stephenson*, followed in *Studdert v. Grosvenor*. But if a director acting *ultra vires*, i.e., not only beyond his own power, but also beyond any power the company can confer upon him, parts with money of the company, I fail to see on what principle the fact that he acted *bona fide* and with the approval of a majority of the

> shareholders can avail him as a defence to an action by the company to compel him to replace the money. I never could understand that part of the Vice-Chancellor's judgment; nor can I understand it now -- I think he was wrong.

***Angus, supra*, at para. 54**

38. In *Sharpe*, Lindley L.J. then further stated: "As soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted. Whether they can in their turn get it back from those persons who received it is another matter; but their own liability to restore it is now clearly settled.

***Angus, supra*, at para. 54**

39. Based on the foregoing, the appellate court of appeal reversed the judgment of the trial judge and held that the common law absolute liability of directors for breach of trust for *ultra vires* misapplication of company funds applied, and that the directors were jointly and severally liable to pay those funds to the company.

***Angus, supra*, at para. 55**

40. The judgment in *Angus* conforms to the views of Victor E. Mitchell, K.C. found in the 1916 edition of Canadian Commercial Corporations, wherein the author described that "directors are liable for losses occasioned through acts done by them as directors in matters which are *ultra vires* the company, and this liability is not dependent upon any question of honesty of intention."

V.E. Mitchell, K.C., Canadian Commercial Corporations (1916: Southam Press Ltd.), at p. 1059

41. It is respectfully submitted that the common law doctrine of *ultra vires* is extremely important in controlling the behaviour of directing minds of corporations and as such has been codified in s. 92(1)(c) of Ontario's *Legislation Act, 2006* which was put before His Honour at first instance, but not dealt with at all in his reasons for judgment. Pursuant to s. 92(1)(c), a member of a statutorily created corporation, such as the City, attracts personal liability where there is a contravention of the Act that incorporates the corporation. This section states as follows:

> 92. (1) A provision of an Act that creates a corporation,
>
> (a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;
>
> (b) gives a majority of the members of the corporation power to bind the others by their acts; and
>
> (c) exempts members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them.

***Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 92(1)(c)**

42. In this case, the "members" of the corporation are the individual respondents. The word "member" is undefined by the *Legislation Act, 2006*, and therefore pursuant to general principles of statutory interpretation it should be given its ordinary meaning. "Member" can be defined as one of the persons constituting a family, partnership, association, corporation, guild, court, legislature or the like. "Member" has also been

defined as one of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization – including the rights of making, debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership. Individual councillors or "members" of council are the persons constituting the corporate entity known as the City and/or are the persons constituting the governing body (or legislature or the like) of the City.

Black's Law Dictionary, 5th ed. (West Publishing Co.: 1979), p. 887

Black's Law Dictionary, 8th ed. (West Publishing Co.: 2004), p. 1005

43. Eighty years ago, the Supreme Court of Canada accepted that members of a corporation were jointly and severally liable for the *ultra vires* act of their respective corporation when they cited the following:

> In Mill v. Hawker [FN6], Kelly, C.B. said: --
>
> I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, *unless* the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, *or unless* the act is *ultra vires*, and is not, and cannot be in the contemplation of law, a corporate act at all. (Emphasis added.)

***Kelliher (Village) v. Smith*, [1931] S.C.R. 672 (S.C.C.) at para. 12**

44. By failing to apply the doctrine of *ultra vires* in the circumstances of this case, it is respectfully submitted that Judge Hainey applied a lower standard of care on publicly elected officials than the standard which would be applied to elected

directors of corporations which also operate under restricted powers. In the context of this case, the decision of His Honour now permits publicly elected municipal officials to ignore their restricted powers to the detriment of the beneficiary, in turn leaving the taxpayers and the corporations which they direct to pursue ineffective remedies which can never return the loss to the taxpayers and the City to the position they would have been in.

45. In this case, knowledge of the *ultra vires* act was only learned by the appellant 15 months after taxpayer funds were handed out improperly to two sitting councillors and only by virtue of investigative journalism.

46. Currently, nearly four years has passed since $140,000 was handed to Messrs. Mammoliti and Heaps to cover their personal legal expenses for which the City had no authority under the law to grant to them, without a single penny being recovered. It is also not expected that recovery will ever be made at this stage. More so the *Limitations Act* will prevent any recovery.

47. Accordingly, the law, public policy and justice demands that the common law doctrine of *ultra vires* and/or s. 92(1)(c) of the *Legislation Act, 2006* be applied to hold the individual respondent councillors who directed the City to wrongfully compensate Messrs. Mammoliti and Heaps for their personal legal expenses jointly and severally liable for the payment.

Precedent supports position of the appellant

48. Contrary to the unexplained conclusion of Judge Hainey that the facts of this case are akin to *Regional Plaza Inc.*, it is respectfully submitted that there is precedent for the remedy sought by the appellant in cases such as *Cluff v. Cameron* and *Ermineskin*

members. Aside from improperly relying on *obiter* comments to distinguish Cluff, Judge Hainey failed to note that the legal opinion of the city's lawyer had definitively stated on two occasions that the grant could not be made.

52. In both her November 7, 2007 and April 30, 2008 reports, the City solicitor definitively concluded that the City did not possess any authority under COTA to grant reimbursement for personal legal expenses by councillors as a result of defending compliance audits of their election campaign expenses. Although the City solicitor later in two voluntarily statements may not have been as clear as in her two previous reports to the Executive Committee and City Council, our principles of law demand that directing minds of a corporate body in carrying out their duties in "good faith" ask pertinent questions prior to making decisions which can be challenged for illegality rather than blindly accepting what might be put before them. The issue of illegality with respect to the reimbursements was a live issue before City Council on September 24/25, 2008, yet the City offered no shred of evidence with respect to the questions asked of the City solicitor on her opinion and solicited no second opinion on the legality of the decision they were about to make. In fact, the vote for reimbursement carried 27-1 on one resolution and the vote on the second resolution wasn't even recorded.

53. When asked to produce the public videotape which would have shown the deliberations and debate undertaken by City Council prior to the allocation of $140,000, the City refused to produce the videotape. Yet His Honour ignored this fact entirely in his judgment although it was duly put before him, and he refused to draw an adverse inference that the Impugned Councillors had something to hide.

Cross-examination of Anna Kinastowski, Qs. 120 and 121, p. 31

54. It is respectfully submitted that His Honour also failed to consider that the recipients of the funds were two members of City Council or in other words that they comprised part of the same group of members as the members who voted to reimburse them. Accordingly, in essence, like in *Cluff*, the recipients were members of the same organization as the members who voted in favour of the reimbursement. They were all members of the body collectively described as City Council.

55. When asked if the Impugned Councillors voted in favour of reimbursing their fellow councillors in order to set a precedent for their own potential reimbursement against future compliance audit challenges which could involve any one of them, the City solicitor provided a shrugging "I don't know." Yet again His Honour ignored this fact and refused to draw an adverse inference against the Impugned Councillors that they were motivated in their vote by self-interest rather than an undeclared and illusory public interest which they later put before the Court in the rejected "expert" opinion of Dr. Siemiatycki.

56. The decision of Latchford J. in *Cluff* was upheld by the Ontario Court of Appeal. In that decision the appellate court granted the individual alderman an indulgence to not enforce the judgment made against them until after the close of the next session of the Ontario Legislature. Similarly, the appellant offered an indulgence to the Impugned Councillors in the order it was seeking to not enforce any judgment which might be made against them for 1 year so that the City could pursue a remedy against Messrs. Mammoliti and Heaps and make recovery of the misallocated funds from the actual recipients. As members, or in the case of Mr. Heaps a now former member of City Council, the appellant placed good faith in these two publicly elected servants

to do the right thing and reimburse the taxpayers for money which since August 2010 the Divisional Court had declared to have been illegally disbursed to them. Instead this willingness to grant an indulgence was used by the City to contend that the appellant did not seriously believe that the Impugned Councillors should be held jointly and severally liable for the misallocation of taxpayers' funds. The insufficient reasons of Judge Hainey provide no indication as to whether or not he was influenced in his ultimate decision by the City's spurious argument.

Alternatively, onus to prove no malice rested with respondents

57. In the alternative, the learned applications judge's decision to find that the Impugned Councillors did not act with malice was made on the basis that there was no evidence of malice before the court.

58. It is particularly here where His Honour erroneously concluded, without any analysis, that the *Regional Plaza Inc.* case closely represented the case at bar. As set out in the table below, *Regional Plaza Inc.* is noticeably distinguishable from the case at bar.

Regional Plaza Inc. v. Hamilton-Wentworth	**Case at bar**
Matter before court was motion under r. 25 to strike pleadings as demonstrating no cause of action against individual councillors where there was an allegation of conspiracy and abuse power which induced councillors to breach a contract and Region of Hamilton-Wentworth and the councillors to breach a duty of good faith owed to the plaintiffs.	Matter before court is an application to hold individual councillors responsible for allocation of payments pursuant to an *ultra vires* act of city which resulted in a breach of fiduciary duty of individual councillors through a breach of trust over the spending of taxpayer money. *Regional Plaza Inc.* did not deal with either an *ultra vires* act or a "breach of trust" situation.
Statement of claim pleaded that individual councillors were liable because they voted in favour of decision which resulted in contract between plaintiffs and the Region of Hamilton-Wentworth being breached.	Application puts forward evidence that Impugned Councillors voted to reimburse fellow councillors despite unfavourable legal opinions given on four occasions prior to vote and on conduct of City Council to scoff at decision of Divisional Court declaring by-law *ultra vires*.

The issue of an *ultra vires* act was not raised by the plaintiffs in its pleading. Instead the plaintiffs alleged that the actions of the individual councillors constituted a flagrant abuse of power *directed* at the plaintiff.	The only issue in this application is the consequences of directing the corporate entity of the City of Toronto to commit an ultra vires act. The applicant has not alleged that the impugned individual councillors acted in flagrant abuse of their power, but rather that the outcome of directing the City to make an *ultra vires* expenditure amounts to a breach of fiduciary duty on the basis that councillors, as trustees of taxpayer money, are responsible for the ultimate breach of trust. The decision to compensate Messrs. Mammoliti and Heaps was not *directed* at the taxpayers. Rather the decision robbed the taxpayers of funds which were to be otherwise used for their benefit.

59. The only evidence offered by the Impugned Councillors to support their justification for passing the resolutions and impugned By-law was that the reimbursement was necessary as a matter of democracy so that people of modest means were not deterred from running for elected city office. This opinion was set out in the affidavit of Dr. Siemiatycki.

60. Yet the opinion offered by Dr. Siemiatycki, which the respondents relied upon in their supplementary factum as evidence of the "good faith" of the Impugned Councillors, was admittedly never presented before City Council prior to their vote in September 2008 and was, among other things, based on no supporting empirical data. Accordingly, His Honour rejected the opinion of Dr. Siemiatycki and concluded that the Impugned Councillors had offered no evidence to justify their vote.

61. However the law of Ontario demands that a person in the position of trustee, as were the Impugned Councillors, bear the onus of demonstrating that a breach of fiduciary duty or breach of trust has not occurred. However, it is submitted that Hainey J.

reversed this onus and placed it on the appellant. The act in question was *ultra vires* and therefore the only conclusion can be that the Impugned Councillors breached their fiduciary duty and did so with malice. The Impugned Councillors tendered no evidence to the contrary. His Honour, without so stating, simply relied on a presumption that elected officials act in good faith whenever they make decisions and can sit passively in silence when challenged for directing the City to spend entrusted taxpayer money illegally.

***Krendall v. Frontwell Investments Ltd.*, 1967 CarswellOnt 145 (H.C.J.) at para. 11**

By-law passed in bad faith

62. Furthermore, in the further alternative, the judge's conclusion that the Impugned Councillors did not act with malice was contrary to the factual history of the challenge to By-law 1043-2008. First, at least four prior written opinions were provided to the City Councillors (2 written reports to the Executive Committee and 2 written reports to City Council) advising that the making of grant to cover personal legal expenses incurred in relation to compliance audits was not within the authority of the City under COTA or, at least, would be vulnerable to legal challenge.

63. Upon the Divisional Court's ruling that the by-law was *ultra vires*, City Council was provided a legal opinion from its outside counsel that a new by-law could not be passed to cure the defect of the *ultra vires* by-law and that the Divisional Court ruling should not be challenged. Yet this advice was ignored and City Council chose to act as scofflaws by passing a new by-law to justify the reimbursement which had been made to Messrs. Mammoliti and Heaps almost two years earlier.

64. City Council then only quashed this second by-law after threat of another legal action was made against the City.

65. This case is unique. At every monthly council meeting, as can be seen from the minutes of the September 24/25, 2008 meeting, hundreds of decisions are made by the directing minds of the City. It is only in extremely rare circumstances that a decision involving a potentially *ultra vires* expenditure of funds like the one at issue here takes place. Contrary to the assertion of the respondents, a decision to hold the directing minds of council personally responsible for the *ultra vires* expenditure will not undermine the City from carrying out its statutorily mandated responsibilities. The City to this day continues to function despite this application and the successful application of Mr. Holyday.

66. In contrast, a decision which holds the Impugned Councillors to account will prevent the directing minds of statutorily created governments from running amok and will send a clear judicial message that those directing minds do not reign supreme and that entrusted taxpayer money when wrongly disbursed will be protected and recovered in full.

67. It is respectfully submitted that as a matter of sound legal principle and sound public policy, in the extremely rare instance where directing minds of a statutorily created municipal government cause their government to expend entrusted taxpayer money contrary to the widespread powers which the government has been granted to exercise, those directing minds who voted to permit the government to act beyond its scope be held, as was held under the common law and in *Cluff*, personally accountable.

PART IV – ORDER REQUESTED

68. It is respectfully submitted that this Honourable Court allow the appeal and grant the following:

(i) a declaration that the individual respondents Brian Ashton, Shelley Carroll, Raymond Cho, Glenn De Baeremaeker, Paula Fletcher, Mark Grimes, Cliff Jenkins, Gloria Lindsay Luby, Ron Moeser, Howard Moscoe, Joe Pantalone, John Parker, Gord Perks, Anthony Perruzza, Karen Stintz and Adam Vaughan breached their fiduciary duty to the taxpayer and the City; and

(ii) an order that the above named individual respondents are jointly and severally liable to the City in the amount of $139,159.70, plus pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: August 28, 2012

per: Murray Maltz
Solicitor for the Appellant,
The Toronto Party for a Better City

SCHEDULE "A"

1. *Holyday v. Toronto (City)*, 2010 ONSC 3355

2. *Smith v. London* (1909), 20 O.L.R. 133 (Div. Ct.)

3. *Bowes v. Toronto (City)* (1858), 14 E.R. 770 (P.C. U.K.)

4. *Guerin v. R.*, 1984 CarswellNat 813 (S.C.C.)

5. *Sims v. Fratesi*, 1986 CarswellOnt 4854 (Gen. Div.)

6. *Angus v R. Angus Alberta Ltd. 1988 ABCA 54 (CanLII)*

7. *Ermineskin Cree Nation v. Minde*, [2010] A.J. No. 189 (Q.B.)

8. *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*, [2007] A.J. No. 1065 (Q.B.)

9. *Krendel v. Frontwell Investments Ltd.*, 1967 CarswellOnt 145 (H.C.J.)

10. *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 (S.C.C.)

11. *Cluff v. Cameron (1922)*, 22 O.W.N. 245 (H.C.), aff'd (1923), 23 O.W.N. 89 (C.A.)

12. *Black's Law Dictionary, 5th ed (West Publishing Co.: 1979).*

13. *Black's Law Dictionary, 8th ed. (Thomson West: 2004)*

14. *Ian Rogers, The Law of Canadian Municipal Corporations*, 2nd ed. (Carswell: looseleaf)

15. *V.E. Mitchell, K.C., Canadian Commercial Corporations (1916: Southam Press Ltd.)*

SCHEDULE "B"

***City of Toronto Act*, 2006, S.O., c. 11 Schedule "A", ss. 125(1), 132(1)**

125. (1) The City of Toronto is hereby continued as a body corporate that is composed of the inhabitants of its geographic area. 2006, c. 11, Sched. A, s. 125 (1).

132. (1) The powers of the City shall be exercised by city council. 2006, c. 11, Sched. A, s. 132 (1).

***Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 92(1)(c)**

Corporations, implied provisions

92. (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them. 2006, c. 21, Sched. F, s. 92 (1).

TORONTO PARTY FOR A BETTER CITY

Plaintiff

- and -

THE CITY OF TORONTO et al

Defendant

Court of Appeal File No.: C54125
SCJ Court File No.: CV-09-394259

COURT OF APPEAL FOR ONTARIO

Proceeding commenced in Toronto

FACTUM OF THE APPELLANT, TORONTO PARTY FOR A BETTER CITY

(Appeal – Personal liability for *ultra vires* act)

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