

[2] Toronto Party originally brought this Application in December, 2009 and amended it in March, 2010. The Application, sought, *inter alia*, a declaration that a by-law passed by City Council authorizing the City to reimburse Giorgio Mammoliti (“Mammoliti”) and Adrian Heaps (“Heaps”), two candidates for City Council, for expenses they incurred in successfully opposing compliance audits (the “By-law”) was *ultra vires* and of no force or effect. It was adjourned pending the determination of a similar judicial review proceeding brought by City Councillor, Douglas Holyday.

[3] Councillor Holyday’s application was heard on May 17, 2010. On July 19, 2010, the Divisional Court quashed the By-law on the ground that it was beyond the authority of City Council.¹

[4] The City’s application for leave to appeal the Divisional Court’s decision to the Ontario Court of Appeal was dismissed on December 24, 2010.

[5] Prior to the Divisional Court’s decision, Mammoliti and Heaps were reimbursed for their legal expenses pursuant to the By-law. In February, 2011, City Council passed resolutions to seek recovery of \$74,402 from Mammoliti and \$64,757.70 from Heaps. Demand letters were sent to both councillors by the City Solicitor, Anna Kinastowski (“Kinastowski”) on February 28, 2011 providing them with two years in which to repay the money.

[6] As a result of these developments, the only outstanding issue arising under Toronto Party’s Application is whether the individual City Councillors who voted in favour of the By-law breached their fiduciary duties to the taxpayers of the City of Toronto by doing so and are, therefore, jointly and severally liable for the amounts that were paid to Mammoliti and Heaps, totalling \$139,159.70. For the Reasons that follow, I have concluded that they did not breach their fiduciary duties

Factual Background

[7] The Divisional Court carefully set out the factual background as follows:

- (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.

¹ *Holyday v. City of Toronto*, 2010 ONSC 3355

- (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 \$52,081.37 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 \$64,757.70, which includes \$19,427.30 withheld for income tax.

[8] The Divisional Court concluded that the City did not have jurisdiction to pass the By-law as follows:

[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.

...

[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.

[9] The Divisional Court also commented upon the expert opinion relied upon by the Respondents from Dr. Meyer Siemiatycki as follows:

[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...

[10] Following the Divisional Court's decision to quash the By-law, City Council enacted a new by-law in August, 2010, in an effort to address the Divisional Court's ruling. The new by-law authorized the "grant" of money to Mammoliti and Heaps and was passed despite a legal opinion from the City's outside legal counsel that the By-law could not be retroactively

corrected. City Council repealed the new by-law in February, 2011. To date, the City has not recovered any of the money paid to Mammoliti and Heaps pursuant to the By-law. Although, Kinastowski advised Mammoliti and Heaps that they have two years in which to make arrangements to repay the money, she testified that if satisfactory repayment arrangements have not been made by the Fall of 2011, the City of Toronto will initiate legal proceedings against them within the applicable limitation period.

Issue

[11] Did the City Councillors who voted in favour of the By-law breach their fiduciary duties to the City of Toronto taxpayers and if so, are they liable for the amounts paid to Mammoliti and Heaps?

Fiduciary Duty to Taxpayers

[12] The Respondents concede that the City Councillors stand in a fiduciary relationship to the taxpayers of the City of Toronto. They rely upon the decision of the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 in which Dickson J. (as he then was) held:

... where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.

[13] They also cite the decision of Poupore J. in *Simms v. Fratazie*, [1996] O.J. No. 4488 at para. 80 in which he held:

It is argued, and this Court does agree, an elected official stands in a fiduciary relationship with the electorate.

[14] The Applicants rely on the Privy Council's decision in *Bowes v. City of Toronto* (1858), 14 E.R. 770 in which the Privy Council held:

We are of opinion, however, that neither the governing character nor the deliberative character of the Corporation Council makes any difference, and that the Council was in effect and substance a body of trustees for the inhabitants of Toronto; trustees having a considerable extent of discretion and power, but having also duties to perform, and forbidden to act corruptly.

[15] On the strength of these judicial authorities, I agree with the parties and I find that the City Councillors owe a fiduciary duty to the electorate of the City of Toronto, which includes its taxpayers.

Did the City Councillors Breach Their Fiduciary Duty?

Applicant's Position

[16] The Applicant submits that the individual City Councillors who voted in favour of the By-law breached their fiduciary duties to the taxpayers and that it is unnecessary to find “malice” to establish a breach of fiduciary duty. According to the Applicant, there is an onus on each City Councillor who voted in favour of the By-law “to prove that he or she did not breach his or her fiduciary duty or trust to the taxpayer.” The Applicant submits that the City Councillors “have put forward absolutely no evidence as to why the By-law was passed.” Mr. Maltz, on behalf of the Applicant, argues that the opinion of Dr. Siemiatycki should not be considered by me for the reasons given by the Divisional Court and because he lacks the necessary experience and independence to be qualified as an expert witness on the subject matter of his opinion.

[17] Mr. Maltz further argues that by voting for the By-law that was found to be *ultra vires*, the City Councillors were in breach of their fiduciary duties to the City of Toronto and its taxpayers and no finding of malice or impropriety of any kind is required to establish their liability for having breached their fiduciary duties.

[18] In support of its position, the Applicant cites the case of *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 (S.C.C.) at para. 12 in which the court stated:

In *Mill v. Hawker* [FN 6], 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 contemplation of law, a corporate act at all.

[19] The Applicant also relies on the case of *Cluff v. Cameron* (1922), 22 O.W.N. 245 (H.C.), Aff'd (1923), 23 O.W.N. 89 (C.A.) in which the Ontario Court of Appeal upheld the decision of Latchford J. who found that individual city aldermen who had voted in favour of a by-law that resulted in a misallocation of municipal funds were jointly and severally liable for the *ultra vires* act. In *Cluff*, the municipal council of the City of Ottawa made a grant of \$2,000 to the Kiwanis Club of Ottawa. The court found that the action of the city council was not warranted by any provision of the City's governing legislation and was, therefore, illegal. The individual aldermen who had voted for the resolution authorizing the payment were held to be jointly and severally liable for the *ultra vires* act. However, Latchford J. also observed:

The conduct of the defendants Plant, Lowe and McGuire was all the more reprehensible because of the fact that they were voting public money for the benefit of an organization of which they were members.

[20] The Applicant also cites the decision of the Alberta Court of Queen's Bench in *Ermineskin Cree Nation v. Minde* [2010], A.J. No. 189 (Q.B.) in which the court held that the misallocation of funds by the Chief of the *Ermineskin* band, who was an elected representative, was a breach of his fiduciary duty and an *ultra vires* act. However, the trial judge also found that the Chief had not been truthful about the purpose for which certain cheques were written and speculated that the misappropriated funds "may have found their way into hands that might have benefited" the Chief.

[21] The Applicant urges me to find that the City Councillors who voted in favour of the By-law breached their fiduciary duties because they voted in favour of the By-law in the face of the City Solicitor's unequivocal opinions that City Council lacked the authority to reimburse the City Councillors for their legal expenses. The Applicant also cites the fact that City Council passed another by-law following the Divisional Court's decision, which sought to characterize the reimbursement to Mammoliti and Heaps as a "grant", as further evidence of the City Councillors' breach of their fiduciary duties.

Respondents' Position

[22] The Respondents argue that a breach of fiduciary duty can only occur when a person acts in a manner so as to prefer his own personal interest to the duty that he owes to his principal or beneficiary. They argue that it is clear that none of the City Councillors who voted in favour of the By-law preferred their own personal interests over their obligations to the City of Toronto. According to the Respondent, they did not and could not benefit personally from voting in favour of the By-law.

[23] Mr. Lenczner, on behalf of the Respondents, submits that there must be some advantage to the party in breach to find a breach of fiduciary duty. He points out that in each of the cases relied upon by the Applicant there was an element of conflict or advantage on the part of the elected official found to have breached his fiduciary duty and he argues that there can be no such finding of either a conflict or an advantage on the part of any of the City Councillors who voted in favour of the By-law in this case. Further, he argues that there is no public interest mandating a finding of liability against the City Councillors since the city has already taken steps to recover the funds paid to Mammoliti and Heaps.

[24] In response to the Applicant's position that the City Councillors' decision to vote in favour of the By-law in the face of the City Solicitor's legal opinions supports a finding that they breached their fiduciary duties, Mr. Lenczner points out that the legal opinions provided by the City Solicitor to City Council are not as unequivocal as the Applicant suggests. He also points to Ms. Kinastowski's evidence in which she testified:

Q: And has the City solicitor's advice always been upheld by the court?

A: I wish I could say that it was, but we provide – by professional obligation is to provide advice and that advice from time to time is tested by the courts, and we have been proven wrong before.

[25] The City Solicitor’s legal opinion provides in part as follows:

While I have been directed to comment on the reasonableness of the invoices, it is incumbent upon me to remind Council of the law with respect to reimbursement for these sorts of expenses. 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 a 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.

[26] The Respondents further argue that since the By-law constitutes a decision of City Council, which is a body corporate, the individual councillors who voted in favour of the By-law cannot be liable in their personal capacity for its decisions when none of the City Councillors obtained any benefit or advantage from voting in favour of the By-law. The Respondents maintain that individual members of a municipal corporation can only be liable for an act done as a member of the corporation if the act was done maliciously and, thus, constitutes a misfeasance in public office. They rely upon the decision of Rosenberg J. in the case of *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (H.C.J.) in which the plaintiff sued individual members of the regional council of Hamilton-Wentworth alleging that by voting in favour of a particular resolution they had induced the regional municipality to breach its agreement with the plaintiffs. In dismissing the action against the individual members of council, Rosenberg J. held:

[10] Individual members of a municipal corporation can only be sued for an act as members or officers of the corporation if the act was done maliciously and thus constitutes a misfeasance in public office: See *Harman v. Tappenden* (1801), 1 East 555 at p. 563, 102 E.R. 214 (K.B.); *Mill v. Hawker* (1874), L.R. 9 Ex. 309 at p. 321, 43 L.J. Ex. 129; *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 at p. 681, [1931] 4 D.L.R. 102; *Jones v. Swansea City Council*, [1990] 1 W.L.R. 54 (C.A.) at p. 69.

[11] Even though proposing the motion to rescind the by-law and voting in favour of the motion to rescind the by-law could be characterized as acts that

cause the municipal corporation to breach its agreement, they do not in themselves constitute the tort of inducing breach of agreement unless there is some improper motive shown. Such improper motive will not be assumed, nor will a lack of good faith. On the contrary, there is a presumption that a vote is made in good faith and for a proper motive.

[12] On the other hand, it is acknowledged by the applicants that in the event that they were in breach of good faith or if the acts that were done by proposing the motion and passing it were designed not to further the interests of Hamilton-Wentworth but to intentionally injure Region Plaza, that they may be actionable, or, if the defendants acted with malice and/or recklessly, abused the public office held by each of them, they may be liable.

[27] The Respondents further argue that to impose personal liability against the City Councillors who voted in favour of the By-law would stultify City Council and create a chilling effect on the democratic process within City Council.

Analysis

[28] Despite Mr. Maltz's able argument, I agree with the position of the Respondents. As the Divisional Court observed there is no evidence to establish that the City Councillors who voted in favour of the By-law did so for the reasons cited by Dr. Siemiatycki. However, there is no evidence that they voted in favour of the By-law for an improper purpose or as a result of any improper motive or lack of good faith. In arriving at this conclusion, I have not relied upon Dr. Siemiatycki's opinion for the reasons cited by Mr. Maltz.

[29] In all of the decisions relied upon by the Applicant in which elected officials were found to have breached their fiduciary duties, there was an element of conflict and/or misfeasance. In my view, this explains the court's willingness, in each of those cases, to impose personal liability upon the elected officials for the actions of the corporate body.

[30] I have concluded that the facts of this case are more in line with the facts considered by Rosenberg J. in the *Region Plaza* case and his reasoning is applicable to the City Councillors who voted in favour of the By-law.

[31] 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.


Conclusion

[32] I find that the City Councillors who voted in favour of the By-law, did not breach their fiduciary duties to the City of Toronto, its electorate or its taxpayers and they are, therefore, not liable for the amounts paid to Mammoliti and Heaps.

Costs

[33] As I suggested to counsel at the conclusion of argument, I am prepared to receive written submissions with respect to the issue of costs. The Respondents may file their submissions of not more than five pages, double-spaced by July 15, 2011 and written submissions from the applicants in response, of the same length by July 29, 2011.

[34] I want to thank counsel for their very thorough and helpful submissions and the professional manner in which this Application was presented.


HAINEY J.

Released: July 5, 2011

CITATION: Toronto Party for a Better City v. Toronto (City), 2011 ONSC 3233

COURT FILE NO: CV-09-394259

DATE: 20110705

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

TORONTO PARTY FOR A BETTER CITY

Applicant

- and -

THE CITY OF TORONTO, BRIAN ASHTON, SHELLEY
CARROLL, RAYMOND CHO, GLENN DE
BAEREMAERKER, 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

REASONS FOR DECISION

HAINES J.