Court File No.: 37/10

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

DOUGLAS HOLYDAY

Applicant

-and-

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

Respondents

-and-

TORONTO PARTY FOR A BETTER CITY

Intervenor
As Friend of the Court

RESPONDING WRITTEN SUBMISSIONS, TORONTO PARTY FOR A BETTER CITY

PART I – THE LAW

<u>One-year limitation period in s. 214(4) of COTA does not apply to void by-law</u>

1. The issue for determination by this Honourable Court is whether, as a matter of statutory interpretation, the City of Toronto (the "**City**") under the *City of Toronto Act, 2006* ("**COTA**"), has the authority to recompense members of city council for legal expenses incurred as a result of acts taken outside their duties as councillors.

2. As a party granted intervenor status as a friend of the court, we have been served with the supplementary submissions of both the City and Mr. Giorgio Mammoliti (collectively, the "**Respondents**") in relation to whether s. 214(4) of COTA

precludes a challenge to two resolutions and the by-law giving legal force to these resolutions since Mr. Douglas Holyday's judicial review application was commenced more than one year after the resolutions and by-law were enacted. It is respectfully submitted that the Respondents cannot rely on the protection of s. 214(4) because the resolutions and by-law were void *ab initio*. The statutory limitation period found in s. 214(4) does not protect a resolution or by-law which the City has no statutory authority to pass.

3. The law draws a distinction between a void by-law and a voidable by-law for the purposes of the application of limitation periods like those found in s. 214(4). Where a municipality enacts a by-law but does not follow the proper procedure to pass it, the by-law is merely voidable. In contrast, where a municipality enacts a by-law that it substantively has no jurisdiction to enact, the by-law is void and cannot be protected by a statutory limitation period.

4. The resolutions and by-law in question are not being challenged on the grounds of a procedural irregularity and therefore the limitation period found in s. 214(4) of the COTA does not apply.

5. The Supreme Court of Canada has ruled on the distinction between a void and a voidable by-law. In the leading case of *Wiswell v. Greater Winnipeg (City)*, the court in rendering its decision cited the following passage from *The Law of Municipal Corporations*:

> …if a by-law is within the power of the council and remains unimpeached within the time limited, it is validated by the effluxion of time.

> It must be stressed, however, that the curative effect of a failure to quash a by-law is limited to by-laws which are merely voidable and not void. The courts have made a distinction between these two clases of illegal by-laws. A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relating to its passing and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of non-compliance with a prerequisite to its passing.

The foregoing passage can still be found in the current version of Ian Rogers' leading textbook on municipal law.

***Wiswell v. Greater Winnipeg (City)*, 1965 CanLII 106 (S.C.C.) at p. 524**

Ian Rogers, The Law of Canadian Municipal Corporations, 2nd ed., (Carswell: looseleaf) at p. 1362.2

6. In *Tonks v. Reid*, the Supreme Court of Canada also refused to apply a one-year statutory limitation found in the Ontario *Municipal Act* where it was determined that the by-law in question was void.

***Tonks v. Reid*, [1967] S.C.R. 81 at p. 85**

7. The City's reliance on *Re Clements & Toronto* is misplaced. The decision, determined before both *Wiswell and Tonks* conflicts with the pronouncements of the Supreme Court of Canada. From a public policy perspective, it would be absurd to permit a government to enact legislation which it does not have

authority to enact and then run and hide behind a limitation period to uphold it. The City's argument in support of the payments to Messrs. Adrian Heaps and Mammoliti is based, although curiously never discussed in either of the motions at issue or accompanying staff reports, on the interest of democracy. Yet it is the antithesis of the best interests of democracy for a government to justify legislation which it does not have authority to pass on the grounds that the challenge to the impugned legislation is too late. To uphold such legislation leads to tyranny, chaos and, although right-minded people would never advocate such a course of action, the potential for violent uprising which is not unknown to Ontario (i.e. Ipperwash) or Canada (i.e. the FLQ Crisis).

Section 83 of COTA does not permit reimbursement for personal legal expenses

8. In Mr. Mammoliti's supplementary submissions, he argues that the City's decision to compensate him for his legal expenses was within the grant power of the City found in s. 83 of the COTA. However, it is respectfully submitted that s. 83 cannot be interpreted in such a limitless fashion.

9. Indeed, the powers of a City are not limitless. Notwithstanding changes in way municipal statutes have been drafted and interpreted by our courts, our judicial system has understood that municipal powers must be exercised for the valid objectives of a city. The Supreme Court of Canada clearly expressed this view in *114957 Canada Ltd v Town of Hudson*, stating as follows:

> While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an

> impugned by-law enacted under an "omnibus" provision such as s. 410 *C.T.A.* must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not. As a Justice of the Ontario Divisional Court, Cory J. commented instructively on this subject in *Re Weir and The Queen* (1979), 26 O.R. (2d) 326 (Div. Ct.), at p. 334. Although he found that the City of Toronto's power to regulate matters pertaining to health, safety and general welfare (conferred by the *Municipal Act*, R.S.O. 1970, c. 284, s. 242) empowered it to pass a by-law regulating smoking in public retail shops, Cory J. also made the following remark about the enabling provision: "There is no doubt that a by-law passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner."

***114957 Canada Ltee v. Hudson (Town)*, 2001 SCC 40 (CanLII) at para. 20**

10. The Supreme Court of Canada went in *Hudson (Town)* went on to state as follows:

> In *Shell*, *supra*, at pp. 276-77, Sopinka J. for the majority quoted the following with approval from Rogers, *supra*, § 64.1:
>
> > In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.
>
> In that case, Sopinka J. enunciated the test of whether the municipal enactment was "passed for a municipal purpose". Provisions such as s. 410(1) *C.T.A.*, while benefiting from the generosity of interpretation discussed in *Nanaimo*, *supra*, must have a reasonable connection to the municipality's permissible objectives. As stated in *Greenbaum*, *supra*, at p. 689: "municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing *ultra vires* by-laws".

***114957 Canada Ltee, supra*, at para. 26**

11. The court then concluded that: “In the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws (*R. v. Greenbaum*, 1993 CanLII 166 (S.C.C.), [1993] 1 S.C.R. 674).”

***114957 Canada Ltee, supra*, at para. 52**

12. The judgment of Sopinka J. in *Shell Canada Products Ltd. v. Vancouver (City)* similarly did not give effect to the idea that a municipality’s power was open-ended and limitless. For a by-law to be valid it must be passed for a municipal purpose or otherwise stated must be connected to a city’s permissible objectives.

***Shell Canada Product Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC) at pp. 26 and 28 (CanLII)**

13. The test set out in these Supreme Court of Canada decisions has been used by the Ontario Court of Appeal. In *Fourth Generation Realty Corp. v. Ottawa (City)* the court expressly stated that in order for a municipal by-law to be valid, it must have a reasonable connection with the municipality’s permissible objectives. The appellate court stated as follows:

> 32] In *114957 Canada Ltée. v. Town of Hudson*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, the Supreme Court of Canada held valid a municipal by-law that was allegedly in conflict with provincial legislation. The Court affirmed the test for determining whether an enactment was passed “for a municipal purpose” given by Sopinka J. in *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (S.C.C.), [1994] 1 S.C.R. 231, quoting from I. M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1971):

> The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.
>
> [33] In other words, for the provision to meet the test, it must have a reasonable connection with the municipality's permissible objectives

***Fourth Generation Realty Corp. v. Ottawa (City)*, 2005 CanLII 16568 (C.A.) at paras. 32 and 33**

14. Neither *Santa v. Thunder Bay* nor *Harding v. Fraser*, two cases affirmed by the Ontario Court of Appeal in 2004 and 2007 respectively, deviate from the pronouncements of the Supreme Court of Canada or *Fourth Generation Realty Corp*. Indeed both cases apply the current rule of law and recognize that the powers of cities are not limitless and cannot be wielded by politicians for their own personal benefit, as was done with the resolutions which compensated Messrs. Heaps and Mammoliti for their personal legal expenses in defending compliance audits brought against them pursuant to the provisions designed to enhance democracy under the *Municipal Elections Act*.

***Santa v. Thunder Bay (City)*, 2003 CanLII 21828 (S.C.J.), aff'd 2004 CanLII 19529 (C.A.)**

***Harding v. Fraser*, 2006 CanLII 21784 (On. S.C.), aff'd 2007 CarswellOnt 1813 (C.A.)**

15. In *Santa*, the court specifically rejected the idea that defending a sitting city councillor for a compliance audit, whether the audit was one brought in the councillor's capacitiy as a candidate or councillor, was not in the public interest. The court stated as follows:

>] Councillor Santa submits that, once served with the electors' application to declare him in contravention of the *Municipal Elections*

> *Act*, he was being sued not as a *candidate*, but as a *representative* of city council. His argument is that, by resisting the electors' application in the court, he was *defending* the decision made by city council not to order a compliance audit of his election expenses.
>
> [35] He contends that the city should have intervened to assume his defence in that the electors' application was designed to *prevent* him from engaging in the legal execution of his duties. Thus he had no alternative but to defend the city's decision. He points to the resolution of February 10, 2003 as an admission by the city of its responsibility to pay his legal expenses, on the basis that he undertook the defence of the city's position when the city would not.
>
> [36] Finally, he argues that the defence of the electors' applications to the Court of Appeal benefited all members of council, both in Thunder Bay and throughout the province, by clarifying the state of the law.
>
> [37] **While this last argument has merit, there is no provision in the *Municipal Act* authorizing the payment of costs for public interest litigation. (My emphasis added)**

Similarly, the grant power of COTA does not authorize the payment of expenses incurred by Messrs. Heaps and Mammoliti.

***Santa, supra*, at paras. 34-37**

16. In *Harding*, the court reiterated the view that a council does not have standing to do indirectly what the Legislature did not authorize it to do directly. Specifically, the court said as follows:

> 29] The recent trend in jurisprudence involving municipalities is to move away from the principle that municipal powers are closely circumscribed by their governing statute, and to interpret powers conferred on municipalities broadly. This approach defers to the decisions of locally elected officials. See *Croplife Canada v. City of Toronto,* [2005] O.J. No. 1896 (Ont. C.A.).
>
> [30] However, that deferential approach cannot, in my view, extend to giving a council standing to do indirectly what the Legislature has not authorized it to do directly. Council has no standing to initiate an application under the *Municipal Conflict of Interest Act.*

***Harding, supra,* at para. 29 and 30**

17. The grant power of COTA is not all-encompassing. It does not provide the City with the authority to recompense two elected councillors, or anyone, for their personal legal expenses incurred in defending a compliance audit. It is not a provision designed to enhance the interests of democracy by encouraging people of modest means to seek elected office. The grant power is found under the heading "Economic Development".

18. General principles of statutory interpretation, which are codified in ss. 12 and 13 of COTA, require that specific provisions of a statute override general provisions. COTA contains a specific provision dealing with the ability of the City to recompense a sitting councillor for expenses he or she incurs, including legal expenses. Section 222 of COTA specifically states that reimbursement can only be made where the councillor is carrying out his or her duties as a councillor. During an election, a candidate, which is what Messrs. Heaps and Mammoliti were, do not carry out duties of a councillor. Accordingly, s. 83 of COTA cannot be interpreted so broadly that City Council is permitted to choose to reimburse them for their legal expenses incurred outside the office of councillor.

***City of Toronto Act,* 2006, S.O. 2006, c. 11, Schedule "A", ss. 12 and 13**

19. If the s. 83 power can be wielded by the City under the guise of what is in the best interests of democracy, then it is respectfully submitted that this Honourable Court will be granting City Council carte blanche to spend the revenue it collects

because virtually anything, including pronouncements unsupported by empirical evidence as in this case, can qualify as being in the best interests of democracy. Giving a grant to a homeless person is in the best interests of democracy because he or she can use the grant to find accommodation or enroll in educational programs and thereby become a productive member of society. Moreover, city council could give grants to their friends and supporters for home improvements because it is interests of democracy that people live in more comfortable accommodations which in turn better their quality of life and which in turn increase their productivity and build a better society. Surely this is not the intent of s. 83. Section 83 was not enacted for the purpose of permitting City Council to protect its friends from the legal expenses associated with defending a compliance audits brought by concerned residents because they believed Messrs. Heaps and Mammoliti exceeded their election spending limits. If the Legislature had wanted such a result, it would have expressly included such a provision in the *Municipal Elections Act*, where the ability on the part of a voter to commence a compliance audit is found.

20. Although the City is advocating a policy that a person who is successful at defending an election compliance audit should be recompensed out of city revenues, even though curiously in both cases Messrs. Heaps and Mammoliti also received a tax gross-up for their reimbursements as though the monies somehow constituted a taxable benefit to them, the issue for this court to determine is a matter of law and whether s. 83 is broad enough to permit the City to compensate someone for their personal legal expenses. Neither s. 83 nor any other section of

COTA permits such a reimbursement. Such a reimbursement is not for a municipal purpose.

21. Accordingly, the impugned resolutions and the by-law which enacted them are substantively void for illegality and therefore are not protected by the one-year limitation period found in s. 214(4) of the COTA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: June 3, 2010

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Murray Maltz/Stephen Thiele

Lawyers for the Intervenor, as Friend of the Court
Toronto Party for a Better City

SCHEDULE "A"

1. *Wiswell v. Greater Winnipeg (City)*, 1965 CanLII 106 (S.C.C.)

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

3. *Tonks v. Reid*, [1967] S.C.R. 81

4. *114957 Canada Ltee v. Hudson (Town)*, 2001 SCC 40 (CanLII)

5. *Shell Canada Product Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC)

6. *Fourth Generation Realty Corp. v. Ottawa (City)*, 2005 CanLII 16568 (C.A.)

7. *Santa v. Thunder Bay (City)*, 2003 CanLII 21828 (S.C.J.), aff'd 2004 CanLII 19529 (C.A.)

8. *Harding v. Fraser*, 2006 CanLII 21784 (On. S.C.), aff'd 2007 CarswellOnt 1813 (C.A.)

SCHEDULE "B"

City of Toronto Act, 2006 S.O. 2006, c. 11, Schedule "A", ss. 12 and 13

Specific power, by-laws under general powers

12. (1) If the City has the power to pass a by-law under section 7 or 8 and also under a specific provision of this or any other Act, the power conferred by section 7 or 8 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision. 2006, c. 11, Sched. A, s. 12 (1).

Interpretation

(1.1) For the purpose of subsection (1) and, unless the context otherwise requires, the fact that a specific provision is silent on whether or not the City has a particular power shall not be interpreted as a limit on the power contained in the specific provision. 2006, c. 32, Sched. B, s. 4 (1).

Application to new and existing provisions

(2) Subsection (1) applies whether the specific provision was enacted before or after,

(a) the day this section comes into force; or

(b) the day a by-law passed under section 7 or 8 comes into force. 2006, c. 11, Sched. A, s. 12 (2).

No retroactive effect

(3) Nothing in this section invalidates a by-law which was passed in accordance with the procedural requirements in force at the time the by-law was passed. 2006, c. 11, Sched. A, s. 12 (3).

Limitation

(4) Subsection (1) applies to limit the powers of the City despite the inclusion of the words "without limiting sections 7 and 8" or any similar form of words in the specific provision. 2006, c. 32, Sched. B, s. 4 (2).

Non-application of section

(5) This section does not apply to a by-law under section 7 or 8,

(a) respecting fences and signs;

(b) requiring persons to clear away and remove snow and ice from land;

(c) requiring persons to remove debris from land they own or occupy or from other private or public land;

(d) requiring persons to cut and remove long grass and weeds, as defined in the by-law, from land they own or occupy or from highways abutting the land;

(e) prescribing standards to protect against entry into vacant buildings, as defined in the *Building Code Act, 1992*, or to detect and signal the presence of a person in a vacant building;

(f) authorizing front yard parking;

(g) requiring owners or persons in charge of any premises to remove decayed, damaged or dangerous trees or branches that pose a danger to persons or property;

(h) providing for any project or undertaking designed to provide housing accommodation in the City, including any public space or recreational, institutional, commercial or industrial facilities or buildings that, in the opinion of the City, may be reasonably necessary for that purpose; or

(i) respecting such other matters as may be prescribed by the Minister of Municipal Affairs and Housing. 2006, c. 32, Sched. B, s. 4 (2).

Exception

(6) Clause (5) (h) does not apply so as to exempt the by-law described in that clause from the application of the *Planning Act*. 2006, c. 32, Sched. B, s. 4 (2).

Restrictions, corporate and financial matters

13. Sections 7 and 8 do not authorize the City to do any of the following:

1. Impose any type of tax, including taxes under any Part of this Act.

2. Make a grant or loan.

3. Become a bankrupt under the *Bankruptcy and Insolvency Act* (Canada).

4. As an insolvent person, make an assignment for the general benefit of creditors under section 49 of the *Bankruptcy and Insolvency Act* (Canada) or make a proposal under section 50 of that Act. 2006, c. 11, Sched. A, s. 13.