

## COUNCILLOR SUCCESSFUL IN PROTECTING COUNCIL FUNDS

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On July 19, 2010, the Divisional Court (McCombs, Swinton and Wilton-Siegel JJ.) released its judgment in an application brought by Councillor Douglas Holyday, a member of the Council of the City of Toronto, against the City and three other members of Council, challenging four decisions by the Council to approve the expenditure of City funds to reimburse councillors for legal expenses.

Two of them, involving Councillors Adrian Heaps and Giorgio Mammoliti, involved expenses which they incurred arising out of requests by electors for compliance audits in respect of their campaign finances in their campaign for election to Council in 2006 municipal election.

The Court describes the circumstances of these two payments in the following terms:

[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.

...

[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."

In its judgment addressing the issue involving compliance audit expenses, the Court refers at the outset to the broad powers conferred upon City Council by sections 1, 2 and 6 of the *City of Toronto Act, 2006*, and to the support and deference given by the courts to municipalities in the exercise of such powers where having a "reasonable connection to the municipality's permissible objectives".

The Court also refers to and quotes the provisions of section 83 of the *City of Toronto Act, 2006* (*Municipal Act, 2001*, s. 107), which authorizes the City to “make grants, on such terms as to security and otherwise as the council considers appropriate to any person ... for any purpose that council considers to be in the interests of the City”.

The Court then turns to the argument made on behalf of Councillor Holyday that section 83 does not confer the power to pay the expenses relating to the compliance audits because of the specific provisions of the *City of Toronto Act, 2006* (ss. 222-223), governing the payment of the expenses of City councillors only if incurred “in their capacity as members”.

Following its quoting of the relevant provisions of section 222(2), the Court enters into a detailed discussion of this argument, and of a number of court decisions relied upon in support of the application, “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”:

- (1) *Rawana v. Sarnia (City)* (1996), 30 O.R. (3d) 85 (Gen. Div.), (1997), 35 O.R. (3d) 640 (C.A.);
- (2) *Santa v. Thunder Bay (City)* (2003), 66 O.R. (3d) 434 (S.C.), (2004), 49 M.P.L.R. (3d) 290 (C.A.); and
- (3) *Harding v. Fraser* (2006), 81 O.R. (3d) 708 (S.C.), (2007), 33 M.P.L.R. (4th) 76 (C.A.).

The Court then goes on to discuss arguments made on behalf of the City that payments for the compliance audits are expressly permitted under the general grant-making power in furtherance of the objectives of the *City of Toronto Act, 2006* to provide good government to the City of Toronto, and “because it removes barriers that prevent candidates of integrity, but modest means, from running for municipal office”.

The significant ratio decidendi of the Court’s decision is set out in the following paragraph from its judgment:

“[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 purposes 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.”

The Court rejected, as authority for the Council decisions, the general grant power, which it found to “deal with grants to business and commercial ventures”, concluding that the City has the power to make such grants if there is a reasonable connection with the municipality’s permitted objectives.

The Court referred to the fact that there was no indication in the material before it suggesting that the City had discussed or relied upon the grant power contained in section 83, nor that the Council had “determined that reimbursement of two councillors’ expenses for compliance audits relating to their election campaign finances was in the interests of the City”.

The Court points out *“there [was] 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.”*

The Court concludes *“even if s. 83 might in some circumstances be available to permit grants to counsellors [sic], it has not been demonstrated with respect to these payments that there is a reasonable connection between the payments to these two counsellors [sic] and permitted municipal objectives. Therefore, the by-law is not authorized under s. 83.”*

The Court, accordingly, concludes that the City did not have the jurisdiction to pass the reimbursement by-law, deciding that “the by-law is void to the extent that it approves these payments and should be quashed”.

The Court refused, however, to make an order requiring the City to retrieve the funds from the councillors, on the basis that the councillors had not exercised any statutory power of decision brought into question in the proceeding, and that the Court “has no authority in this application for judicial review to make an order for the payment of money against individual councillors”.

With respect to the third decision by City Council, to reimburse Councillor Bussin for her legal costs as plaintiff in a defamation action, the Court referred to the provisions of section 222(2) of the *City of Toronto Act, 2006* (s. 283 of the *Municipal Act, 2001*), referred to above, noting that *“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”*. The Court decided to defer to the Council’s conclusion that this was an expense incurred by the Councillor in her capacity as a member, and that the Council had reasonably determined that her legal expenses for the action should be reimbursed.

In dismissing the applicant’s attack on this decision, the Court referred to counsel for the City’s having assured the Court during oral argument that should Councillor Bussin recover damages

or costs arising out of her legal proceeding, she would be required to repay her legal expenses, even though such obligation to repay was not expressly stated in the by-law, nor had she signed any indemnification agreement to that effect.

In the fourth challenged Council decision before it, the Court refused to address the applicant's challenge to the Council's decision to reimburse Councillor Heaps in respect of a defamation proceeding brought against him arising out of the 2006 municipal election, on the basis that Councillor Heaps had refused to accept the payment and no funds had in fact been paid to him.

## **Discussion**

The Court's judgment constitutes a significant application of the principle *expressio unius est exclusio alterius*, and an appropriate and intended limitation on the powers of municipal councils under the very generalized grant provisions contained in section 83(1) of the *City of Toronto Act, 2006* and section 107 of the *Municipal Act, 2001*.

The Court in its discussion of relevant case law, and its clear conclusion that the wording of section 222 precludes municipal councils from relying upon section 83 to compensate their members for costs incurred in their personal capacity, and not as a member of council, would appear to impose a clear limitation in that regard, consistent with the decision of the Ontario Court of Appeal in the three decisions referred to above.

Although it might be argued that the significance of the decision to some extent is limited to the particular fact situation, and the phraseology used, or not used, by the City Council in referring, or not referring, to the legal authority upon which it relied; nevertheless, it would appear that the Court decision would have been the same whether or not the Council stated specifically that it believed that compensating the councillors for their compliance audit expenses was in the interests of the City, and that the Council believed that insuring candidates for office against attempts to have the City audit their campaign expenses, would discourage good candidates from running for municipal office.

## **Implication of the Decision for Municipalities**

The decision of the Court clearly vindicates the City Solicitor for the City of Toronto who to some extent stuck her neck out in volunteering her accurate and clear legal opinion that "*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*".

The Court has confirmed this advice to be correct.

Aside from particular issues relating to compliance audits, the Court's judgment may be seen as an acknowledgement of the broad powers conferred upon municipalities, and a statement that courts will support such decisions where they constitute a true exercise of such powers.

The judgment also constitutes the latest in a series of authoritative court decisions adopting a generous and deferential approach to judgment calls by municipal councils, supporting their exercise of powers where the enabling legislation, taken as a whole, demonstrates a legislative intent to authorize the power to be exercised, where the powers is expressed in general terms, and if there is a reasonable connection with the municipality's permitted objectives.

### **A Surprising Decision**

In supporting the decision of the City to indemnify Councillor Bussin for legal expenses voluntarily incurred by her in proceeding with a defamation action against a third party, with no restrictions on the nature or amount of expenditures, or limit on the ultimate cost to the Toronto taxpayers, and with no agreement for a repayment of funds to the City, whether or not the Councillor is successful in the action, or recovers costs, both the City and the Court appear to have opened up a new and expanding area of potential municipal liability, not based on any specific reference to the public interest.

This is particularly the case in respect of a defamation action, which is so clearly a type of proceeding used to protect the personal reputation and position of the plaintiff, but which, from the point of view of a potential defendant, brings to bear the full purchasing power of municipal funds backing up a substantial legal proceeding that the municipality itself does not have the power to bring as a plaintiff. See:

*Dixon v. Powell River (City)* (2009) 310 D.L.R. (4th) 176 (B.C.S.C.);

*Halton Hills (Town) v. Kerouak* (2006), 80 O.R. (3d) 577 (O.S.C.J.); and

*Whitcombe v. Manderson*, [2009] O.J. No. 5482 (O.S.C.J.).

In this case, the Council not only made a decision addressing Councillor Bussin's own situation, but also established a process for the reimbursement generally of legal expenses incurred by members of Council initiating civil actions for defamation. This is all in a context in which neither the City Solicitor, nor any outside counsel, provided legal advice to the Council that it had the power to make such payments. The Divisional Court now appears to have provided that authority.

In the case of Councillor Bussin, the City was provided with a comprehensive written legal opinion by outside counsel suggesting, among other things, that "*no one will wish to serve the*

*public if they are unable financially to challenge false and defamatory publications*". The opinion also concluded that "*defamatory statements against members of council have the potential for disruption of the efficient functioning of council*". "*Further, the victim of a smear campaign who cannot take steps to clear his or her reputation, would arguably be tentative and less effective as councillor.*" The report concluded by recommending that Councillor Bussin's claims "be eligible for reimbursement of legal expenses" for bringing the defamation action in respect of the publications.

The Respondents (other than Councillor Bussin) have served Notices of Motion for Leave to Appeal from the decision of the Divisional Court.

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

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

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

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