See paras. 61-63

Case Name:

Toronto Party for a Better City v. Toronto (City)

Between
Toronto Party for a Better City,
Plaintiff (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, Defendants (Respondents)

[2013] O.J. No. 2286

2013 ONCA 327

307 O.A.C. 201

115 O.R. (3d) 694

11 M.P.L.R. (5th) 1

362 D.L.R. (4th) 370

2013 CarswellOnt 6276

228 A.C.W.S. (3d) 257

Docket: C54125

Ontario Court of Appeal
Toronto, Ontario

H.S. LaForme, D. Watt JJ.A. and S.N. Lederman J. (ad hoc)

Heard: December 11, 2012.

Judgment: May 21, 2013.

(75 paras.)

Municipal law -- Government -- Council members -- Duties -- Fiduciary -- Liability -- Appeal by plaintiff from the dismissal of its application to hold individual Toronto councillors who voted in favour of a bylaw subsequently declared ultra vires liable for amounts paid pursuant to that bylaw dismissed -- Bylaw purported to authorize repayment of reasonable expenses incurred by two councillors for compliance audits of their election campaign expenses -- Application judge did not err in dismissing application -- Councillors' liability was not absolute and required evidence their conduct was motivated by bad faith to ground finding of breach of fiduciary duty -- No evidence of malice by respondents in passing bylaw.

Tort law -- Negligence -- Duty and standard of care -- Fiduciary duty -- Appeal by plaintiff from the dismissal of its application to hold individual Toronto councillors who voted in favour of a bylaw subsequently declared ultra vires liable for amounts paid pursuant to that bylaw dismissed -- Bylaw purported to authorize repayment of reasonable expenses incurred by two councillors for compliance audits of their election campaign expenses -- Application judge did not err in dismissing application -- Councillors' liability was not absolute and required evidence their conduct was motivated by bad faith to ground finding of breach of fiduciary duty -- No evidence of malice by respondents in passing bylaw.

Appeal by the Toronto Party for a Better City from a decision dismissing its application to hold individual Toronto councillors who voted in favour of a bylaw subsequently declared ultra vires jointly and severally liable for amounts paid pursuant to that bylaw. The City had passed a bylaw that authorized the repayment of reasonable legal and audit expenses incurred by two councillors in response applications for compliance audits of their election campaign expenses. Prior to the approval of the bylaw, the City's solicitor provided an opinion the City did not have the authority to make such a bylaw because the reimbursement related to activity that occurred before the councillors had taken office. The Divisional Court subsequently declared the bylaw ultra vires. The application judge dismissed the appellant's application to have the councillors who voted in favour of the bylaw found liable for amounts paid under the bylaw on the grounds of breach of fiduciary duty on the basis there was no evidence the respondent councillors preferred their personal interests over their duties to the taxpayers or otherwise breached their fiduciary duties. The appellant argued the application judge erred in holding that to establish personal liability of a fiduciary for conduct ultra vires the fiduciary's authority, a beneficiary had to establish acts of malice or misfeasance. Alternatively, the appellant argued that if malice or misfeasance was required, the judge erred in failing to find malice. In the further alternative, the appellant argued the judge erred in failing to draw an adverse inference of bad faith from the failure of the City solicitor, on the advice of counsel, to answer any questions that would have provided evidence on the issue of the respondent councillors' fides.

HELD: Appeal dismissed. First, contrary to the appellant's argument, the respondent councillors' liability was not absolute and required evidence their conduct was motivated by bad faith or some equivalent impropriety to ground a finding of breach of fiduciary duty. A measure of disloyalty was at the core of a breach of fiduciary duty. No principled reason supported the creation of a presumption of lack of good faith or other misfeasance in public office from the mere passage of a bylaw that was later declared ultra vires by a court of competent jurisdiction. Second, the application judge did not err in failing to find malice. The appellant's argument the respondent councillors put their own interests first in supporting the bylaw was rejected because the respondents could have been the subject of a compliance audit and would have wanted their expenses paid. It pointed out the impugned bylaw related only to two specifically named councillors and not to the entire class of councillors. The respondents' failure to follow the City solicitor's legal advice, while it may not have been wise, did not on its own or together with the subsequent declaration of invalidity, give rise to an inference of bad faith. Finally, the City solicitor's evidence could not have shed any meaningful light on the respondents' individual or collective state of mind and could not have supported an inference of bad faith.

Statutes, Regulations and Rules Cited:

Bylaw 1043-2008

Bylaw 1080-2010

City of Toronto Act, 2006, S.O. 2006, c. 11, s. 83, s. 83(1), s. 125, s. 132(1), s. 222(2), s. 391(1)

Legislation Act, 2006, S.O. 2006, c. 21, Schedule F, s. 46, s. 92(1)(c)

Securities Act, R.S.O. 1990, c. S.5, s. 48

Appeal From:

On appeal from the judgment of Justice Glenn Hainey of the Superior Court of Justice, dated July 5, 2011.

Counsel:

Murray N. Maltz, for the appellant.

Alan Lenczner, Q.C., for the respondents.

[Editor's note: Corrections were released by the Court May 30, 2013; the changes have been made to the text and the corrections are appended to this document.]

The judgment of the Court was delivered by

1 D. WATT J.A.:-- This case involves an attempt to hold members of a city council who voted in favour of a by-law later declared *ultra vires* jointly and severally liable for payments made by the city under the by-law. For reasons that I will develop, the attempt fails.

THE BACKGROUND FACTS

2 The facts that are relevant to determine the issues raised by the application are largely uncontested and fall within narrow compass.

Principals

3 The Toronto Party for a Better City ("The Toronto Party" or "the appellant") is a not-for-profit corporation composed of individual residents of the City of Toronto. Its mandate is to bring good government, fiscal responsibility, and accountability for taxpayers' money to the City.

4 The individually named respondents are councillors, past and present, who voted in favour of the motions resulting in the passage of the by-law declared *ultra vires*. Adrian Heaps ("Heaps") and Giorgio Mammoliti ("Mammoliti") are the councillors whose expenses incurred in responding to requests for compliance audits of their 2006 election expenses were paid by the City under the by-law.

The Legal Opinions of the City Solicitor

5 In 2007, the Executive Committee of Toronto City Council asked the City Solicitor for her opinion about the legality of establishing a grant program in which councillors could apply for grants to cover approved extraordinary legal and audit expenses incurred during the election campaign and subject to requests for compliance audits.

6 In November 2007, the City Solicitor expressed the opinion that although s. 83 of the *City of Toronto Act, 2006*, S.O., [*COTA*] c. 11 was sufficiently expansive to encompass the contemplated financial assistance, the courts have held that the power to make grants must be exercised in a manner reasonably connected to the permissible objectives of the municipality. The City Solicitor concluded that the grant-making power did not permit council to make a grant to assist candidates with their costs in relation to the compliance audit process.

7 About six months later, the City Solicitor provided a further opinion to the Executive Committee. She advised the members that the courts have held that council lacks the authority to reimburse a councillor for legal costs received for activity outside of his or her office, such as activity relating to the individual's candidacy for the municipal council.

8 The City Solicitor was asked next to review the reasonableness of legal fees that had been submitted for reimbursement for expenses incurred in the compliance audit process. Despite the

narrow scope of her task, the City Solicitor expanded on the views she had previously expressed about the absence of authority to reimburse councillors for expenses incurred in responding to requests for compliance audits. She explained:

> 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 grant. (Emphasis added.)

9 In a fourth report provided to all members of Council about three days before it was set to vote on the proposed by-law, the City Solicitor reiterated the opinion she had previously expressed that Council had no authority to reimburse councillors for legal expenses incurred resisting an application for a compliance audit of their expenses as candidates for election.

Passage of the By-Law

10 On September 25, 2008, Council approved By-law 1043-2008 that authorized payments to two councillors, Mammoliti and Heaps, to reimburse them for legal and audit expenses incurred as a result of their response to applications for compliance audits of their election campaign expenses. The named respondents voted in favour of the motion.

The Declaration of *Ultra Vires*

11 On July 19, 2010, on an application for judicial review brought by another councillor, the Divisional Court, [2010] O.J. No. 3083, declared By-law 1043-2008 *ultra vires* City Council to the extent that it authorized repayment of legal and other expenses of councillors responding to a request for a compliance audit in connection with their expenses in the election campaign preceding their election.

12 Council decided to seek leave to appeal to this court from the decision of the Divisional Court.

The New By-law

13 On August 25, 2010, while the motion for leave to appeal the decision of the Divisional Court was outstanding, City Council enacted By-law 1080-2010 to rectify By-law 1043-2008 that had been declared invalid by the Divisional Court one month earlier. The new by-law also authorized

repayment of reasonable expenses incurred by councillors Mammoliti and Heaps in responding to requests for compliance audits of their election expenses.

14 Prior to the passage of this by-law, City Council had received legal advice from outside counsel that a new by-law could not retroactively correct an earlier by-law declared *ultra vires*.

The Repeal of the New By-law

15 At their meeting on February 7 and 8, 2011, City Council repealed By-law 1080-2010 and instructed the City Solicitor to seek recovery of about $140,000 paid to Mammoliti and Heaps under the former by-law. The debts were to be repaid on negotiated terms over two years.

The Recovery Efforts

16 About 16 months later, an agreement was reached with Councillor Mammoliti to repay the amount he was reimbursed over a period of two years. A tolling agreement was to be negotiated for repayment by Councillor Heaps.

The Application

17 The Toronto Party applied to the Superior Court of Justice for a declaration that the original by-law, By-law 1043-2008, was *ultra vires* City Council, but the application was adjourned pending determination of an application for judicial review of the same by-law seeking similar relief brought by another councillor.

18 After the decision of the Divisional Court on the judicial review application, the Toronto Party pursued its application to declare the individual respondents, the councillors who voted in favour of the *ultra vires* by-law, jointly and severally liable for the amounts paid out on the basis that they breached their fiduciary duty to the taxpayers of the City of Toronto.

The Decision of the Application Judge

19 The application judge found, as the respondents conceded, that a fiduciary relationship exists between councillors and taxpayers. However, the judge went on to state that to succeed on a claim of breach of fiduciary relationship, the beneficiary must demonstrate an improper motive or purpose, or at least a lack of good faith on the part of the fiduciary. In other words, the liability of the named respondents is not absolute as the applicant contended.

20 The application judge pointed out that, in all the authorities 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". On the record in this case, the application judge concluded, there was no evidence to support a conclusion that the respondent councillors preferred their personal interests over their duties to the taxpayers or otherwise breached their fiduciary duties. The judge dismissed the application.

THE GROUNDS OF APPEAL

21 The appellant raises three grounds of appeal.

22 First, the appellant says, the application judge erred in holding that to establish personal liability of a fiduciary for conduct that is *ultra vires* the authority of the fiduciary, a beneficiary must establish acts of malice or malfeasance. The appellant contends that the personal liability of the fiduciary is absolute, not subject to any requirement of bad faith, or excusable on the grounds of good faith.

23 Second, and in the alternative, if malice or misfeasance is required to establish a breach of a fiduciary relationship in this context, the application judge erred in failing to find malice despite his rejection of the only evidence offered to establish good faith.

24 Third, and in the further alternative, the application judge erred in failing to draw an adverse inference of bad faith from the failure of the City Solicitor, on the advice of counsel, to answer any questions that would provide evidence on the issue of the *fides* of the respondent councillors.

Ground #1: The Absolute Liability of Municipal Councillors

25 The first ground of appeal alleges that the application judge erred in the standard he applied to determine the personal liability of the respondents who voted in favour of the by-law. Specifically, the appellant contends that the councillors' liability is absolute and requires no demonstration that their conduct was motivated by bad faith or some equivalent impropriety.

The Positions of the Parties

26 For the appellant, Mr. Maltz says that municipal councillors occupy a position that makes them fiduciaries in relation to the taxpayers of the city. As fiduciaries, like the directors and officers of a corporation, councillors are absolutely liable for acts that are *ultra vires*. In this case, the respondent councillors passed a by-law that exceeded their authority, in other words, was *ultra vires*. It follows, Mr. Maltz contends, that they are absolutely liable, jointly and severally, for their conduct. It is not incumbent on the appellant to establish bad faith, malice, or some similar kind of misfeasance, nor can good faith excuse what occurred.

27 Mr. Maltz adds that the absolute nature of the liability of individual councillors for *ultra vires* conduct is confirmed by s. 92(1)(c) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, which contains no exemption from the absolute liability standard it imposes.

28 For the respondents, Mr. Lenczner advances a contrary argument. He says that the personal liability of the respondents is not absolute. The appellant's submissions on the standard by which the liability of corporate officers and directors for *ultra vires* conduct through contraventions of an enabling statute is established are misplaced in the present context. The fiduciary relationship that

exists in the context of corporate officers' and directors' liability is not the equivalent, nor the functional equivalent, of that which exists here between municipal councillors and taxpayers.

29 Mr. Lenczner submits that in the case at bar, the respondents were mistaken about whether the by-law that they passed fell within the scope of their statutory authority. They thought it did. The Divisional Court held otherwise. The respondents were mistaken; only in that sense was their conduct *ultra vires*. A finding of personal liability in the circumstances would require the appellant to establish that they acted in bad faith or with some other improper motive or influence. The appellant has failed to do so.

30 Mr. Lenczner adds that s. 92(1)(c) of the *Legislation Act, 2006*, a statute of general application, yields here to the specific provisions of s. 391(1) of *COTA*. And under s. 391(1) of *COTA*, proceedings may not be commenced against City Councillors for any act done in good faith in the performance or intended performance of any duty or authority specified by *COTA*. And so it follows, Mr. Lenczner concludes, that the enabling legislation makes it clear that personal liability is not absolute, but rather requires proof of bad faith or some similar tainting influence. The burden of proving bad faith, he submits, is on the appellant.

The Governing Principles

31 Several features of this case are uncontroversial.

32 The City of Toronto is a municipal corporation, a body corporate according to s. 125(1) of *COTA*. As a creature of statute, the City has only the authority conferred upon it by the provincial legislature through its enabling statute. The powers of the City are exercised by City Council: *COTA*, s. 132(1).

33 Like the City, the authority of the councillors is defined and limited by *COTA*. Among the powers assigned to the City under Part III of *COTA*, under the heading "Economic Development", is the general power to make grants to any person for any purpose that Council considers to be in the interests of the City: *COTA*, s. 83(1).

34 Part VI of *COTA* deals with "Practices and Procedures" including remuneration and expenses of members of City Council. Under s. 222(2), a provision that applies "despite any Act", the City may only pay the expenses of City Councillors if those expenses are

i. incurred in their capacity as councillors; and
ii. actually incurred or reasonably estimated.

35 Section 222(2), on its face, does not issue a blank cheque to City Councillors. The provision authorizes reimbursement of expenses. But not any or all expenses. The provision does not include expenses incurred in councillors' personal capacity: *Rawana v. Sarnia (City)* (1996), 30 O.R. (3d) 85 (Gen. Div.), at p. 89. Nor as electors: *Harding v. Fraser* (2006), 81 O.R. (3d) 708 (Sup. Ct.), at

para. 34, affirmed, (2007), 33 M.P.L.R. (4th) 76 (Ont. C.A.), at paras. 4-5. Nor expenses incurred as candidates for the office of councillor: *Santa v. Thunder Bay (City)* (2003), 66 O.R. (3d) 434 (S.C.J.), at paras. 28-54, affirmed, (2004), 49 M.P.L.R. (3d) 290 (Ont. C.A).

36 The appellant's claim asserts a breach of fiduciary relationship which, according to the appellant, imposes absolute liability on the respondents, jointly and severally, in their personal capacity.

37 The concept of fiduciary obligation has a venerable lineage rooted in the notion of breach of confidence, an original head of jurisdiction in Chancery: *Guérin v. The Queen*, [1984] 2 S.C.R. 335, at p. 383. 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. Equity intervenes to supervise the relationship by holding the fiduciary to a strict standard of conduct: *Guérin*, at p. 384.

38 The standard categories of agent, trustee, partner, director, and the like do not establish and exhaust the nature of the fiduciary relationships. It is, after all, the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary are not closed: *Guérin*, at p. 384.

39 Fiduciary duties generally arise only in connection with obligations originating in a private law context. Public law duties, the performance of which commands the exercise of discretion, do not typically give rise to a fiduciary relationship: *Guérin*, at p. 384.

40 The obligation imposed on a fiduciary may vary in its specific substance depending on the relationship. Compendiously, the obligation has been described as the fiduciary duty of loyalty and often will include

i. the avoidance of a conflict of duty and interest; and
ii. a duty not to profit at the expense of the beneficiary.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 646.

41 A measure of disloyalty resides at the core of a breach of fiduciary duty. Typically, those in breach of fiduciary duties are seen to have preferred their interests over those of the relationship's beneficiary, or to have demonstrated some other element of disloyalty: *J.H. v. British Columbia*, [1998] B.C.J. No. 2926 (S.C.), at para. 36. It is also fair to say that not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty: *Lac Minerals*, at p. 647.

42 No principled reason supports or favours the creation of a presumption of a lack of good faith or other misfeasance in public office from the mere passage of a by-law that is later declared *ultra vires* by a court of competent jurisdiction. Any presumption is to the contrary, that is to say, that the

vote was presumptively made in good faith and for a proper motive: *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (H.C.J.), at p. 755. The presumption is rebuttable by the introduction of evidence to the contrary.

43 To establish the personal liability of individual members of a municipal council, the party who seeks to establish liability must prove the relevant conduct was done maliciously or in bad faith, thus amounting to a misfeasance in public office: *Region Plaza*, at p. 755; *Kelleher (Village) v. Smith*, [1931] S.C.R. 672, at p. 681; and *Jones v. Swansea City Council*, [1990] 1 W.L.R. 54 (C.A.), at p. 69.

44 Part VI of Schedule F of the *Legislation Act, 2006*, is of general application and applies to every provincial enactment unless a contrary intention appears: *Legislation Act, 2006*, s. 46. Section 92(1)(c) of the Act exempts members of a corporation from personal liability for acts if their conduct does not *contravene* their incorporating act.

45 On the other hand, *COTA* is an act of specific application. As its title suggests, it applies only to the City of Toronto, and among other things, delineates the authority of City Council. Section 391(1) of *COTA* bars proceedings against councillors for any act done *in good faith* in the actual or intended performance of any duty or authority under *COTA* or a by-law passed under it.

The Principles Applied

46 As I will explain, I would not give effect to this ground of appeal.

47 First, to the extent that the appellant seeks to establish the joint and several personal liability of municipal councillors by analogy to the basis upon which company directors may be held personally liable for *ultra vires* corporate acts, the analogy is misplaced.

48 The appellant invokes the decision of the Alberta Court of Appeal in *Angus v. R. Angus Alberta Ltd*., 1988 ABCA 54, 50 D.L.R. (4th) 439 to support its claim of absolute liability. But *Angus* involved the misapplication of company funds by directors, conduct in breach of s. 48 of the governing *Securities Act*. The directors' conduct was *ultra vires* because it was illegal, thus a breach of fiduciary duty, for which the directors were personally liable. The fiduciary duty of the directors was essentially that of a trustee. That said, the court allowed for relief from the consequences of a breach of fiduciary duty on the basis of honesty and good faith: *Angus*, at para. 52.

49 The decision in *Angus* has not been applied in the municipal law context, nor do the authorities support any equation of the fiduciary duty of company directors with the duty imposed on municipal councillors. See *Gook Country Estates Ltd. v. Quesnel (City)*, 2006 BCSC 1382, 26 M.P.L.R. (4th) 36 at para. 95.

50 Second, the nature of the obligations imposed upon a fiduciary are variable, taking into account the nature of the fiduciary's duty. The fiduciary obligation of municipal councillors is a

duty of loyalty towards the electorate that includes the avoidance of conflicts of duty and interest, and the duty not to profit at the expense of the beneficiary. The imposition of a bright line rule that imposes absolute liability on councillors who support passage of a by-law later declared *ultra vires* is inappropriate, as such conduct does not violate the nature of the fiduciary duty of councillors.

51 Third, persuasive authority holds that the personal liability of councillors is not absolute, but rather requires proof of malice: *Region Plaza*, at p. 755.

52 Fourth, the imposition of absolute personal liability on councillors for the votes each casts in the performance of their duties seems at odds with s. 391(1) of *COTA*. That provision bars proceedings against City Councillors "for any act done *in good faith* in the performance or intended performance of a duty or authority under [*COTA* ...] ... or for any alleged neglect or default in the performance *in good faith* of the duty or authority". *COTA*, a specific constituent statute, takes precedence over s. 92(1)(c) of the *Legislation Act*, a statute of general application.

53 Finally, the by-law in this case exceeded the legislative competence of City Council and in that sense was declared *ultra vires*. Its enactment was not, as the director's conduct in *Angus*, in breach of the enabling statute.

Ground #2: Error in Failure to Find Malice

54 In the alternative to its principal ground of appeal, the appellant says that if personal liability requires proof of malice on the part of the respondents, the application judge erred in failing to find that malice had been established.

The Positions of the Parties

55 For the appellant, Mr. Maltz says that the application judge rejected the only evidence the respondents adduced to demonstrate good faith. At trial, the respondents sought to lead evidence proving that the by-law was passed to ensure that persons of lesser means were not discouraged from seeking election as councillors because of the prohibitive costs associated with it. Once this evidence was rejected, the appellant says, an inference of bad faith, rooted in Council's failure to follow the unequivocal advice of the City Solicitor, remained. The respondents failed to rebut this inference and the application judge erred in failing to find malice in the circumstances.

56 Mr. Lenczner's response begins from a different premise. He submits that it is presumed that the respondents voted in favour of the by-law in good faith and acted scrupulously in the discharge of their duty. In accordance with general principles, the onus of establishing malice on a balance of probabilities is on the party alleging it -- the appellant, who also bears the evidentiary burden of adducing evidence to put the issue in play. The simple failure to follow the (not unequivocal) opinion of the City Solicitor fails to raise an inference, much less establish the malice required.

The Governing Principles

57 As a matter of general principle, a party who seeks to establish liability of another bears the evidentiary and persuasive burdens of proof. Discharge of the evidentiary burden puts the issue of liability in play before the trier of fact. Satisfaction of the persuasive burden entitles the party to succeed on the issue of liability before the trier of fact.

58 The manner in which the party bearing the onus of proof discharges its burden in either sense varies and is left largely to that party. Sometimes, the party benefits from inferences that arise from proof of certain preliminary facts. Where a beneficiary alleges a breach of fiduciary duty, the beneficiary need only establish *prima facie* inferences of fiduciary obligations and of their breach. The fiduciary concept then imposes a reverse onus that shifts the burden to the fiduciary to disprove the beneficiary's allegations: Rotman, *Fiduciary Law* (Thomson Carswell: Toronto, 2005), at p. 614. The fiduciary may discharge this burden by, among other things,

> i. establishing that no fiduciary obligation existed; or
> ii. accepting that a fiduciary obligation existed, but establishing that it was properly fulfilled or discharged.

Rotman, at p. 616.

59 It has been held, and indeed may be implicit in the provisions of s. 391(1) of *COTA*, that votes cast by municipal councillors are presumed to have been made in good faith and for a proper motive: *Region Plaza*, at p. 755; *Gook Country Estates Ltd.* at paras. 96-99.

The Principles Applied

60 I would not give effect to this ground of appeal.

61 The application judge found no evidence that the respondents, in voting in favour of the motion supporting the by-law, preferred their own interests to those of their constituents, the taxpayers of the City of Toronto. Absent palpable and overriding error this finding of fact is entitled to deference.

62 The appellant relies upon a series of inferences to establish malice or misfeasance by, and thus the personal liability of, the respondents.

63 The appellant says that it is self-evident that the respondent councillors, each a former candidate, put their own self-interest first since each might be the subject of a similar request for a compliance audit and would want his or her expenses paid. But the relevant by-law related only to specific claimants, not to the entire class of councillors. The inference the appellant seeks to draw from the foundational fact is not an inference, only impermissible speculation.

64 The appellant points next to the application judge's rejection of the explanation advanced in the affidavit of Dr. Myer Siemiatycki, namely, that without the possibility of reimbursement, the

possibility of exposure to significant legal and accounting fees "deters candidates of integrity, but of modest means, from running for municipal office". In other words the rejection of good faith gives rise to an inference of bad faith. However, the result of the trier of fact's rejection of an assertion of good faith is a lack of evidence of good faith, not positive proof of bad faith.

65 The appellant invites consideration of two further factors as proof of misfeasance. The respondents ignored the City Solicitor's advice that courts have decided that municipal councils lack the authority to reimburse councillors for expenses incurred in responding to compliance audit requests or other election-related activities outside the office of councillor. Second, the respondents voted to approve a by-law that was declared *ultra vires*.

66 The councillors' repeated failure to follow legal advice may not have been wise, but it does not, on its own, or together with the subsequent declaration of invalidity, give rise to an inference, much less amount to proof of misfeasance.

67 The appellant has failed to establish misfeasance. The application judge did not err in law in failing to find misfeasance established.

Ground #3: Failure to Draw Adverse Inferences

68 The final ground of appeal is similar to the second. It alleges that the application judge erred in law in failing to draw an adverse inference against the respondents because, on the instructions of counsel for the City, the City Solicitor refused to answer certain questions when cross-examined on her affidavit. The answers to the questions, according to the appellant, "would shed light on whether there was malice or misfeasance" on the part of the respondents.

69 The principles that govern determination of this issue have already been canvassed and do not warrant repetition. Brief reference to the positions advanced by the parties is a sufficient prelude to resolution of this issue.

The Positions of the Parties

70 For the appellant, Mr. Maltz contends that the City Solicitor's response to the questions asked would have provided valuable evidence on the respondents' rationale in passing the by-law. This information would have been particularly relevant, he says, where the by-law's passage was contrary to the repeated advice of the City Solicitor and, notwithstanding the declaration of invalidity, the same conduct was repeated by the enactment of a similar by-law contrary to the advice of outside counsel. In the circumstances, the appellant says, the application judge was wrong when he failed to draw an adverse inference that would have gone some way to establishing malice or misfeasance.

71 Mr. Lenczner submits that the directed refusals of the City Solicitor cannot support an inference of malice or misfeasance on the part of the respondents. The opinions stated that the

by-law *could* be vulnerable. The City Solicitor's opinion about the respondents' state of mind was irrelevant, especially since none of the respondents benefitted personally from the passage of the by-law.

The Principles Applied

72 I would not give effect to this ground of appeal.

73 The evidence sought from the City Solicitor could shed no meaningful light on the respondents' individual or collective state of mind. It follows logically that the refusal to respond to a question, the answer to which had no probative value on the issue of the respondents' state of mind, cannot support an adverse inference.

CONCLUSION

74 For these reasons, I would dismiss the appeal.

75 The respondents are entitled to their costs, which the parties agree should be fixed at $5,000, inclusive of disbursements and all applicable taxes.

D. WATT J.A.
H.S. LaFORME J.A.:-- I agree.
S. LEDERMAN J. (ad hoc):-- I agree.

* * * * *

CORRECTIONS
Released: May 30, 2013

Please be advised the attached corrected copy of the judgment in the above-mentioned appeal supersedes the one previously sent. The corrections are on page 1. There have been some cosmetic changes in the title of proceedings and in para. [1], "severely" has been changed to correctly read: "severally".