



*Act, 2002*<sup>1</sup> in paragraph 5 of the defendant's pleading. On this basis, the motion proceeded and submissions on the summary judgment motion were heard.

**Factual Background**

- [3] The plaintiff was employed as an elected municipal councillor for Ward 2 of the Town from December 1, 2010 to November 30, 2014.
- [4] Following the end of his elected term, the plaintiff was entitled to severance pay pursuant to Town By-Law 138-01. The amount of his entitled severance was \$24,043.24.
- [5] The entitlement of the severance pay and the amount of the severance pay is not in dispute.
- [6] The plaintiff did not receive the full amount of his severance pay. The Town deducted from his severance pay an amount of \$5,434.21. Council passed Town By-Law 135-14 ("the By-Law") authorizing the deduction from the plaintiff's severance pay. The deduction represents an amount the Town incurred due to the plaintiff charging postage to the Town's corporate account with Canada Post for a survey he conducted. This survey was conducted by the plaintiff in 2014 ("the 2014 survey"). The charging of the postage by the plaintiff was sent to the Integrity Commissioner to ascertain whether the plaintiff breached the Town's policies and rules.
- [7] The plaintiff conducted a previous survey in 2013 ("the 2013 survey"). At that time, the issue of the costs came before Council at the November 25, 2013 Council Meeting ("November 2013 Meeting"). The postage cost of the survey was in the amount of \$8,573.91. It was requested that the Town's solicitor, David R. Melitzer, provide an opinion whether the policies of the Town permitted the reimbursement of the costs of the 2013 survey. Mr. Melitzer and two assistant Town solicitors reviewed the Town's policies and came to the conclusion that: "...we can't find anything that indicates this would... [be an] ineligible expense, within the terms of that policy".<sup>2</sup>
- [8] At the November 2013 Meeting, a motion was made by Councillor Brenda Hogg, seconded by Councillor Vito Spatafora, supported by Mayor Barrow, to require the plaintiff to reimburse the Town the costs of the 2013 survey. This motion was defeated 5-3. The end result was that the Town paid for the costs of the 2013 survey as a recoverable disbursement.
- [9] The Town's policy has not been changed.
- [10] The defendant now relies on the By-Law as authorization for deducting the costs of the 2014 survey from the plaintiff's severance pay.

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<sup>1</sup> S.O. 2002, c. 24, Sched. B.

<sup>2</sup> Affidavit of Carmine Perrelli, dated June 9, 2017 ("Perrelli Affidavit"), Exhibit "D", Transcript of the November 25, 2013 Council Meeting, at p. 12.

- [11] The parties have agreed that if I find that the By-Law is valid, the action is at an end. If I find that the By-Law is not valid, then the action is to continue to determine whether monies are owed to the plaintiff or the defendant. The parties have agreed that if the action continues, a conference call is to be scheduled through my judicial assistant to set a timetable and process for the expeditious trial of this action.

***Is the By-Law a valid by law or is it ultra vires or void for bad faith?***

**Position of the Parties**

- [12] The plaintiff submits that the By-Law is invalid and void for bad faith. The plaintiff submits that the Town Council did not have the authority to enact the By-Law. In addition, the plaintiff contends that in reviewing the circumstances in its totality, the By-Law was passed in bad faith. The “political opponents” of the plaintiff took this opportunity to get the plaintiff. The plaintiff was not given the opportunity to respond to the motion authorizing the deduction from the plaintiff’s severance pay. Further, the plaintiff contends that the Town could not deduct from the plaintiff’s severance pay because By-Law 138-01 does not permit such a deduction. The By-Law was passed after the plaintiff was entitled to his severance pay pursuant to By-Law 138-01. The By-Law is void and the plaintiff is entitled to the full amount of his severance pay, without deduction.
- [13] The defendant argues that the By-Law is presumptively a valid by-law, if enacted in good faith. The By-Law was enacted in good faith. The By-Law is a legitimate means for the Town to “set off” the amount owed to it from the postage expense improperly incurred by the plaintiff. The expense is not reimbursable. The plaintiff was advised that the postage costs were not reimbursable. The plaintiff violated the Town’s policies, procedures and rules. Thus, the By-Law is a valid by-law and the deduction was authorized by the By-Law.

**Legal Principles**

- [14] Section 272 of the *Municipal Act, 2001*<sup>3</sup> states that:

A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.

- [15] Section 273 (1) states:

(1) Upon application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

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<sup>3</sup> S.O. 2001, c. 25.

- [16] A by-law is presumed to be valid and enacted in good faith. The onus is on the party wishing to quash a by-law of a Municipality to demonstrate to the court that the by-law is not valid or as not enacted in good faith. The standard to demonstrate bad faith is high. Courts should be slow to find bad faith in the actions of democratically elected representatives acting under legislative authority.<sup>4</sup> But the courts should not hesitate to intervene where the courts finds that a council has acted in bad faith.<sup>5</sup>
- [17] Edwards J. in *Methuku v. Barrow*<sup>6</sup> dealt with an issue of whether or not the respondent, the then Mayor of the Town of Richmond Hill, “failed to disclose a pecuniary interest necessitating his removal from office when he voted on a motion that he ‘personally repay the Town \$10,800 for the over-expenditure in the Engagement and Marketing Account’...”<sup>7</sup>
- [18] In reviewing the statutory authority of a municipality to enact a by-law mandating the Mayor to repay an expenditure, Edwards J. reviewed the provisions of the *Municipal Act*, including section 11 (2) and stated:

...I was not directed to any similar authority, of any Municipality within the Province of Ontario, where any Municipality had passed a by-law that would allow for a Municipality to seek restitution or reimbursement in a similar situation. This is not a situation where a Municipality is seeking repayment of personal expenses that a counsellor or Mayor may have improperly charged to his or her expense amount. Such a factual situation may result in an entirely different disposition. What is sought in this case is for an elected official to bear personal responsibility for an alleged over expenditure within a budget, albeit an over expenditure for which the elected official derived no personal benefit.<sup>8</sup>

- [19] Further in the decision Edwards J. states:

There is no statutory authority from my review of the *Municipal Act*, even with its enhanced powers, that would allow a Municipality to seek restitution or reimbursement in a situation like the one before this court.<sup>9</sup>

- [20] If a municipality enacts a by-law within its statutory authority, it may do so based on whatever information it chooses.<sup>10</sup>

<sup>4</sup> *Seguin (Township) v. Hamer*, 2014 ONCA 108 (CanLII), at para. 5.

<sup>5</sup> *Markham v. Sandwich South (Township)*, 1998 CanLII 5312 (ON CA), at para. 22.

<sup>6</sup> 2014 ONSC 5277 (CanLII).

<sup>7</sup> *Ibid*, at para. 2.

<sup>8</sup> *Ibid*, at para. 37.

<sup>9</sup> *Ibid*, at para. 38.

<sup>10</sup> *Sequin, supra* note 4, at para. 7, quoting from *Mr. Pavn Ltd. v. Winnipeg (City of)*, 2002 MBCA 2 (CanLII), at para. 11.

- [21] To establish bad faith, the conduct of the municipality “connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to establish purposes at the expense of the public interest...”<sup>11</sup>
- [22] The Court of Appeal in *Equity Waste Management of Canada Corp. v. Halton Hills (Town)*<sup>12</sup> also cited the Ontario Divisional Court in *H.G. Winton Ltd. v. North York (Borough)*<sup>13</sup> in stating:
- To say that council acted in what is characterized in law as “bad faith” is not to imply or suggest any wrongdoing or personal advantage on the part of its members... But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government...<sup>14</sup> [Citations omitted.]
- [23] A by-law that is passed which is a “one-shot reimbursement device” directed to a specific person alone, without notice and in response to law suit is bad faith legislation.<sup>15</sup> Consequently, the legislation enacted in such circumstances should be quashed.<sup>16</sup>

### Analysis

- [24] The factual circumstances that gave rise to the By-Law is not in dispute. The Town enacted the By-Law without notice to the plaintiff. There was no evidence presented that allowed the plaintiff to respond to the motion that resulted in the By-Law. The By-Law is dealing only with the plaintiff’s use of the Town’s postal account with Canada Post.
- [25] The Integrity Commissioner did find that the plaintiff did not violate the reimbursement policy but did breach the policy concerning the use of the Town’s account with Canada Post. Additionally, the Integrity Commissioner found that By-Law 138-01 did not permit any assessment of “penalty”.
- [29] The Town has not directed this court to any previous by-law of the Town or any other municipality that sanctions the actions taken by the Town in these circumstances. Even though I acknowledge that the factual matrix of this case is not the same as that in *Methuku*, there are striking similarities. The Town here is using its power to enact a by-law to justify its deducting from the severance pay owed to a specific person. In *Methuku*, the Town attempted to use its authority under a by-law to force the Mayor to reimburse the Town for an expense. The deduction from a sanctioned severance pay and the payment of an expense, to me, are the same action by different means. The end result

<sup>11</sup> *Seguin, supra* note 4, at para. 8, quoting from *Equity Waste Management of Canada Corp. v. Panorama Investment Group Ltd.*, 1997 CanLII 2742 (ON CA).

<sup>12</sup> 1997 CanLII 2742 (ON CA).

<sup>13</sup> 1978 CanLII 1566 (ON SC).

<sup>14</sup> *Equity Waste Management of Canada Corp.*, *supra* note 11.

<sup>15</sup> *Markham, supra* note 6, at paras. 26-27.

<sup>16</sup> *Ibid*, at para. 27.

is to obtain reimbursement of an expense which is not ineligible by the policies of the Town.

- [30] I agree with the statement of Edwards J. that: "There is no statutory authority from my review of the *Municipal Act*, even with its enhanced powers, that would allow a Municipality to seek restitution or reimbursement in a situation like the one before this court."<sup>17</sup>
- [31] Furthermore, By-Law 138-01 sets out circumstances that the Town may not pay the severance pay authorized by the By-Law. These circumstances do not include a deduction from the severance pay for "set off". The Town in effect failed to comply with the terms of its own By-Law 138-01, which predates the enactment of the By-Law.
- [32] The Town solicitor provided Council with an opinion in 2013 that the reimbursement of the expense for the survey was not ineligible. The Town solicitor also indicated to Council that the process to recover the costs by the plaintiff for the postage costs was to commence a law suit. Council ignored that advice and enacted the By-Law which determined the result Council wished to achieve: reimbursement for the postage expense incurred by the plaintiff.
- [33] In the circumstances of this matter, I find that the Town acted "unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government."<sup>18</sup>
- [34] I therefore come to the conclusion that Council did not have the statutory authority to enact the By-Law and that Council acted in bad faith in enacting the By-Law.
- [35] The result is that the By-Law is not sustainable and I find it illegal.
- [36] Having said the above, to be clear, I am not making any finding on the whether the costs of the postage deducted is or is not recoverable by the plaintiff or if the Town has a legally sustainable claim for "set off". The question of whether the monies are due and owing to the plaintiff and should or should not be paid to the plaintiff will be determined later when a trial of that issue is held.

#### **Disposition**

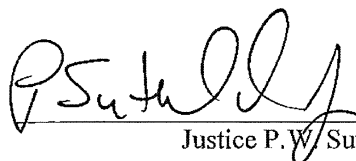
- [37] For the reasons given, I make the following:
- (a) A declaration that Town By-Law 135-14 is illegal and enacted in bad faith.
  - (b) An order that Town By-Law 135-14 is hereby quashed.

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<sup>17</sup> *Methuku*, *supra* note 6, at para. 38.

<sup>18</sup> *Supra* note 14.

- (c) An order that either of the parties may contact my judicial assistant, Helena Howell to schedule a conference call for the purpose of setting a timetable and process to have the issue of whether the plaintiff is owed the sum of \$5,434.21 tried, expeditiously.
- (d) An order that I remain seized of this matter.
- (e) An order that costs of these two motions are reserved to me, to be determined after the adjudication or settlement of the postage cost issue.

  
Justice P. W. Sutherland

**Released:** October 11, 2017