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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **The Corporation of the City of Vaughan**
v. Mary Ruffolo and Luiginio Ruffol

BEFORE: Master D.E. Short

COUNSEL: Nancy J. Tourgis, for the Defendants (Moving Parties)

Glenn P. Christie and Kathryn L. Meehan, for the Plaintiff (Responding Party)

REASONS FOR DECISION

[1] This is application by counsel for the defendants Ruffolo to have me determine whether or not the mayor of the City of Vaughan may be examined for discovery as the representative of the city.

[2] Counsel for the city asserts that the mayor and the city have or may have divergent interests as a result of certain litigation commenced against the mayor, Linda Jackson.

[3] At present, there is an appeal pending from a decision of Madame Justice Lauwers in which Mayor Jackson brought an application against the city and others seeking an order quashing the city bylaw authorizing Mr. Timothy Wilkin to act as an independent prosecutor to initiate legal proceedings under the Municipal Election Act.

[4] Apparently some 68 charges have been laid against the mayor and five charges against her husband and campaign manager. These charges relate to alleged violations of election finance rules during her 2006 mayoral election campaign. Given this litigation, it would seem to create numerous difficulties were the mayor to be produced for discovery as about representative of the municipality.

[5] It should be emphasized that Mayor Jackson has not has not been found responsible for, and is presumed innocent of, any wrongdoing. Nevertheless, the charges are presently outstanding.

[6] Rule 31.03 (2) of the Rules of Civil Procedure addresses how a “corporation” may be examined for discovery:

“The examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee.”

[7] Normally, the court is reluctant to second-guess the choice of a party of the individual to be examined on behalf of the other side.

[8] Is the mayor a Rule 31.03(2) “officer”? Is the municipality a Rule 31.03(2) “corporation”?

[9] My examination of the *Municipal Act, 2001* (the “Act”), as set out in further detail below at paragraphs 27 and 33, indicates that it is the role of the municipal council to represent the public and to consider the well-being and interests of the municipality.

[10] Section 225 of the *Act* provides that the role of the “head of council” is “to act as chief executive officer of the municipality”. Based on that provision it seemed to me at first blush that the mayor must be an “officer”, since “officer” is the exact word used in the *Act*.

[11] However, counsel for the city has referred me to the *Law of Canadian Municipal Corporations*, (second edition) by Ian Rogers. In that text, Mr. Rogers states :

“like other members of council **the mayor has no authority to act for the corporation, except in conjunction with other persons constituting a quorum** and in giving an undertaking that the municipality will perform an act, he [sic] cannot bind Corporation or its council”(emphasis added)

[12] It seems to me that in the circumstances of an action against a municipality, it is obvious that the individual produced on discovery must be in a position to bind the party he or she is representing. Based on my understanding of the *Act* the mayor does not have that authority.

[13] One of the main purposes of discovery is to obtain admissions which will be binding at trial upon the party whose witness is being examined for discovery. It would seem that unless both the witness and counsel for the party for whom they are testifying agree that their evidence will be binding upon the municipality, an elected individual ought not to be the witness examined.

[14] I was assisted in my review of this matter by both counsel who produced what seemed to be all the Canadian case authorities dealing to some degree with this issue.

[15] A helpful decision of the Supreme Court of Canada from 1977 is *Porky Packers Ltd. v. The Pas (Town)*, [1977] 1 S.C.R. 51. In this case damages were claimed for losses incurred by reason of statements by municipal officials. Apparently the mayor had communicated that the establishment of a slaughter house within municipality, next to a motel property, would be acceptable and the plaintiff sought damages from the municipality based upon losses suffered as a consequence of the project ultimately being prevented, despite the mayor's assurances that the project could proceed. Chief Justice Laskin held (as is set out in the headnote to the case):

“ as to the action of the mayor, who, after the argument on the motion to quash and prior to the delivery the judgment thereon, expressed the intention of taking any steps necessary to assure the continuance of the operation of the enterprise, such undertakings by the mayor could not bind the Town or its Council and therefore no liability could be assessed upon the town based upon such undertaking.”

[16] Thus it seems clear that an individual elected official has no authority acting alone, to bind the municipality in matters of contract.

[17] I am surprised that the question of whether or not a mayor can be examined for discovery has not been dealt with and resolved by this point in the 21st Century. In fact, there appears to be a paucity of authority on the point.

[18] Given that fact ,it is somewhat amazing that the only Ontario case that counsel seem to of been able to discover is a decision of my colleague Master Birnbaum reflected in her endorsement of September 27, 2004, in an action of where the estate of Lorna Jackson was suing the Corporation of the City of Vaughan, based on a claim that the city had made a decision by way of a bylaw not to pay the estate.

[19] The then mayor of the city of Vaughan, Michael Di Biasi was ordered to appear for examination for discovery in the action as a representative of the defendant corporation. That the estate involved in that case would be the estate of the mother of the current mayor of Vaughan is truly an amazing coincidence. In her decision, Master Birnbaum noted that it was “clear Mr. Di Biasi was involved in the passing of the bylaw and in the decision not to pay the estate.”

[20] Master Birnbaum refers to two cases in her endorsement. One is *Dick Engineering v. Thermal Tech Waste Systems*, [2003] O.J. 5132 . The other is *MacRae v. Santa*, ([2003] O.J.2625, 37 C.P.C. (5th) 342, affirmed [2003] O.J. 2624, 48 C.P.C. (5th) 383). The Master noted that the Court should not lightly overturn a party's *prima facie* right to which individual it wishes to examine and ordered the mayor to appear for discovery “as a representative of the Defendant Corporation”.

[21] The *Dick Engineering* case did not involve the municipal representation issue that was before me. The *MacRae* decision is instructive, but did not involve an application to examine an elected official. Rather the motion involved a plaintiff seeking to examine the City Clerk who was employed by the Corporation of the City of Thunder Bay. The distinction from

the case at bar is that, in the words of the headnote, “[t]here was no evidence that she had a hostile relationship with the city”.

[22] In *MacRae*, Pierce J. noted that the City Clerk had an outstanding lawsuit for libel against a city councillor, Mr. Santa, who was a co-defendant in the litigation in which the City Clerk was sought to be examined for discovery on behalf of the City of Thunder Bay.

[23] In resisting the application to have the City Clerk examined, the city alleged that there was a conflict of interest or bias on the part of the city clerk, which made her an inappropriate witness. Justice Pierce noted that there was no cross claim by the city against Mr. Santa in the *MacRae* action and the clerk had no claims against the city. In the result, Justice Pierce held that a city clerk could be examined in the *MacRae* case. Thus, neither case considered by Master Birnbaum dealt with the examination of a mayor in Ontario.

[24] I totally agree that the Court should not lightly overturn a party’s *prima facie* right to select the individual it wishes to examine; however, with the greatest respect to my colleague, I believe that when the appropriate provisions of the applicable municipal statutes are considered, it may well be that that the mayor of a municipality in Ontario does not fall within the category of individuals which rule 31.04 was intended to encompass.

[25] In coming to this conclusion I have consider the distinction found elsewhere in the *Rules of Civil Procedure*. Rule 16.02 (1) deals with the requirements for personal service of court documents:

16.02 (1) Where a document is to be served personally, the service shall be made,

Individual

(a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;

Municipality

(b) on a **municipal corporation**, by leaving a copy of the document with the chair, mayor, warden or reeve of the municipality, with the clerk or deputy clerk of the municipality or with a lawyer for the municipality; (emphasis added)

Corporation

(c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

[26] Thus the draftspersons of the *Rules* recognized a distinction between a “corporation” and a “municipal corporation”.

[27] As noted above, I considered provisions of the Act. For example the following sections were helpful to me:

PART I GENERAL

Interpretation

1. (1) In this Act,...

Municipality

(2) In this Act, a reference to a municipality is a reference to its geographical area or to the municipal corporation, as the context requires.

(4) This section applies to all other Acts or provisions of Acts affecting or relating to municipal matters unless the context otherwise requires

....

4. (1) The inhabitants of every municipality are incorporated as a body corporate.

Non-application

(2) The *Corporations Act* and the *Corporations Information Act* do not apply to a municipality. **2006, c. 32, Sched. A, s. 4.**(emphasis added)

Powers exercised by council

5. (1) The powers of a municipality shall be exercised by its council.

...

Powers exercised by by-law

(3) A municipal power, including a municipality's capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise. 2001, c. 25, s. 5 (3); 2006, c. 32, Sched. A, s. 5.

Scope

(4) Subsections (1) to (3) apply to all municipal powers, whether conferred by this Act or otherwise.

PART II GENERAL MUNICIPAL POWERS

Scope of powers

8. (1) The powers of a municipality under this or any other Act shall be interpreted broadly so as to confer broad authority on the municipality to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues. 2006, c. 32, Sched. A, s. 8.

[28] The *Municipal Act, 2001*, S.O. 2001,c.25 was amended to 2006. Two of the amendments are identified above. The change to add section 4(2) was made two years after Master Birnbaum's decision.

[29] Because by virtue of Section 4(2) the *Corporations Act* and the *Corporations Information Act* now clearly do not apply to a municipality, it would seem reasonable to conclude that the reference to a corporation in the Rules does not conclusively mean a municipal corporation.

[30] Because of the lack of clear authority in cases involving Ontario municipalities. I've considered cases in other provinces dealing with whether or not, a municipal elected official is an appropriate party to be examined for discovery.

[31] In the New Brunswick case *Vincent v. St. John (City)*, [2001] N.B.J. No.442 (N.B.Q.B.), McLellan J. was addressing whether or not the mayor of the city could be examined for discovery. It is in this case, the city applied for the examination of some other officer in lieu of the mayor. Justice McClelland noted that "in the view of the city, the mayor is not an Officer within the meaning of the examination for discovery rule but is a legislative officer of the City." The judge went on to conclude that it was not appropriate in that case for the mayor to be the officer examined on behalf of the city. He, however, did note at paragraph 9 of his reasons that:

"The plaintiff may, if circumstances warrant, apply to discover the mayor as a witness but not as an officer on behalf of the city. If there are some details in the oral communications that passed between the mayor and the plaintiff then it may be that the circumstances might be such that she should be discovered on that, but her answers would not be binding on the city. She would be just examined as a witness."

[32] I believe that the same determination ought to be made in this case. Recognizing that the defendant may rely upon Rule 31.10 in appropriate circumstances to obtain a specific examination of the mayor on particular issues.

[33] As noted earlier, there is also an issue as to whether a mayor is the type of “officer” contemplated in Rule 31.03. Counsel for the plaintiff referred me to sections of *Municipal Act, 2001* which clearly describe the mayor as the “chief executive officer” of the municipality:

**PART VI
PRACTICES AND PROCEDURES**

MUNICIPAL ORGANIZATION AND
ADMINISTRATION

224. It is the role of council,

- (a) to represent the public and to consider the well-being and interests of the municipality;
- (b) to develop and evaluate the policies and programs of the municipality;
- (c) to determine which services the municipality provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
- (d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;
- (e) to maintain the financial integrity of the municipality; and
- (f) to carry out the duties of council under this or any other Act. 2001, c. 25, s. 224; 2006, c. 32, Sched. A, s. 99.

225. It is the role of the head of council,

- (a) to act as **chief executive officer of the municipality**;
- (b) to preside over council meetings so that its business can be carried out efficiently and effectively;
- (c) to provide leadership to the council;

- (c.1) without limiting clause (c), to provide information and recommendations to the council with respect to the role of council described in clauses 224 (d) and (d.1);
- (d) to represent the municipality at official functions;
and
- (e) to carry out the duties of the head of council under this or any other Act. 2001, c. 25, s. 225; 2006, c. 32, Sched. A, s. 100

[34] Significantly however these duties appear to not include an ability to personally bind the municipality. If the municipal council sees fit to delegate the right to bind the municipality to the mayor (assuming even that were possible) we would have a different situation. Here the municipal council opposes the mayor being examined and I see no legal basis to compel an examination for discovery of the mayor.

[35] I am therefore also not satisfied that a mayor can be examined for discovery on the basis that he or she is an officer of the type contemplated by rule 31.03.

[36] However I may be wrong in my analysis. As a consequence, a further issue needs to be addressed. Even if the mayor can be examined for discovery in more normal circumstances, I need to be satisfied that the examination of Mayor Jackson would be appropriate in the circumstances of this case.

[37] In *University of Toronto v. Deprenyl Research Ltd*, [2003] O.J.2988, my colleague Master Hawkins dealt with a similar situation to that presented to me, but not with respect to a municipal corporation. Rather, in an action involving the Governing Council of the University of Toronto, while recognizing the right of an examining party to select of the person to be examined on behalf of a corporation is not to be interfered with lightly, he held:

"Where however, it will take, the person nominated to be examined for discovery on behalf of a corporate party has a conflict of interest. As regards that corporate party, the court may order that a different corporate officer be examined." *See Exhibition Association of the City and County of St. John v. Canadian Imperial Bank of Commerce* (1987), 21 C.P.C. (2d) 88 at 92..."

[38] In another Ontario case, Mr. Justice Pennell in *Protter Management Ltd v. Ontario Housing Corporation*, (1975) 8 O.R. (2d) 445, addressed, at page 447, the choice of a nominated discovery witness who had pending criminal charges arising out of his conduct as an employee of the corporate party:

" The point, which was made but for the defendant corporation is that the circumstances are such that if Philbrook were examined, he would be for the purpose of the examination the *alter ego* of the defendant

and the defendant would have to place at his disposal all documentation the subject-matter of production and would have to cooperate in providing him with all relevant information, and yet through its officers itself would be a compellable witness in the trial of the charges brought against him.

The probability is thus apparent that the circumstances here would constitute an embarrassment (within the meaning of that word as used in the cases) to the defendant if Mr. Philbrook had to be produced and examined."

[39] Justice Pennell also stated "I am of [the] opinion that applications must be dealt with upon the circumstances in particular cases rather than by a 'fixed standard of measurement' ". I agree.

[40] It is my view that producing the mayor in the circumstances of this case would similarly cause an "embarrassment" within the meaning of that word, as it is used in the cases, to the Corporation of the City of Vaughan.

[41] I therefore have concluded that it is inappropriate for Mayor Jackson to be examined as the representative of the City of Vaughan in this case. While the municipality has proposed that Janice Atwood-Petkovski, the Commissioner of Legal and Administrative Services and the City Solicitor should be examined for discovery on behalf of the city, I do not believe that the defendants should be limited to that choice. They are entitled to examine a knowledgeable representative of the municipality who is an officer or employee of the municipal government. In the circumstances that individual can not be an elected official.

[42] I wish to thank counsel for their assistance with this matter. Inasmuch as there was caselaw in Ontario which was contrary to my decision in this case, and having regard to the amendments to the *Municipal Act, 2001* I have concluded that the fairest result would be that there be no order as to costs of this motion.

Master D.E.Short

DATE: July 17, 2009

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