

# OMAA Spring Workshop

Jody E. Johnson

Case Law Update:  
Interesting Tidbits & Things That Keep me up at Night

Friday May 20, 2022



# Agenda

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- Integrity Commissioners
- Restraining Contravention of By-laws
- Construction (for your watch list)
- Public Interest Litigation/Challenges of Municipalities
- Role of Head of Council

# Integrity Commissioners

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- *Chiarelli v. Ottawa (City of)*, 2021 ONSC 8256
  - A reasonable apprehension of bias on the part of council
  - Dual role of members of Council – elected representatives & adjudicative role re IC recommendations (see especially paragraphs 151 & 152)
  - Could not remit back to Council, court determined appropriate sanction (same as original sanction)
  - “We appreciate that this conclusion could leave some puzzled. If Council got it right, why would we set aside its decision and then re-impose it ourselves? The answer lies in the important principle that justice must not just be done, but also be seen to be done” (paragraph 166)

# Integrity Commissioners

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- *Kroetsch v. Hamilton (City) Integrity Commissioner*, 2021 ONSC 7982 (Div. Ct.)
- Council passed resolution asking IC to investigate conduct of applicant, chair of City's Lesbian, Gay, Bisexual, Transgender & Queer Advisory Committee – recommended reprimand (privacy breach) & removal as chair, Council reprimanded – JR by applicant
- IC had jurisdiction (committee is a local board, specific authority from council to investigate conduct of citizen committee members, procedurally fair)

# Integrity Commissioners

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- *Espanola (Integrity Commissioner) v. Van Alstine*, 2022 ONSC 2881
- Member voted twice on matter in which she had a pecuniary interest, after failing to disclose interest – IC recommended reprimand, declaration of seat vacant & disqualify from running for 2 years
- Applicant says too harsh, should be reprimand or up to 90 day suspension of pay
- Court reprimanded & declared seat vacant

# Restraining Contravention of By-laws (and related cost awards)

- Section 440 of the *Municipal Act, 2001*:  
If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

# Restraining Contravention of By-laws (and related cost awards)

- Municipalities can and have applied to the courts for orders restraining contravention of by-laws
- Municipality must establish a clear breach of the by-law
- Once shown, burden shifts to respondents to show there are exceptional circumstances such that a court should exercise jurisdiction to refuse to order the permanent injunction (*Allied Properties v. 1064249 Ontario Inc.*, 2016 ONSC 6665, paragraphs 4-7, *Town of Lincoln (Corporation) v. Shire Corporation*, 2022 ONSC 2363, paragraph 26)

# Restraining Contravention of By-laws (and related cost awards)

- *Town of Lincoln (Corporation) v. Shire Corporation, 2022 ONSC 2362*
  - 440 obtained, costs awarded to Town, jointly and severally between land owner (25%) and contractor moving fill (75%)
  - Continued importing fill after stop work order issued

# Restraining Contravention of By-laws (and related cost awards)

- *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, 2022 ONSC 2261
  - 440 granted (prior) prohibiting dumping of fill, engaging in site alteration without a permit, acting in contravention of zoning by-law
  - Respondents in contempt of the order, high degree of blameworthiness, entered into order with legal advice & promptly ignored it, acted in bad faith, displayed disrespect for orders of the court (paragraphs 16 & 17)
  - Fine of \$110,000, full indemnity costs of \$140,000 jointly and severally

# Restraining Contravention of By-laws (and related cost awards)

- *Automotive Parts Manufacturers' Association v. Jim Boak*, 2022 ONSC 1001
- Protest blocking access to Ambassador Bridge, City of Windsor Intervened in support of the application for an interim injunction under Courts of Justice Act and/or a statutory injunction under section 440
- Contravention of several City By-laws, including by-law to regulate traffic (ie. not blocking or obstructing traffic, not obstruct, encumber, injure or foul any highway or portion of highway)
- See particularly paragraphs 35, 54 and also comments on 440 in paragraph 55 through 61

# Restraining Contravention of By-laws (and related cost awards)

- *Syrowik v. Wheeler*, 2021 ONCA 819
- Fence height dispute between neighbours, application judge found that court should only intervene using section 440 if a municipality acted unreasonably or in bad faith in declining to take steps to enforce by-law, courts should defer to municipal decisions on enforcement and not interfere
- Court of appeal found this to be wrong – this is not an application to compel the municipality to enforce by-law, rather exercising their own statutory right

# Construction (for your watch list)

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- *Corporation of the City of Greater Sudbury v. Ministry of the Attorney General (Ministry of Labour, Training and Skills Development)* (SCC docket # 39754)
- Interpretation of OHSA, who is an “employer”
- Implications for municipalities as owners of construction projects

# Public Interest Litigation/Challenges

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- *Miele v. Bevilacqua*, 2022 ONSC 2065
- Application against City, Mayor and Councillors alleging corruption/fraud, applicant admits allegations were baseless, apologies – this decision determines costs payable to respondents
- Applicant says he should not face costs because: acting in public interest/not for personal gain; duped; unsophisticated in municipal finance/economics & didn't understand allegations; incapable of thinking clearly at the time; defendants insured; financial hit to pay costs
- Substantial indemnity costs - \$813,101.99 (paragraphs 13, 100, 105)

# Public Interest Litigation/Challenges

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Para. 92:

I also accept that whistleblowing that discloses corruption should not be dissuaded by excessive costs awards. But there has to be some minimal evidentiary basis for the allegations before abusive name-calling becomes bona fide exposure of wrongdoing. I agree with Pomerance J. in *Ford v. Windsor (City)*, 2018 ONSC 4211 who wrote:

[49] The applicants are also disentitled to public interest status because they had no case to present. **Calling government officials to account is in the public interest; launching unfounded allegations against government officials is not.**

[50] In this case, it was the City that acted in the public interest, by defending the integrity of democratic process. It was in the public interest that the City of Windsor defend against the allegations of wrongdoing, this was not just for the benefit of City officials – it was for the purpose of maintaining public confidence in the process by which the municipal government was elected. The City of Windsor is not a private corporation. It is funded by taxpayers who live in this community. The costs of defending against the accusations of wrongdoing – found to have no merit- should not be borne by the citizens of Windsor.  
[emphasis added]

# Role of Head of Council

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- *Report on the Collingwood Judicial Inquiry (2020)*, Marrocco A.C.J, pages 18-20 of the Executive Summary outline comments & recommendations on the role of Mayor, particularly around CEO role visa vis CAO and Recommendation 2 (building on the Bellamy report and John Fleming's work) provides:
  - Describing the Mayor as both the head of Council and chief executive officer blurs the fact that the Mayor is the head of Council and the chief administrative officer (CAO) is the head of staff. There must be a clear division of roles and responsibilities between the Mayor and the CAO, a separation of the political from the administrative

# Role of Head of Council

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- *Judson v. Caul* (SCJ, Court File No. CV-21-15) (did not proceed to a hearing)
- Sought orders confirming role of head of council (as head and as CEO) confirming no role in administration of the municipality, no role in directing administrative staff
- Sought order that Mayor has no authority or power without authorization, direction or delegation from Council no power or authority under any by-law or policy; no authority to exercise or enforce rights of municipality without specific authorization

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