MIELE v. BEVILACQUA – AN EXPENSIVE FRIVOLOUS LITIGATION

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Introduction

It has been said many times and in many different contexts that it is imperative that local citizenry be able to challenge the decisions and actions of democratically-elected representatives. A person is entitled to scrutinize and question such decisions and actions and to contest legitimate issues and disputes through the courts. The corollary is that decisions made and actions that are taken in good faith and that are discharged in an ethical manner should not be baselessly impugned, together with the reputations of the decision-makers and administrators.

A recent decision of the Ontario Superior Court of Justice, *Miele v. Bevilacqua*,[1] is a cautionary tale for anyone who seeks to pursue baseless allegations against municipalities, their councils and their members. In this case, a claim seeking damages of $210 million against the City of Vaughan, eight current members of its Council and two former members was wholly dismissed. Along with it, the plaintiff's attempt to have all of the individual current and former member defendants disqualified from office was also dismissed. The individual plaintiff was ordered to pay a total cost award of $1,156,906.15 in aggregate to the City of Vaughan and the individual defendants.[2]

Background

It is not easy to remove municipal councillors who are elected to office in Ontario. The authorities to do so under Ontario's *Municipal Conflict of Interest Act*[3] and *Municipal Elections Act, 1996*[4] are likely readily recognized. Less well-known are the powers of councillor disqualification for members who vote improperly on finance-related matters.

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[1] *Miele v. Bevilacqua,* 2022 ONSC 2065.

[2] The Court ordered that the plaintiff pay 90% of the City's costs (which amounted to $888,030): $813,101.99; 90% of the individual councillors' legal fees (which amounted to $312,000): $281,510.88; and substantial indemnity costs of the motion to dismiss: $62,293.28. The final cost award tally: $1,156,906.15.

[3] *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50.

[4] *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.

Miele v. Bevilacqua has brought to light a longstanding but little utilized provision set out in s. 424 of the *Municipal Act, 2001*[5] which provides that a member of a municipal council who votes to divert specially-raised municipal funds may be disqualified from holding municipal office for up to two years and be held personally liable for the illegally diverted funds. These are significant penalties for what amounts to a misapplication of public funds.

Imagine the furor that would follow if it were alleged that eight of nine members of a municipal council in a large municipality in the Greater Toronto Area had voted, illegally, to divert hundreds of millions of dollars that had been raised for special purpose uses in order to cover up multi-year budgetary deficits. Imagine the added uproar if that allegation were publicly asserted just before a municipal election?

This is precisely what happened on October 1, 2018 (there weeks prior to the regularly-scheduled municipal election on October 22, 2018) when a lawyer wrote to the Clerk of the City of Vaughan on behalf of unnamed "Rate Payers in Vaughan" alleging that 11 current and former members of the City Council and six current and former senior administrative officials had contravened s. 424 of the *Municipal Act, 2001*. The notice stated as follows:

> It is alleged that:
>
> 1. The City has been functioning in an operational deficit contrary to the [*Municipal*] *Act*; and
> 2. The City has misapplied funds raised for a special purpose by using those funds to reduce the operational deficit.

The letter continued by demanding that a "tax refund" of over $217 million be disbursed to all "Rate Payers in Vaughan", a refund of almost $6 million be made to the city's reserves, payments of $30 million be made to an entity seeking to build a new hospital in the City, that the City immediately cease operating in a deficit, and that "full transparency of 'City Finance to Rate Payers'" be provided forthwith. This demand was shortly thereafter accompanied by the lawyer's media blitz to tell his tale.

The problem was that none of it had any bearing in reality or truth.

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[5] *Municipal Act, 2001*, S.O. 2001, c. 25.

The City responded swiftly and bluntly with a one-page letter on October 5, 2018 which noted:

> The City denies that there is any merit to the allegations that have been set out in your letter.

This was met by a letter in response by the lawyer on October 8, 2019:

> It is interesting to me that the City of Vaughan as a distinct entity from the Members of Council would be so quick to deny the allegations without any attempt to investigate the same.

The municipal election took place and that matter remained dormant until, all of a sudden, in late May 2019, certain secondary media sources began reporting that a plaintiff by the name of Frank Miele – expressly on behalf of himself and the ratepayers of Vaughan – had commenced an action seeking $210 million in damages personally against eight current members of the City Council and two former members for allegedly contravening s. 424 of the *Municipal Act, 2001*. The claim also sought all of the defendant members' disqualification from holding any municipal office for two years.

The Legislation

The action was commenced pursuant to s. 424 of the *Municipal Act, 2001*. Subsection 424(1) and (2) (ss. 424(3)-(5) were not engaged in the litigation) provide as follows:

> **Liability of members for diversion of funds**
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> **424** (1) If a council applies any money raised for a special purpose or collected for a sinking or retirement fund otherwise than permitted by this Act, each member who votes for the application,
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> (a) is personally liable for the amount so applied which may be recovered in a court of competent jurisdiction; and
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> (b) is disqualified from holding any municipal office for two years.
>
> **Action by ratepayer**
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> (2) If a council, on the request in writing of a ratepayer, refuses or neglects for one month to bring a court action under clause (1) (a), the action may be brought by any ratepayer on behalf of all ratepayers.

The *Municipal Act, 2001* does not define "money raised for a special purpose" and this term is not used elsewhere in the statute.

One will immediately notice that s. 424 is unusual in that if a member of a municipal council votes in contravention of the provision, the member may be held to be: (i) *personally* liable for the funds; and (ii) disqualified from holding any municipal office for two years.[6]

The current iteration of s. 424 has not been considered in any reported judgments. While earlier versions of the *Municipal Act* contained similar provisions that had received judicial treatment, those provisions differ crucially from s. 424(1) in its current form because they did not provide for the possibility that, in some instances, the statute would permit a council to apply money raised for a special purpose to another expenditure.[7]

The Claim

The proceeding in *Miele v. Bevilacqua* was based on a statutory authority for a "ratepayer"[8] to commence an action "on behalf of all ratepayers" of a municipality.

The plaintiff commenced his action in late May 2019. The first paragraph of his Statement of Claim expressly stated that the plaintiff was claiming relief against the defendants "on his own behalf and on behalf of all the Ratepayers of the City of Vaughan."

The main allegation was essentially an assertion that the defendant council members had acted fraudulently in misappropriating public funds:

> Mr. Miele is a failed candidate for the office of Mayor of Vaughan in the 2018 municipal election. He brought this lawsuit in 2019 asserting corruption tantamount to fraud against the entire municipal council and the incumbent Mayor.[9]

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[6] There is one other similar provision in the *Municipal Act, 2001* which is found in s. 423(1):

> **Prohibition**
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> **423** (1) A member of a municipal council who knowingly votes to authorize the borrowing of any amount larger than permitted under section 407 is disqualified from holding any municipal office for two years.

[7] For example, s. 175(1) of the former *Municipal Act*, R.S.O. 1990, c. M.45, provided as follows:

> **Liability of members for diversion of sinking fund**
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> **175** (1) If the council applies any money raised for a special purpose or collected for a sinking fund in paying current or other expenditure, the members who vote for such application are personally liable for the amount so applied, which may be recovered in a court of competent jurisdiction

[8] The term "ratepayer" is not defined in the *Municipal Act, 2001*, but means (and is occasionally interchangeably used with the more commonly utilized) "taxpayer."

[9] *Miele v. Bevilacqua* at para. 2.

According to the plaintiff, the City of Vaughan – guided by its councillors – had harboured an illegal and undisclosed deficit every year between 2014 and 2018. In order to hide this deficit, the City raised $152 million for its water reserve fund and subsequently used the bulk of this surplus – some $138.5 million – to reduce its concealed deficit. The plaintiff claimed that these decisions were controlled and managed by councillors for the City. In doing so, the defendant councillors had supposedly violated ss. 424(1) and (2) of the *Municipal Act, 2001*.

Interestingly (and as was noted by Myers J. in his ruling), notwithstanding that s. 424 does not at all refer to a municipality's liability, the plaintiff included the City of Vaughan as a defendant, alleging that the City had negligently failed to ensure that the individual council members did not misapply the specially-raised funds. Essentially, the plaintiff's allegation was that the City failed to stop its council members from voting!

The accusations were both weighty and shocking. There were hundreds of millions of dollars at stake and the supposed financial malfeasance involved nearly the entirety of the City Council. Use of municipal funds is stringently controlled by statute, meaning accusations of mismanagement are inherently consequential.

As has been noted, the plaintiff's claims attracted some media attention. After all, the plaintiff was a seemingly well-qualified senior administrator with particular expertise in municipal finance. He had held the position of chief administrative officer of three smaller municipalities in Ontario and had once been employed as a commissioner with the City of Vaughan. These were all points that were touted to demonstrate the veracity of the very serious allegations of wrongdoing he had unearthed.

What is notable is that the plaintiff had run unsuccessfully for Mayor of the City of Vaughan in the 2018 election. He had campaigned with and supported a slate of candidates in 2018 that were all unsuccessful. He had positioned himself as a champion of public integrity. He had also previously run and been defeated as a candidate for ward councillor in 2014.

Given that the City was named as a defendant and that the individual councillors were facing personal liability (and possible disqualification from office), each individual defendant needed to retain independent legal counsel. Also, given the allegations, a forensic accountant was engaged to review the City's financial records for the years in question. Considerable legal and consulting costs in defending the claim were incurred.

Conflict of Interest Stalemate

As noted, the claim named eight of the nine current members of the City's Council as defendants. They were personally named and could be held to be personally liable and to be disqualified from office. The City was also named as a defendant. This created a quorum problem for any meeting of the Council because s. 237(1) of the *Municipal Act, 2001* provides that "a majority of the members of a municipal council is necessary to form a quorum."

Section 5 of the *Municipal Conflict of Interest Act* provides that a member who has a pecuniary (i.e. financial interest) in a matter being considered by their council must disclose the interest and cannot thereafter participate in the discussion, vote or attempt to influence the voting in any way. This meant that if the defendant councillors properly abided by their statutory obligations to disclose their financial interests and recuse themselves from participating in any way in the decision-making process under the *Municipal Conflict of Interest Act*, the Council could not meet and could not provide any instructions on the litigation.

Perhaps surprising to many, the *Municipal Conflict of Interest Act* envisages a situation where quorum may be lost via proper disclosures of interest and recusal from participation and voting by members. Subsection 7(1) of the statute actually allows a re-calculation of quorum in the following instance:

> **Quorum deemed constituted**
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> **7** (1) Where the number of members who, by reason of the provisions of this Act, are disabled from participating in a meeting is such that at that meeting the remaining members are not of sufficient number to constitute a quorum, then, despite any other general or special Act, the remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two.

In this case, the plaintiff had named eight of the 9 current members of Council as defendants. The deemed quorum authority would not work because there was only one single member of Council who was not implicated in the allegedly illegal votes.

The City proceeded with an application under s. 7(2) of the *Municipal Conflict of Interest Act*, seeking a judge's "order authorizing the council…to give consideration to, discuss and vote on the matter out of which the interest arises."

Seeing a potential opportunity to control the process himself and determine who could make decisions on behalf of the Council, the plaintiff discontinued the action against one of the members of Council.

However, the councillor against whom the action had been discontinued determined that she still had a potential pecuniary interest and she indicated that she would abide by her obligations to continue to declare a pecuniary interest in the action.[10] For adhering to her statutory ethical obligations, the councillor was threatened with a provincial offence and with criminal charges of municipal corruption and influencing a public official.[11] As noted by Justice Myers, "A threat to invoke the criminal law is as serious as it gets"[12] and viewed this as part of the high-handed tactics employed by the plaintiff throughout the litigation.

Provided with notice that the City would be proceeding with an application under s. 7(2) of the *Municipal Conflict of Interest Act*, the plaintiff applied for and was granted (on consent) intervenor standing to oppose the relief sought by the City. The plaintiff filed an affidavit on the application and, promptly following the City's cross-examination of him on that affidavit, his lawyer resigned from the file and moved to remove himself from the record. The plaintiff then commenced an action in negligence against his former lawyer.

The plaintiff next secured a new lawyer who recognized that the plaintiff's opposition to the City's application for relief under the *Municipal Conflict of Interest Act* had no real merit and he urged him to remove his opposition. The plaintiff took this sound advice and removed himself from the record, agreeing to pay $20,000 in costs to the City.

The City then succeeded in its application for relief under s. 7 of the *Municipal Conflict of Interest Act*.[13] However, Justice Myers imposed a condition on the granting under s. 7(3) being that the parties would need court approval prior to rendering any final decisions related to the litigation, including any possible settlement. This was done to protect the residents and taxpayers of the City and was deemed to be "fair, reasonable, and appropriate."[14] It ensured transparency and

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[10] The council member had very good reason to do so: s. 424 of the *Municipal Act, 2001* provides that any member who votes is liable; a discontinuance is without prejudice and can be revoked; and the council member could very simply be cross-claimed by one of the other members still named as a defendant.

[11] *Miele v. Bevilacqua* at para. 69.

[12] *Miele v. Bevilacqua* at para. 70.

[13] *The Council of the Corporation of the City of Vaughan* (2020), 3 M.P.L.R. (6th) 235 (Ont. S.C.J.).

[14] *The Council of the Corporation of the City of Vaughan* at para. 14.

accountability in the council's management of the litigation. Judicial oversight allowed councillors to navigate the impasse that hobbled the city's ability to manage the litigation while respecting that the members' conflicts of interest created by the action necessitated limits on councillor agency and freedom in decision-making. It is one of a handful of reported decisions on the issue.

Abandonment of Claim

Two years after the commencement of the action, the plaintiff finally retracted his allegations. He admitted his claims were baseless and offered a private and unreserved apology for his actions. This was not the end of the matter because, based on the Justice Myer's decision on the application under the *Municipal Conflict of Interest Act*, the parties needed to return to court to seek approval to have the action formally dismissed by the court.

The Matter of Costs

Of course, what was also left to be determined by the court was the matter of costs. At this point, the plaintiff's second lawyer removed himself from the record and a third lawyer was engaged.

Needless to say, the defendants' legal costs in the case were substantial. Under s. 131 of the *Courts of Justice Act*, Ontario judges may exercise discretion in awarding costs.[15] The jurisprudence dictates that judges should seek to implement fundamental touchstones of reasonableness and fairness.[16] As Justice Myers wrote in *Miele v. Bevilacqua*, Ontario's system of civil litigation traditionally depends upon a "loser pays" system of costs. Under this rubric, a losing party generally pays approximately 60% of the winning party's legal costs. Costs can edge closer to 100% when the losing party's allegations entail "serious wrongdoing and criminality." Under Rule 1.03(10) of the *Rules of Civil Procedure*, "substantial indemnity costs" are defined as 1.5 times the regular award.[17]

The plaintiff requested that the Court depart (significantly) from these guidelines. He bewilderingly contended that he should only have to pay somewhere in the range of $35,000 to $50,000 in the aggregate, including legal fees, taxes, and disbursements.[18] This range amounted to approximately 4 per cent of the legal costs of the opposing parties.

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[15] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[16] *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 24-26 and 38.

[17] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[18] The accounting audit invoices alone amounted to approximately $280,000.

Justice Myers held that, given the specific facts of the case, it would not be "fair or reasonable" to depart from an award of costs on a substantial indemnity basis. Despite the unusually high cost award, Justice Myers displayed little hesitation in ordering that the plaintiff carry nearly the entirety of the defendants' fees. Considered in its totality, the decision can fairly be interpreted as an admonishment of the plaintiff's "reprehensible behaviour" during the proceedings. Using strong language, Justice Myers denounced the plaintiff's "scurrilous allegations" and "hardball tactics,"[19] noting both that the plaintiff deployed baseless accusations and aggressive stratagems throughout the litigation, and that it would be illogical and unfair for him to avoid the costs resulting from his own manoeuvres.

In deciding the matter of costs, the Court also repeatedly emphasized the plaintiff's professional expertise in matters related to municipal finance. It seems likely that the plaintiff's own strategy hindered his attempt to avoid bearing the costs of the proceedings. In a wide-reaching claim, the plaintiff argued that a substantial indemnity basis would be an unfair way to allocate costs because he had understood neither the nature of his allegations nor the costs associated with litigation.

The application judge justly found this argument to be entirely implausible. He noted that the plaintiff had served as a senior municipal manager in various local governments in Ontario. In these roles, he had amassed considerable financial expertise and had managed significant civil litigation cases (including his own unresolved claim with a former municipal employer).

According to Justice Myers, it was unconceivable that the plaintiff did not understand the nature of his allegations and that costs associated with complex litigation would swiftly escalate. The court held that it was eminently foreseeable that the City of Vaughan would seek a forensic audit of its finances and records to counter the financial misappropriation claims and that the individually-named councillors would need to secure independent legal representation. In a lawsuit seeking $210 million in damages and the effective dissolution of the City's Council, a concerted response was "predictable and reasonable."[20]

The Court dealt fully with each of the plaintiff's arguments that he should not be made to bear the defendants' full legal costs. These arguments – and the Court's rebuttals – are each addressed separately below.

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[19] *Miele v. Bevilacqua* at para. 10.

[20] *Miele v. Bevilacqua* at para. 19.

(a) Public Interest Litigation

The plaintiff argued that he should not bear the defendants' full legal costs because he brought his legal suit in the public interest and had nothing to gain from the litigation. The plaintiff claimed to be a plaintiff "on behalf of all the ratepayers of Vaughan."[21]

The Court agreed that while the plaintiff had not followed any of the appropriate procedures in launching a class action suit, he did not appear to be motivated by financial gain. (Curiously, if he had emerged victorious, the resulting damages would be awarded directly to him instead of being dispersed; but the Court noted there was no evidence that he intended to keep the funds.)

The Court was less tolerant of the plaintiff's wider claim of acting in the public interest. Citing a decision of the Ontario Court of Appeal, *The St. James Preservation Society v. Toronto (City)*, Justice Myers noted that litigation based on accusations "manifestly devoid of merit" could not be construed as being in the public interest because they inherently abuse court processes.[22] The Court noted that whistleblowing disclosing corruption in public office is a valid pursuit: it should be supported by the legal system, even in cases that entail significant costs. However, the plaintiff was not a whistleblower, and his meritless litigation did *not* meet the standards of public interest.

The Court cited the ruling in *Ford v. Windsor (City)*[23] which held that unfounded allegations entirely divorced from reality could not serve the interests of the community. There had to be some minimal evidence before "abusive name-calling" can become bona fide exposure of wrongdoing in order to maintain confidence in the legal system.[24]

In this case, the plaintiff's aggressive tactics and baseless accusations were proof that he was not acting in the public interest. The City and its councillors had to expend considerable time and energy defending themselves against the plaintiff's accusations. During this time, the City effectively lost the leadership of council members (who were not permitted to manage the litigation due to their pecuniary interest). Furthermore, the plaintiff's pugnacious and convoluted approach to the litigation meant that both the City and the councillors incurred considerable legal fees.

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[21] *Miele v. Bevilacqua* at para. 78. As noted, his original Statement of Claim indicated he was bringing the claim on his "own behalf". This was removed when he subsequently amended his claim.

[22] *The St. James Preservation Society v. Toronto (City)*, [2007] O.J. No. 3293 (Ont. C.A.).

[23] *Ford v. Windsor (City)*, [2018] O.J. No. 3795, 2018 ONSC 4211 (Ont. S.C.J.).

[24] *Miele v. Bevilacqua* at para. 92.

Justice Myers held that because the plaintiff was the driving force behind the high costs of the case, it would not be fair for the defendants (or their insurers) to carry said costs.

(b) The Plaintiff was "Duped"

The plaintiff asserted that he should not be made to bear the legal costs because he had effectively been tricked into pursuing the litigation. He claimed in a new affidavit filed for the motion that in the summer of 2018, one of his acquaintances shared information with him regarding financial misconduct of City Council. She was the one who had introduced him to his first lawyer. According to the plaintiff, these two persons had convinced him that legal action against the City of Vaughan and its individual councillors was both worth pursuing and was very likely to be successful. The plaintiff explained that he was initially reluctant, but eventually gave in to these overtures. In the blunt words of the Court, the plaintiff essentially claimed "that he was set up as a dupe."[25]

The problem – which took Justice Myers no time at all to discover – was that the plaintiff appeared to be telling an entirely different story than he had previously told. The plaintiff himself had provided conflicting evidence regarding the origins of the case, such that his purported victimhood was simply not plausible. Under cross-examination in the application, the plaintiff had sworn that he had conceived and masterminded the idea to commence the lawsuit, and that he alone had instructed his original legal counsel. As noted, he changed his story completely and pointed the finger at his former lawyer. The learned justice noted that the plaintiff had already launched a lawsuit against that lawyer following the plaintiff's retraction of his initial claims. If the plaintiff wished to prove that he had been mistreated by his lawyer, this subsequent litigation was the appropriate venue for doing so. As the Court explained, requiring the defendants to bear their own legal costs because the plaintiff had (allegedly) been led astray by a third party "does not make sense."[26]

(c) Financial Illiteracy

The plaintiff contended that he should not be responsible for the legal costs because he did not possess sufficient financial expertise and thus could not understand the nature of his own allegations against the City and its councillors. Incredulously, the plaintiff claimed that when he

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[25] *Miele v. Bevilacqua* at para. 42.

[26] *Miele v. Bevilacqua* at para. 96.

had been provided with information from his original lawyer and his acquaintance regarding financial malfeasance of City Council, he simply did not understand what he later acknowledged: that his claims were baseless and that no misconduct whatsoever had occurred.

The learned justice clearly regarded this argument as absurd - they were "incapable of belief."[27] The Court set out in detail the plaintiff's credentials. He had been the chief administrative officer in three Ontario municipalities and had worked in senior administrative capacities over the course of several decades. As a chief administrative officer, he was responsible for managing all municipal operations. This oversight would, as Justice Myers emphasized, have necessarily entailed financial matters.[28]

Furthermore, the plaintiff was an academic in the field of Municipal Economic Development. He holds a Bachelors degree in Urban and Regional Planning, a Masters degree in Local Economic Development and he has taught courses related to economic development at three post-secondary institutions. He had also wrote a university textbook on the topic and was the founding editor of the *Economic Development Journal of Canada*. As the Court wrote, the plaintiff was a thought leader in the field of local economic development; his argument that he could not understand the financial aspects of his own allegations against the City and its councillors stood "in stark contrast" to his experience and background and was "incapable of belief".[29]

(d) Mental Distress

The plaintiff next argued that he should not be made to bear the costs of the litigation because he was not "thinking clearly" at the time he made the allegations and launched his suit. He contended that, due to disruptions in his personal life, he was "at a low point" in 2018 and 2019. He explained that he was not in a position to properly assess the information provided to him by his former lawyer and acquaintance.[30]

The Court rejected this claim soundly and swiftly. According to Justice Myers, this argument was nothing more than a tactical attempt to avoid costs: ungrounded in reality and unsupported by

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[27] *Miele v. Bevilacqua* at para. 49.

[28] Section 229 of the *Municipal Act, 2001* provides that a chief administrative officer is "responsible for exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality."

[29] *Miele v. Bevilacqua* at para. 49.

[30] *Miele v. Bevilacqua* at para. 51.

evidence. As noted, the plaintiff had been running for election as Mayor at the very moment he claimed to be "incapable of thinking clearly."[31] The Court implicitly noted that the plaintiff's claims of prior mental distress coincided with his current anxiety in the face of his legal woes. Strain and stress resulting from errors of judgement were normal, the judge noted, but were not a reason for the court to allocate costs on an unfair basis.

(e) Insurance

The plaintiff submitted that he should not have to pay the all of defendants' legal costs because the City had insurance that would provide coverage for the legal fees resulting from the litigation.

The court acknowledged that the City had insurance. Justice Myers explained, however, that this fact did not alter the nature of responsibility and fault in the case. Just like any insurance holder, the City had a responsibility to minimize the insurer's loss. The plaintiff was effectively responsible for the high costs incurred by the City and the individual defendants in the case. It would thus not be equitable for the insurers to bear the fees simply because they were capable of doing so.

(f) Economic Devastation

Finally, the plaintiff contended that he should not be responsible for paying the defendants' legal costs because his retirement and marriage would be negatively affected by the massive financial blow.

This contention, too, was rejected. Justice Myers acknowledged that the costs associated with the case were high, and would likely prove a serious financial burden to the plaintiff. He expressed sympathy for the plaintiff's spouse, who would suffer as a result of her husband's poor judgment. He also acknowledged that the exercise of his discretion needed to be alive to the risk that the imposition of a significant damage award could, in the future, impair access to justice by discouraging would-be plaintiffs from pursuing valid lawsuits.[32]

Nonetheless, the application justice held that a high damage award was entirely appropriate in this case because the plaintiff had knowingly pursued baseless allegations. The Court thus soundly refuted the plaintiff's depiction of himself and his circumstances. He was not, as he claimed, an innocent public crusader at risk of financial ruin due to a legitimate attempt at

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[31] *Miele v. Bevilacqua* at para. 52.

[32] *Boucher v. Public Accountants Council (Ontario).*

whistleblowing. Instead, he was a canny operator who had to bear the high costs of the frivolous lawsuit he chose to pursue despite its obvious lack of merit. Justice Myers noted that if the high damage award dissuaded the commencement of claims lacking a reasonable evidentiary basis, that would not serve to impair access to justice. It would properly allocate responsibility for abuse.

Tactical Considerations

The Court took particular pains to describe and decry the plaintiff's aggressive legal tactics. In short, there is little question that the plaintiff's ploys contributed to the Court's willingness to award costs on a substantial indemnity basis.

The learned justice detailed the plaintiff's methods. The plaintiff had sued both the councillors and the City in order to access the greater financial resources of the City (through its insurers). While the plaintiff's complaint of financial malfeasance was directed at the individual councillors, he had also sued the City of Vaughan for negligence with the bizarre notion that the City and its staff ought to have prevented their elected officials from voting. The inclusion of the City as a party (notwithstanding that the claim was brought under s. 424 which only speaks to the members who vote) was a calculated strategy in the hopes of securing the requested $210 million payout.[33]

By suing both the City and the individual members of its governing body, the plaintiff knowingly left the municipality unable to manage both its quotidian affairs and the lawsuit itself. When the City applied for judicial relief under the *Municipal Conflict of Interest Act* (detailed above), the plaintiff attempted to block the application. As Justice Myers concluded: the plaintiff took every possible step to ensure that the City would be operationally hobbled.

Intriguingly, the court regarded the plaintiff's subsequent apologies and abandonment of the litigation as further evidence of "hardball" tactics. If anything, the plaintiff's attempts at damage control only hindered his attempt to avoid costs. Justice Myers noted that the plaintiff only agreed to apologize and dismiss the suit after being advised to do so by his new lawyer (after his original lawyer exited the case). For the Court, it was significant that the plaintiff apologized publicly only one day before the costs hearing (although he had promised to deliver the apology over one year earlier). This was a "situational" and tactical manoeuvre, according to the learned justice, and should be rejected as such.

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[33] *Miele v. Bevilacqua* at para. 65.

It is also worth noting that the plaintiff's legal machinations likely contributed to the Court's unwillingness to entertain his claims of legal and professional ignorance. Only someone familiar with municipal governance would have pursued this extensive scheme to create such disruption to the City's Council.

Conclusion

The ruling in *Miele v. Bevilacqua* offers a scathing indictment of tactical and meritless lawsuits. It illustrates when and why significant cost awards in favour of municipalities may not only be appropriate, but necessary, and, it is the second case now in what appears to be an emerging line of cases that draws a very bright line between public interest litigation against municipalities, and abuse.

In the words of Justice Pomerance, now adopted by Justice Myers: "…Calling government officials to account is in the public interest; launching unfounded allegations against government officials is not."[34]

[34] *Miele v. Bevilacqua* at para 92, citing *Ford v. Windsor* at para. 49.