

CITATION: Miele v. Bevilacqua, 2022 ONSC 2065

COURT FILE NO.: CV-19-619608

DATE: 20220404

ONTARIO SUPERIOR COURT OF JUSTICE

RE: FRANK MIELE (on behalf of all Ratepayers of Vaughan),
Plaintiff

-and-

MAURIZIO BEVILACQUA, MARIO FERRI, GINO ROSATI,
MICHAEL DIBIASE, MARILYN IAFRATE, TONY CARELLA,
ROSANNA DEFRANCESCA, SANDRA YEUNG-RACCO, ALAN
SHEFMAN, DEBORAH SHULTE, and THE CORPORATION OF
THE CITY OF VAUGHAN, Defendants

BEFORE: FL Myers J

COUNSEL: *Larry J. Levine, Q.C.*, for the Plaintiff

John Mascarin and David S. Reiter, for the Corporation of the City of
Vaughan

Kim Mullin, for Maurizio Bevilacqua

Jack B. Siegel, for Alan Shefman

Cristina Senese, for Mario Ferri

Tina Kaye, for Gino Rosati and Sandra Yeung-Racco

Gerard C. Borean, for Michael DiBiase

Bernie Romano, for Tony Carella

Jonathan L. Frustaglio, for Rosanna DeFrancesca

HEARD: March 25, 2022

ENDORSEMENT

The Motion and Outcome

[1] The defendants seek an order requiring the plaintiff Frank Miele to pay them \$1.2 million in the aggregate to indemnify them for the legal costs they spent having to respond to this meritless and abusive lawsuit.

- [2] 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.
- [3] Mr. Miele now admits that his allegations were wrong and baseless. He has abjectly and unreservedly apologized publicly to the defendants for the meritless allegations of wrongdoing he made against them.
- [4] Mr. Miele's apology helps mitigate some of the defamatory sting of his allegations. But the defendants are not asking for damages for libel or slander. Rather, they seek compensation for their legal costs incurred in defending themselves from the plaintiff's false allegations.
- [5] Mr. Miele put the defendants to very substantial expense to defend themselves in this litigation. The City, for example, had to hire an expert accounting firm to conduct an audit of its finances for the fiscal years covered by Mr. Miele's allegations. The Mayor and councillors all had to hire lawyers.
- [6] In Ontario civil litigation, we have a "loser pays" costs system. Normally, when a party loses litigation, he or she has to pay the successful party about 60% of his or her legal costs of the proceeding. Where, as here, the unsuccessful person made scandalous allegations of serious wrongdoing and criminality against the successful party, the degree of indemnity is increased to closer to 100% of the successful party's legal costs reasonably incurred defending the claim.
- [7] Mr. Miele asks the court to exercise discretion to refrain from applying the usual rule because, he says:
- a. he was acting in the public interest with nothing to gain personally in the lawsuit;
 - b. he was duped to become plaintiff by another unsuccessful candidate for municipal office and a negligent (or worse) lawyer whom he is suing;
 - c. he is unsophisticated in matters of municipal finance and economics and could not understand the allegations he made;
 - d. he was incapable of thinking clearly at the relevant time;

- e. The defendants are insured for their legal costs; and
- f. Mr. Miele has modest employment and owns a house with his spouse with only about \$1.5 million in equity. A substantial costs award will be a major loss for him and his spouse.

[8] Mr. Miele does not challenge the reasonableness of the hours spent by the defendants' lawyers or the hourly rates claimed. He agrees that the amounts sought are reasonable. Rather, Mr. Miele submits that the court should exercise its discretion to depart from the normal approach to costs, taking into account all of his various submissions. Mr. Levine submits that, in all of the circumstances of this case, it would be fair and reasonable for Mr. Miele to pay total costs of \$35,000 to \$50,000 to all the defendants in the aggregate inclusive of legal fees, disbursements, and taxes.

[9] The City incurred legal fees of \$888,030.00 including disbursements and taxes. Of that amount, the City paid about \$280,000 to PricewaterhouseCoopers to audit its finances. The rest of the defendants, in the aggregate, incurred legal fees, disbursements and taxes of about \$312,000.

[10] Fairness and reasonableness are the fundamental touchstones of the exercise of discretion to award costs under s. 131 of the *Courts of Justice Act*, RSO 1990, c.43. Mr. Miele submits that it would be fair and reasonable for him to pay about 4% of the aggregate legal costs and disbursements to which he put the other parties. I disagree. In my view, there is no reason to depart from the normative approach that Mr. Miele should be required to pay reasonable costs to the successful parties. In light of the scurrilous allegations he chose to make and Mr. Miele's hardball tactics, I find his behaviour in this litigation reprehensible and fairly attracts an award of costs on a substantial indemnity basis.

[11] In my judgment, it is both fair and reasonable for Mr. Miele to pay to the defendants their costs of this proceeding on a substantial indemnity basis and I so order.

[12] Rule 1.03 (1) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 defines "substantial indemnity costs" as 1.5 times the regular award. The rule of thumb for a regular or partial indemnity award is 60% of fees (plus disbursements and applicable taxes). I find that in this case the substantial indemnity award is therefore to be calculated at 90% of reasonable fees plus disbursements and taxes. As noted above, Mr. Miele does not challenge the reasonableness of the fees set out in the invoices delivered by the defendants' counsel. I find that they are all based on market rates and that the time claimed in each is reasonable.

- [13] I award costs to the City of \$813,101.99 all-inclusive. Messrs. Reiter and Mascarin are directed to coordinate with the other counsel (including Mr. Levine) to calculate 90% of their actual legal fees plus disbursements and applicable HST to arrive at dollar figure for substantial indemnity awards for each of the other defendants.
- [14] I feel for Mrs. Miele who, it is claimed, did not know of the costs risk undertaken by her husband. After receiving independent legal advice, Mrs. Miele has apparently offered to consent to a mortgage of their home for up to \$100,000. While admirable, the offer barely scratches the surface of the harm that Mr. Miele has wrongfully caused and for which he ought to be responsible.
- [15] In exercising the discretion to award and to fix the amount of costs payable, the court also takes into account the amount that the plaintiff ought reasonably to have expected to pay in costs in the event that the lawsuit failed. To inflict massive awards on unsuspecting plaintiffs could dissuade legitimate plaintiffs from suing and thereby impair access to civil justice. *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (ON CA).
- [16] I do not have concern in this case with a costs award impairing access to justice. First, costs awards that dissuade frivolous or meritless claims do not impair access to justice. Rather, they properly allocate responsibility for abuse. If they encourage plaintiffs to have some minimal basis in evidence to support allegations to be made in a lawsuit, that is a good thing. Second, Mr. Miele has provided no evidence of the time or rates (if any) charged by his various counsel to understand what he might reasonably have understood to be the costs investment on his side.
- [17] It would have been apparent to anyone considering the cost implications of this lawsuit that, in order to answer Mr. Miele's serious allegations of misfeasance, the City would be required to obtain independent expert accounting evidence to support its financial reporting. As set out in more detail below, Mr. Miele claimed that the defendants had incurred and hidden illegal municipal deficits from 2014 to 2018. That meant that the accounting expert would have to replicate and opine on the City's financial reporting for four or five fiscal periods. The disbursement to PWC in the circumstances is both reasonable and foreseeable.
- [18] It was also foreseeable that each of the Councillors sued would need independent counsel. Each faced personal financial ruin and the loss of his or her office. Plus they were alleged to have engaged in a conspiracy to hide illegal conduct. Each would need to separate himself or herself from the others to respond to that claim. Mr. Levine has reviewed all of the invoices submitted by the defendants' counsel and agrees that each is reasonable.

[19] In all therefore, while Mr. Miele's liability for costs is substantial to be sure, it was reasonably foreseeable that a lawsuit against an entire municipal council and the municipality for years of hidden misappropriations would engender a major response. The lawsuit seeks \$210 million plus expulsion of all of the Councillors from their elected offices. A substantial response was entirely predictable and reasonable.

[20] Mr. Miele says that he is surprised by the magnitude of costs claimed and that he would not have sued had he realized the risk he was undertaking. As I deal with below however, that is an issue for the lawsuit that Mr. Miele has already commenced against his initial lawyer Mr. Karrass. Without Mr. Karrass before the court, I am unable to assess the truth of the claim. As I deal with below, Mr. Miele affirms his oath to two very different accounts of how this lawsuit came about. The truth and responsibility as between Mr. Miele and Mr. Karrass will be fleshed out on proper notice to Mr. Karrass and full documentary disclosure in Mr. Miele's lawsuit against Mr. Karrass.

Frank Miele's Background

[21] According to his profile on LinkedIn and his bios on websites for the schools where he teaches, Mr. Miele has a Bachelors degree from University of Waterloo in Environmental Studies (honours in Urban and Regional Planning and a minor in Political Science). In 1986 he received a certificate and diploma in Economic Development from University of Waterloo. He then obtained a Masters of Applied Environmental Studies degree in Local Economic Development from the same university.

[22] Mr. Miele has been recognized as a Certified Municipal Manager (Level III) by the Ontario Municipal Management Institute.

[23] Mr. Miele has had a lengthy and successful career in municipal management in Ontario. He has held several positions of responsibility with municipalities. From 1979 to 1984 Mr. Miele was Executive Director of Economic Development for the City of Niagara Falls. From 1984 to 1990, he held the position of Commissioner of Economic Development for the City of Scarborough. He then became the Commissioner of Economic/Technology Development and Corporate Communications for the City of Vaughan. He held that post for 17 years from 1990 to 2017.

[24] During his tenure with Vaughan, Mr. Miele was also Chief Administrative Officer for three rural municipalities: Gravenhurst, Meaford, and Erin. He describes those roles as being "responsible to the Mayor and Council for the overall planning, co-ordination and control of all municipal operations...".

- [25] Mr. Miele has written a university level textbook on the study of local economic development entitled, fittingly, *Local Economic Development: An Introspective on Theory and Practice*.
- [26] Mr. Miele teaches courses in local economic development at three post-secondary institutions. He holds posts as the Course Director of Regional Economic Development at York University's School of Public Policy and Administration. He is Academic Coordinator and Instructor for the new Certificate in Local Economic Development at Ryerson University.
- [27] Mr. Miele has been appointed a Professor by the Board of Governors of Seneca College. He teaches Municipal Accounting and Finance there among other things.
- [28] Since 1988, Mr. Miele has been the founding editor and publisher of the *Economic Development Journal of Canada*.
- [29] Mr. Miele has also received numerous government and industry awards and recognitions for his contributions, expertise, and experience. He was awarded the President's Award from the Economic Developers Council of Ontario in recognition of his valuable service to the Council and the profession in 1988, 1991, and 1995. He was the President of the Ontario Municipal Management Institute in 2000-2001. He received the Economic Development Achievement Award in recognition of outstanding achievement in the economic development profession in 1998.
- [30] In 1995, Mr. Miele became the first Canadian awarded the Richard Preston Award from the International Economic Development Council. This award was bestowed on Mr. Miele in recognition of his outstanding long-term contribution towards enhancing the educational advancement of the Economic Development Practitioner.
- [31] By all accounts, Mr. Miele is a highly experienced municipal administrator and a leading practitioner and academic in the field of urban economic development.

This Lawsuit

- [32] Mr. Miele commenced this lawsuit in 2019.

[33] In his Statement of Claim in this action, Mr. Miele alleges that the City of Vaughan incurred an unlawful deficit in each of the years 2014 through 2018. He claims that the City and its Councillors failed to disclose the unlawful deficit in those years. At the same time, he claims that the City collected \$152 million in surplus funds in its water reserve fund. He claims that \$138.5 million of that amount is unaccounted for and was used to reduce the illegal, hidden deficits.

[34] Use of municipal reserve funds is strictly controlled by legislation. A claim that someone dipped into a reserve fund is no different in kind than a claim of misuse of trust funds or, in common parlance, misappropriation.

[35] In the lawsuit, Mr. Miele claims damages for \$210,000,000 against the City and its Councillors personally. He seeks various declarations of illegality. He also seeks a declaration that all of the individual defendants are disqualified from holding office for two years. He also claims that the City was negligent in failing to prevent the defendants from misapplying funds raised for a special purpose.

[36] The City makes much of the fact that Mr. Miele first made these allegations publicly shortly before the election in late 2018. It says that he did so to improve his election chances.

[37] I do not think that costs of this lawsuit turn on what a putative politician did or said in electioneering months before the claim was issued. However, what I see in reading the press reports of interviews given Mr. Mr. Miele before the election is someone purporting to have substantial expertise and credibility on the topic, due to a lengthy career of sound municipal management, purporting to be a whistleblower disclosing serious illegality involving very substantial amounts of money. He certainly seemed to understand the things he claimed and the import of the allegations he made.

Mr. Miele's Evidence

[38] On March 18, 2022. Mr. Miele swore an affidavit in response to the defendants' request that he pay costs. In his affidavit, Mr. Miele testifies under oath that in the summer of 2018, a woman named Carrie Liddy approached him with information about the City of Vaughan. She was a longtime acquaintance of Mr. Miele and a well-known person in the municipality.

[39] Mr. Miele says that Ms. Liddy showed him information indicating that the City Council had engaged in illegal conduct concerning a proposed new hospital and its financial statements. She told him that the City was concealing a number of things from the public.

[40] He then swears:

5. Although I had lengthy experience in municipal matters, speaking generally, I had no particular expertise in financial matters. I was not able to evaluate the validity of what Ms. Liddy was showing me. I expressed that reality to her. Thereafter, in late July, or during the month of August, 2018, Ms. Liddy took me to meet a lawyer by the name of Robert Karrass. I had never met Mr. Karrass prior to that time. We sat together in the office of Mr. Karrass as Ms. Liddy provided him with all of the information that she had provided to me. Ms. Liddy expressed her opinion to Mr. Karrass and asked him to consider all of the information and provide his opinion as to whether an action on behalf of the ratepayers, existed against the City of Vaughan.

6. Sometime in late August, 2018, Mr. Karrass expressed his opinion that the cause of action had great merit, that he would not take on a lawsuit unless he was virtually certain that it would be successful, and that communication ought to be made with the City of Vaughan, without delay...

[41] Mr. Miele says he proposed that Ms. Liddy ought to be the plaintiff in the contemplated litigation. But she and Mr. Karrass suggested that he should sue on behalf of all ratepayers.

[42] In essence, Mr. Miele claims that he was set up as a dupe by Ms. Liddy and Mr. Karrass.

[43] Two years ago, on February 25, 2020, Mr. Miele was cross-examined under affirmation by counsel for the City in a second application that I will discuss below. Mr. Karrass was counsel for Mr. Miele at the cross-examination.

[44] In his evidence under cross-examination, Mr. Miele does not say that he did not understand his allegations or that he was a dupe. To the contrary, he said that he believed the allegations in the statement of claim to be true.

[45] In addition, Mr. Reiter asked Mr. Miele about the involvement of others in bringing the lawsuit including specifically Ms. Liddy,. Mr. Miele testified that he and Ms. Liddy had shared information. But he said that no one asked him to bring the lawsuit and only he was instructing counsel. The following questions and answers are recorded on page 46 of the transcript:

Q. Okay. So my question was, did anyone ask you to bring the action, that was part of the question. Is the answer no one?

A. No, just myself.

Q. Okay. So you're doing this of your own volition?

A. Yes, on behalf of the ratepayers.

Q. Appreciate that. That's what you say. But you're the - no one's asked you to do that?

A. No.

[46] At page 47 of the transcript Mr. Miele testified:

Q. And the same with the action, no one approached you and asked you to do it?

A. Correct.

Q. You've done it all on your own?

A. That's correct.

[47] In relation to Ms. Liddy's role (among a number of other people who provided information to Mr. Miele), Mr. Miele testified at page 23 of the transcript:

Q. Thank you. All right, have any of these people been at meetings with you and Mr. Karrass with respect to the application, or with respect to the action?

A. No.

Q. Are any of these people or anybody else part of the engagement with Mr. Karrass in the application or the action?

A. Are they in, sorry?

Q. Are they part of your engagement with Mr. Karrass?

A. No.

[48] Mr. Miele has now sworn and affirmed under oath both that no one approached him about suing and that Ms. Liddy did just that. He has sworn that Ms. Liddy met with him and Mr. Karrass and affirmed that no one met with him

and Mr. Karrass. He has testified that Ms. Liddy was integral to the lawsuit and effectively used him as her dupe and that the lawsuit is his own activity that no one asked him to bring. He has testified that he did not understand the allegations and yet that he believed them all to be true.

[49] Similarly, his evidence that he does not have “particular expertise in financial matters” and that he was unable to evaluate the information Ms. Liddy provided to him stands in stark contrast to the fact that he is full professor at Seneca College where he teaches Municipal Finance. He was the senior administrator of three municipalities responsible for planning, co-ordination and control of *all* municipal operations. It seems to me that budgeting and finance fall within that description. Moreover, Mr. Miele is an accomplished and decorated author, academic, and leader in the field of Municipal Economic Development. He made serious allegations that he said he believed to be true when he made them. His testimony today that he could not really understand the things he said and believed does not just strain credulity. It is incapable of belief.

[50] In trying to explain that he harbours no malice against the Mayor, Mr. Miele testifies that he only ran for Mayor as a matter of principle to prevent the election being won by acclamation. But there was already another candidate running against the incumbent. This evidence is not particularly relevant to costs as I do not see the issue of Mr. Miele’s motive for running for office or for suing to be material. But, once again, his newly sworn testimony cannot bear even minimal scrutiny.

[51] Similarly, Mr. Miele’s evidence about his mental health is bald and unsupported by any medical evidence. He swears:

During the fall, winter and spring of 2018 - 2019, I was at a very low point in my life for a number of personal reasons, including medical issues affecting myself and close members of my family. I believe that I was not capable of thinking clearly and did not ask the questions of Mr. Karrass that should have been asked, quite apart from his professional obligation to explain all relevant matters to me fully.

[52] Mr. Miele provides no evidence that he was diagnosed as suffering from any physical or mental illness or that he lacked capacity. His evidence that in the fall of 2018 he was “incapable of thinking clearly” makes little sense since he was running for Mayor of a major municipal corporation at the time.

[53] We can all be sympathetic and empathetic to someone who laments making a foolish mistake or error of judgment in hindsight. But regret when faced with consequences, even to the point of personal anxiety and distress, is not an excuse or justification to avoid responsibility for our actions.

[54] Mr. Miele also testifies that he did not understand the risk of costs liability that he undertook in suing the defendants. As a result, as mentioned above, he is suing Mr. Karrass. In his affidavit for this motion, he swore:

9. I must advise that at no time did Mr. Karrass ever suggest to me that the contemplated action was likely to or even could fail; that it was not entirely meritorious; or that if unsuccessful, there might well be costs, **significant or otherwise**, assessed against me for having commenced an unsuccessful proceeding **with serious allegations of impropriety on the part of the Defendants**. [Emphasis added.]

[55] I note first Mr. Miele's acceptance that in this action he made "serious allegations of impropriety on the part of the defendants". I agree.

[56] He also says that he was never advised of *any* risk of costs "significant or otherwise" before he sued. As the senior manager of three municipalities, did Mr. Miele not oversee lawsuits against the municipality? Moreover, he is a plaintiff in a pre-existing wrongful dismissal lawsuit of his own. Of course he understands at some level that costs consequences are part of lawsuits.

[57] On being confronted with these facts, Mr. Miele delivered a supplemental affidavit in which he said that he did not understand "the potentially disastrous consequences in terms of costs" represented by this lawsuit.

[58] Mr. Miele changed his sworn testimony yet again. He first said he was not advised of any costs risk "serious or otherwise". But when confronted with evidence that he has experience with civil litigation, he switched to not appreciating the severity or quantum of costs to which he was at risk.

[59] In all, I find that Mr. Miele is trying to find any justification that he can to avoid responsibility for the costs he inflicted on the defendants. He swears or affirms to whatever he thinks best suits his interest in the moment. His lack of credibility at this late date makes it hard to accept the sincerity of his apologies or to excuse his tactics.

Mr. Miele's Tactics in this Litigation

(a) The Apologies

[60] Shortly after retaining new counsel after Mr. Karrass, Mr. Miele apologized in a personal and confidential letter to the Mayor. With advice from his new lawyer, Mr. Miele promptly agreed to dismiss this claim. His new lawyer also negotiated the wording of a more comprehensive, public apology. But Mr. Miele did not deliver that apology while he tried to negotiate on costs and the terms of dismissal of the proceeding.

- [61] It was over a year later, on the day before this costs hearing, that Mr. Miele delivered his public apology. The timing is not coincidental. It is situational.

(b) The City's Application for Leave for Conflicted Councillors to Direct its Defence of this Action

- [62] For someone who says he was a dupe and did not understand what was happening, Mr. Miele also engaged in very aggressive litigation tactics. In addition to trying to leverage his apology, Mr. Miele tried to prevent City Council from dealing effectively with his lawsuit.
- [63] Without getting too deeply into the specifics, when Mr. Miele sued, all the members of Council whom he sued declared pecuniary conflicts of interest under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50. This meant that none of the conflicted Councillors could be involved in the City's defence of the lawsuit.
- [64] In fact, Mr. Miele's allegations were not really against the City. Under the statute, his relief was against the Councillors themselves. Yet Mr. Miele also sued the City for negligence for failing to stop the Councillors from breaking the law.
- [65] The strategy at play is self-evident. If Mr. Miele proved that Councillors deliberately defrauded the City, he probably would not have been able to access the City's insurance policy. By suing the City for negligence however, he brought the insurer to the table for the \$210 million in damages that he claimed
- [66] But, by suing the City and the Councillors, Mr. Miele left the City with its elected officials conflicted and no one able to instruct City staff on the defence or settlement of the claim. Subsection 7(2) of the *Municipal Conflict of Interest Act* contemplates that possibility. The City therefore brought an application under the section for special permission from the court to allow the conflicted Councillors to deal with the lawsuit on behalf of the City despite their declared conflicts of interest.
- [67] Mr. Miele intervened in that application to prevent the City from obtaining the order sought. He discontinued this lawsuit against one Councillor and argued that doing so provided Council with a quorum to carry on business without the rest of the conflicted Councillors being involved. Mr. Miele confirmed on cross-examination that he only discontinued this action against that one Councillor in order to try to prevent the application from succeeding.

- [68] Mr. Miele did not realize however, that even though he discontinued the lawsuit against the one Councillor, she remained conflicted. While it is true that she was no longer being sued, the allegation of wrongdoing against her had been made and was not withdrawn in the tactical discontinuance of the lawsuit alone. Her personal finances remained at risk by a negative outcome in the lawsuit which could then be resumed against her.
- [69] When the Councillor against whom Mr. Miele discontinued his action did not withdraw her declaration of conflict of interest, Mr. Miele acted harshly. First, Mr. Karrass threatened the Councillor with provincial offence and criminal charges. Mr. Karrass wrote:
- While it is not yet fully clear as to the cause of Councilor Racco's decision to declare interest (given that written reasons were not provided, though required), we are exploring allegations of "Obstruction" under the *Municipal Act* as well as "Municipal Corruption" and "Influencing Municipal Official" under s. 123(1-2) of the *Criminal Code of Canada* which will likely result in the involvement of the Ontario Provincial Police.
- [70] A threat to invoke the criminal law is as serious as it gets. I leave to others the propriety of the threat. But, in cross-examination, Mr. Miele confirmed his instruction to Mr. Karrass to send the letter and his belief in its contents.
- [71] In the same letter, Mr. Karrass also advised that Mr. Miele would discontinue this lawsuit against another Councillor to try to give City Council a quorum.
- [72] Then, as noted above, Mr. Miele intervened in the City's application to try to prevent City Council from asking to able to defend the lawsuit except through the Councillors whom he hand chose not to sue.
- [73] My first involvement with this action was in a case conference on December 11, 2019 to schedule the steps for the hearing of the City's application. I added Mr. Miele as an intervenor in the application as a friend of the court on consent of the City.
- [74] Despite the fact that Intervenor as friends of the court usually do not bear any costs risk, I declined to grant that protection to Mr. Miele. Rather, I expressly reserved to the judge who heard the application the issue of whether Mr. Miele ought to have cost risk due to his intervention. It was apparent even then that the intervention could have been a tactic to try to enhance Mr. Miele's leverage in this action by keeping the City hobbled in its ability to direct its defence.

- [75] My express reservation of costs to the judge who heard the application told Mr. Miele that he could be at risk of costs at least in that proceeding.
- [76] Once Mr. Miele retained new counsel, he withdrew his opposition to the application. By order dated August 25, 2020, I granted the Councillors authority to direct the outcome of the action provided that the City seeks court approval of any settlement. The requirement to seek approval of a settlement ensured transparency so that the court would have the ability to guard against a settlement that may have been directed by conflicted Councillors in their own interests rather than in the best interests of the City.
- [77] Mr. Miele also consented to an order that he pay the City \$20,000 in costs for that misadventure.

Public Interest Litigation

- [78] Mr. Miele's principal argument against being found liable in costs is that he brought this action in the public interest rather than for personal gain. The title of the proceeding says that he is a plaintiff "on behalf of all Ratepayers of Vaughan". But this is not a class action under the *Class Proceedings Act*. Neither did Mr. Miele seek a representation order under Rule 10 of the *Rules of Civil Procedure* to allow him to act on behalf of anyone else.
- [79] From a technical, procedural standpoint, this is a lawsuit in which Mr. Miele is seeking payment of damages of \$210,000,000. However, I accept that Mr. Miele is not trying to receive the funds himself but for all Ratepayers as imperfectly claimed. He swears in his affidavit that his retainer agreement with Mr. Karrass provided that he would not receive any money. But he did not disclose that agreement. I am unfamiliar with a lawyer's retainer that can require all funds to be paid to someone other than the client. It is hard to know what to make of this evidence without seeing the retainer document on which Mr. Miele relies.
- [80] Assuming, that Mr. Miele did not expect to receive money if he succeeded in this action, does that mean that it is litigation in the public interest of the type that has been excused from costs liability in some cases?
- [81] In *The St. James' Preservation Society v. Toronto (City)*, 2007 ONCA 601 (CanLII), the Court of Appeal said it would have upheld an award of costs against the unsuccessful applicant who, like Mr. Miele, sought to rely on the "public interest" exception to the usual rule that costs are paid by the unsuccessful party.

- [82] The Court of Appeal overruled the application judge who held that third parties should pay the costs rather than the unsuccessful plaintiff. That is not an issue here.
- [83] In the *St. James* case, the Court of Appeal quoted a list of factors relied upon by the application judge in conducting his analysis of whether the action was public interest litigation. It did not expressly endorse the list as definitive, exclusive, or otherwise. But the Court of Appeal expressly upheld the judge's finding that,
- ...the application was not in the public interest because many of the arguments advanced were totally devoid of merit and the Society had improperly tried to re-litigate matters that it had already settled by way of the partial settlement agreement.
- [84] That is, despite the balancing of factors involved, it is not in the public interest to bring a lawsuit that is manifestly devoid of merit. Rather, doing so is an abuse of the process of the court.
- [85] This action caused prejudice to the City and the Councillors. They have amassed legal fees and been deflected from their duties fending off very serious allegations put forward with added aggressive tactics to try to keep them from responding efficiently.
- [86] Mr. Miele says that the defendants are insured. That is true. But the allegations themselves against the individuals were likely uninsured as discussed above (at least until they are dismissed). Moreover, insurance is not a ground to deny recovery. An insured person is required to try to minimize the insurer's loss. Under the doctrine of subrogation, the insurer steps into the insured person's shoes with all of his or her rights. The opposing party does not get to claim the benefit of the other side's foresight and payment for insurance.
- [87] In addition, Mr. Miele is seeking indemnification from Mr. Karrass and his insurer LawPro. That is no more a basis to hold Mr. Miele liable or not liable than the fact that the defendants may be indemnified on their side.
- [88] The City has adduced some evidence that this was the most costly claim against it over the past several years. During that time, the City's insurance premiums have greatly increased to the tune of over \$3 million in the aggregate. Mr. Levine fairly notes that absent an inquiry to the underwriters, one cannot ascribe one-to-one causation for a rise in insurance premiums.

- [89] Mr. Miele says that if he is held liable for the costs claimed, they will eat up his equity in his home and negatively affect his retirement and his marriage. That appears to be true.
- [90] So, the question comes down to who should bear the loss? Mr. Levine says that spread across all Ratepayers, even the \$3 million of alleged extra insurance premiums claimed by the City is immaterial compared to the impact on Mr. and Mrs. Miele.
- [91] I do not know how the Mieles maintain their finances or their property. I do not know whether their marriage is really at risk or what might happen in family law proceedings if any are actually brought on a *bona fide* basis (as opposed to an effort to creditor-proof the house).
- [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 the 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.]
- [93] I am not in a position to determine whether Mr. Karrass may have some liability to Mr Miele as he alleges. Mr. Miele did not claim-over for costs against Mr. Karrass under Rule 57.07 in this motion.
- [94] Mr. Miele is the principal who bears responsibility for the acts of his agent and counsel *vis-à-vis* the parties opposite. I know that in some matters the court will strain not to visit counsel's errors on an innocent client. That usually involves forgiveness of a procedural mis-step or delay. Apart from Rule

57.07, I know of no law that allows a client to be freed from an obligation to pay costs on the basis that his or her lawyer was at fault for bringing frivolous proceedings.

- [95] I am in no position to decide as between Messrs. Miele and Karrass here. Moreover, the actual innocent parties are the defendants. There is no reason for their recovery to await a determination as between Mr. Miele and his former lawyer.
- [96] The issue for costs ultimately is what is fair and reasonable between the parties. If Mr. Miele believes that he was mis-treated or mis-informed by his lawyer, that will be determined in his claim against Mr. Karrass. If I were to decline to order costs because I thought Mr. Karrass was the cause, then the defendants would bear the loss for Mr. Karrass's alleged misconduct. That does not make sense.
- [97] Looking at the factors from the *St. James* case, I am unsure whether Mr. Miele was a dupe, or an angry election loser, or a *bona fide* concerned citizen. The defendants are the municipality and its elected Councillors. Absent any hint of wrongdoing, they deserve protection. The claim itself was frivolous and therefore could not have been in the public interest. The financial consequences are serious to both sides. I have no doubt that they are more impactful to Mr. Miele. But such is the nature of responsibility for one's actions.
- [98] In his apology delivered for this motion, Mr. Miele wrote:

I take full responsibility for making the baseless allegations that are set out in the claim. I apologize to the named members of Council for unjustifiably impugning their integrity, and to the City and its residents **for causing the City to expend significant time, effort and resources in investigating and responding to a claim that had no merit whatsoever.** My actions, in all respects, were entirely misguided and plainly wrong. I am sorry for the harm I have caused to Mayor Bevilacqua and members of Council, to the hardworking staff at the City and to all residents of Vaughan. [Emphasis added.]

- [99] Despite the meaning and spirit of these words, Mr. Miele actually seeks to avoid responsibility for the very harm that he acknowledges having caused by his baseless allegations. He blames others and seeks to excuse his own actions in his evidence. His response to this motion shows that he actually takes no responsibility for the expenditures of significant time, effort, and resources caused by his baseless allegations despite the wording of his apologies.

[100] In my view, in exercising the discretion under s. 131 of the *Courts of Justice Act*, it is both fair and reasonable for Mr. Miele to be held liable to pay the costs of the defendants on a substantial indemnity basis. This is not a case to deny the successful party costs because the plaintiff sued in the public interest.

Settlement Approval

[101] The parties agreed to the dismissal of the lawsuit with costs to be determined on this motion. As there is no payment being made by the City, and, in fact, it is receiving substantial indemnity for its costs, there is no basis to be concerned that the conflicted Councillors may have preferred their own interests in agreeing to settle as they did. Even if costs had gone the other way, I see no conflict in a simple dismissal.

[102] Accordingly under the order dated August 25, 2020 in the application with Court File No. CV-19-629929, I approve the settlement.

[103] This action is dismissed with costs as set out in para. [13] above.

Costs

[104] If the parties cannot agree on costs of this motion, I will deal with the issue in writing.

[105] The City is asked to coordinate costs submissions for all the defendants. The City may deliver submissions of no more than five pages plus a schedule listing the costs claimed by each of the other defendants for this motion (if any) by April 15, 2022. Mr. Miele may respond with submissions of no more than five pages by April 29, 2022. Both sides shall submit Costs Outlines for anyone seeking or opposing the quantum of costs of the motion. They may also submit copies of any offers to settle on which they rely for costs purposes. No statutory material or case law is to be provided. Rather, references to legal authorities shall be made by hyperlinks to CanLII in the parties' submission.

F.L. Myers J

Date: April 4, 2022