SUPREME COURT OF NOVA SCOTIA
Citation: *Calkin v Dauphinee*, 2014 NSSC 452

Date: 2014-12-31
Docket: Ken No. 429924
Registry: Kentville

Between:

Tom Calkin

Applicant

v.

Richard Dauphinee

Respondent

Judge: The Honourable Justice Gregory M. Warner

Heard: November 18, 2014, in Kentville, Nova Scotia

Counsel: James J. White and Gerald Francis, for the Applicant

Derrick J. Kimball, Sharon Cochrane and David Faour, for the Respondent

By the Court:

Background

[1] The Applicant, an elector in the Municipality of the District of West Hants ("municipality"), applies for a determination of whether the Respondent, Warden of the Municipality of the District of West Hants ("warden") and a member of the municipal council, has contravened the *Municipal Conflicts of Interests Act* ("*Act*"), and, if so, for a declaration that his seat as a member of the municipal council be declared vacant. The application arises out of the purchase by the municipality of land near land owned by the Respondent.

[2] A member contravenes the *Act* when he has a "pecuniary interest in any matter" before the municipal council and fails to:

a) disclose his interest;

b) withdraw from the meeting;

c) refrain from taking part in consideration of, or voting on, any question on the matter; or

d) refrain from attempting in any way to influence the council's decision on the matter. (*Act*, s. 6(1))

[3] The *Act* does not apply to any interest in any matter that a member has: s. 5(1)(j) "by reason of having a pecuniary interest that is an interest in common with electors generally". The term "interest in common with electors generally" being defined in s. 2(c), or s. 5(1)(k): "by reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."

[4] The term "pecuniary interest in any matter" is not expressly defined in the *Act*. The term "indirect pecuniary interest" is described in s. 3 of the *Act* as an interest that a member has as a shareholder or director of a corporation, a member of an unincorporated body, or, an association in a joint venture. A "deemed pecuniary interest" is described in s. 4 as including an interest of a spouse or other family or household member.

[5] Section 10(1) reads that where the judge determines that a member has contravened the *Act*, the judge shall declare the seat of the member vacant and direct the vacancy be filled in the manner prescribed by law, but if the judge determines that the contravention was committed as a result of inadvertence or a *bone fide* error in judgment the judge may relieve against such forfeiture of office.

Facts

[6] Richard Dauphinee was born in 1947 and raised at Three Mile Plains. He has lived for several years in nearby Garlands Crossing, about two kilometers on Highway 1 from the Town

of Windsor. He has been continuously elected as a municipal councillor for the municipality since 1987. Since 1997, he has been the warden.

[7] In 1985, he and a partner purchased a 24-acre parcel of land near Highway 1 at Garlands Crossing, called the "Hatfield Lane property". This land has remained vacant, undeveloped and unused, except for the cutting of hay. Access to the land is by Hatfield's Lane, a short, un-serviced lane running south from Highway 1. The parcel is situated to the rear of several residences fronting on the south side of Highway 1. The land is zoned residential.

[8] J.W. Mason and Sons Limited ("Mason") was a long-time apple grower and distributer, operating as a family enterprise at Garlands Crossing. It apparently employed sixty to one hundred fifty persons, mostly on a seasonal basis.

[9] Richard Dauphinee grew up with and has been lifelong friends with three of the four brothers who own (or owned) Mason, including Stephen Wells, Mason's president. He testified that on most mornings he and his wife attend a local restaurant for breakfast or coffee; on most, but not all, of those mornings Stephen Wells, his wife and/or his brothers do the same.

[10] Mr. Dauphinee knew before 2011 that an employee had embezzled money from Mason, or a company associated with Mason. He did not know that Mason was in a bad financial situation. About April 2010, Mason listed for sale a 14-acre parcel of land at Garlands Crossing with the Halifax branch of Cushman & Wakefield, real estate advisors. The listing was for $995,000.

[11] It is the subsequent purchase of this 14-acre parcel ("Mason lot") by the municipality for $500,000 that is the reason for this application.

[12] The municipality owned an industrial park near Windsor. As warden, Mr. Dauphinee was active on the municipality's development committee that was seeking lands to expand the almost fully-occupied park. The committee had looked into acquisition of five separate parcels but had acquired none. One of those five parcels was the Mason lot. It was not purchased because the selling price was too high.

[13] On April 5, 2011, Mr. Dauphinee met Stephen Wells, president of Mason, and his brother at one of their usual breakfasts at a local restaurant. Mr. Wells offered to sell the Mason lot, no longer listed with Cushman, for not less than $500,000. At a closed "committee of the whole" of the municipal council held the same evening, Mr. Dauphinee proposed that the municipality purchase the Mason lot for $500,000. The motion carried unanimously.

[14] The minutes record as item #15 the following:

> 15. <u>In Camera (Land Acquisition)</u>
>
> MOVED by Councillor Gaudet and Councillor Shanks to move in camera at 8:15 to discuss Land Acquisition and contractual matters.

Motion Carried.

MOVED by Warden Dauphinee and Councillor Matheson to come out of in-camera at 9:08 p.m.

Motion Carried.

Land Acquisition

MOVED by Warden Dauphinee and Councillor Gaudet to Council that the municipality purchase a parcel of land as identified in the information circulated during the in-camera session at the cost negotiated between the municipality and the property owner.

Motion Carried.

MOVED by Councillor Brown and Councillor Allen that the meeting adjourn at 9:09 p.m.

Motion Carried.

[15] At the next regular session of the municipal council on April 12, 2011, when the Respondent was out of the country on vacation, the Council approved purchase of the Mason lands. The minutes read:

. . .

In-Camera Session (Land Acquisition)

MOVED by Councillor Brown and Councillor Pineo that the meeting go into camera at 8:00 p.m. to discuss a land acquisition.

Motion Carried.

MOVED by Councillor Pineo and Councillor Brown that the meeting come out of in-camera.

Motion Carried.

The meeting came out of in-camera at 8:09 p.m.

MOVED by Councillor Gaudet and Councillor Pineo that the municipality purchase a parcel of land as identified in the information circulated during the April 5, 2011 in-camera session, at the cost negotiated between the municipality and the property owner, plus applicable taxes, and that the warden and the CAO be authorized to sign the purchase agreement for said property on behalf of the municipality, subject to the Municipal Solicitor's review.

Motion Carried.

…

[16] The identity of the property and purchase price became publicly known through an interview given by the warden to the local newspaper on September 14, 2011.

[17] At the time of its purchase, the Mason lot was zoned general commercial, permitting commercial development as of right. It was serviced by water and sewer. It fronted on the portion of Highway 14 that connects Highway 1 at Garlands Crossing with Highway 101. To the south, the Mason lot backs on the Dominion Atlantic Railway right of way, beyond which are single-family residences, which residences front the north side of Highway 1 directly opposite the residential houses and the Hatfield Lane property. The distance between the Mason lot and the Hatfield Lane property, by road (Highway 1 and Highway 14) is about 7/8th of a kilometre; "as the crow flies", less than 1,000 feet.

[18] No appraisal of the Mason lot was obtained by the municipality at the time of purchase. It was assessed for property taxes between $13,000 and $14,000.

[19] In early 2012, the newly-appointed municipal auditors apparently recommended or requested that the municipality obtain a market value appraisal to support the purchase of the Mason lot by the municipality. The municipality's chief financial officer obtained an appraisal report from Paul R. Young, AACI, of Kempton Appraisals Limited on July 24, 2012, opining that the market value of the Mason lot was $185,000.

[20] On October 9, 2012, the municipal council passed a motion directing the chief administrative officer to obtain two additional appraisals.

[21] On November 27, 2012, Richard Escott, FRICS, AACI, of Turner Drake & Partners Limited provided an appraisal report opining that the market value (highest and best use) was $200,000. On December 4, 2012, James Hardy, AACI, of Altus Group Limited provided an appraisal report opining that the current market value of the Mason lot was $562,000.

[22] By December 2011, Mason was in obvious financial difficulty. Mr. Dauphinee organized a volunteer, non-council-related committee of three, including himself, to attempt to save Mason as an operating business. Mr. Dauphinee explained his motive as an attempt to save the employment created by a significant local employer.

[23] Mason sought relief under the *Farm Debt Mediation Act*. At a mediation meeting between Mason and its creditors held on February 29, 2012, the volunteer committee attended to support Mason's efforts to continue in business. On legal advice, Mr. Dauphinee did not attend. The fact that the municipality was one of Mason's creditors was a potential conflict with the volunteer committee's purpose. An 'Action Plan' was agreed to at the mediation meeting, which allowed Mason to continue operating through the 2012 growing season; however, by the end of 2012 Mason had been placed into receivership, and its assets were sold.

These Proceedings

[24] On May 27, 2014, the Applicant filed a request for documentation related to the municipality's purchase of the Mason lot, pursuant to the FOIPOP provisions of the *Municipal Government Act* ("*MGA*"). On June 6, 2014, after consulting with the municipality's solicitor, the chief administrator officer ("CAO") disclosed to the Applicant all of the municipality's documents related to the purchase of the Mason lot.

[25] Based on that FOIPOP disclosure, the Applicant filed this application with his own affidavit on July 30, 2014.

[26] The Respondent filed a Notice of Contest and six affidavits: his own, Gary Cochrane (Deputy Warden), Douglas MacInnis (Municipality Development Officer), Catherine Osborne (Interim Municipality CAO since July 9, 2014), Matthew Kimball (member of the Volunteer Committee), and Sharon Cochrane.

[27] Only Richard Dauphinee was cross-examined. The affidavits and Dauphinee's cross-examination are the evidence.

[28] Dauphinee's cross-examination did not change the facts summarized above, but the following additional points were elicited.

[29] If Mr. Dauphinee had a pecuniary interest in the purchase of the Mason lot by reason of his interest in the Hatfield Lane property, he did not disclose it to council. He negotiated the deal between the municipality and Mason. He presented the deal to, and voted on it, in committee of the whole on April 5th. He was absent from the April 12th council meeting that approved the purchase. He did not refrain from attempting to influence council's decision. Council's decisions on April 5th and April 12th were unanimous.

[30] Mr. Dauphinee denied that he had told the Applicant's counsel that he was 'best friends' with Stephen Wells, but he did acknowledge having a long-time, on-going friendship with three of the four Wells brothers who owned Mason, including Stephen Wells.

[31] He acknowledged a CBCL feasibility study financed and carried out for three municipalities – his Municipality and the towns of Windsor and Hantsport, which in June 2010 recommended that the three municipalities acquire the 'Exhibition' lands for future industrial development. The municipality turned down the CBCL recommendation. He disagreed with the study's conclusion that the area already had enough industrial land to last five to ten years.

[32] Mr. Dauphinee was shown a document entitled "Information Bulletin #7 – Open Meetings" provided by the Nova Scotia Department of Housing & Municipal Affairs to municipalities as 'practical suggestions involving interpretation of municipal legislation in general situations'. This was erroneously referred to by the Applicant's counsel as a regulation. The Bulletin reads in part:

> Council cannot make a decision at a closed meeting which would bind council. Binding decisions must be made in an open meeting.
>
> Closed meetings are intended to provide a forum for council to discuss these specified items in private, prior to making a decision. …
>
> Since substantive decisions may not be made at closed meetings, council cannot simply ratify the action agreed in the closed meeting, that is, for example, council cannot "ratify the action recommended at the April 2 closed meeting." Council at an open meeting must put the specific motion on the "floor" to discuss and vote on, for example: "resolve to dismiss [name]" or "agree to purchase the Smith property for the price of $97,000".
>
> …
>
> Freedom of Information
>
> … Obviously, closed meetings that do not meet the standards of the MGA (apart from being illegal) are not eligible for confidentiality.

[33] Mr. Dauphinee acknowledged that the identity of the purchased Mason lot and the purchase price were not disclosed in the council's minutes of April 5 or April 12, 2011. He agreed that the identity of the property being purchased should have been in the minutes. With respect to the municipal solicitor's addition of para. 9(b) to the agreement of sale (requiring the parties "to keep the details of the conveyance confidential at all times prior to and subsequent to the purchase"), he denied that he directed that that provision be inserted in the agreement, and stated that it "had to be the CAO".

[34] Mr. Dauphinee's explanation for why two additional appraisals were requisitioned by council in October 2012 was that the comparables upon which first appraisal were based were not relevant. When asked whether he was embarrassed, in light of all the appraisals, that the municipality paid $500,000 for the Mason lot, his reply was that he was only one of nine votes. He denied that he had participated in the completion of the Mason lot purchase, other than to sign the cheque. He denied that the CAO had ever raised with him the potential for a conflict of interest because of his ownership of the Hatfield Lane property.

[35] He did not know how long after council's decisions approving the purchase of the Mason lot that the purchase, and purchase price, became public.

[36] He denied knowing that Mason was in financial difficulty before Christmas 2011, about eight months after the municipality's agreement to purchase the Mason lot.

The Law

[37] The most relevant portions of the *Act* are summarized in paras. 2 to 5 of this decision.

[38] The *Act* was enacted in 1982. *Stubbs v Greenough*, (1984) 61 NSR (2d) 300 (NSSC), appears to be the only Nova Scotia decision respecting the *Act*. In *Stubbs*, the respondent councillor was found to have participated in discussions about a change in a policy regarding the servicing of lots that would have benefitted him. He claimed that the *Act* was an unreasonable restriction on his *Charter* right to freedom of expression, and alternatively that his conduct was saved by subsections 5(1) (b) and (j) of the *Act*. Glube CJTD held that the *Act* was a reasonable restriction for the protection of society saved by s. 1 of the *Charter*, that the councillor contravened the *Act*, and that his conduct was not saved by ss. 5(1)(b) or (j), but that his actions occurred through inadvertence, ignorance of the law or a *bona fide* error in judgment. She exercised discretion to relieve against forfeiture of office, pursuant to s. 10 of the *Act*.

[39] Counsel in this case agree that the wording of the *Act* is similar to corresponding judicially-considered legislation in other provinces and refer the court to decisions from those other jurisdictions.

[40] The Applicant refers the court to two decisions: *Madger v Ford*, 2012 ONSC 5615 (Hackland J, not the Divisional Court decision) and *Schlenker v Torgrimson*, 2013 BCCA 9. In this decision I reference the Divisional Court decision, 2013 ONSC 263 (Div.Ct.).

[41] The Respondent refers the court to eleven decisions: *Old St. Boniface Residents Assn v Winnipeg* [1990] 3 SCR 1170 (SCC); *Synchyshyn (Clanwilliam) v Tiller* 2000 MBCA 40 (MCA); *(Re) Greene and Borins* 1985 CarswellOnt 666 (ONSC, Div.Ct.); *Jafine v Mortonson* 1999 CarswellOnt 285 (ONSC); *Tuchenhagen v Mondoux* 2011 ONSC 5398 (Div.Ct.); *Bowers v Delegarde*, 2005 CarswellOnt 4374 (ONSC); *Fewer v Harbour Main-Chapel's Cove-Lakeview* 2007 NLTD 91; *Lorello v Meffe* 2010 ONSC 1976; *Fleet v Davies* 2011 SKQB 159; *Duncan v Thurlow* 2012 SKQB 179; and, *Gammie v Turner* 2013 ONSC 4563.

[42] The Respondent submits that the Supreme Court of Canada decision in *Old St. Boniface* sets out the test applicable to this case.

[43] *Old St. Boniface* was not a decision respecting statutory conflict of interest provisions. In that case, the municipal councillor was accused of having a "disqualifying" bias in respect of a development proposal for a condominium project, which project also required closure and sale of an adjacent city owned street to the developer. The councillor voted on the proposal at council. He had previously appeared before other community boards advocating in favor of the project. The challenge was based on the administrative law principle that a tribunal must maintain an open mind, free of any actual or perceived bias.

[44] In its decision, the court distinguished the role of a municipal councillor from that of a member of other types of administrative tribunals, such as the National Energy Board. At paragraph 92, Sopinka J. wrote for the court:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing

> inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See *Re Blustein and Borough of North York*, 1967 CanLII 350 (ON SC), [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 1979 CanLII 2020 (ON SC), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, supra; and *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673.

[45] *Old St. Boniface* has been judicially cited as setting out a three-part test for analyzing a conflict of interest: (1) there must be a pecuniary interest held by the councillor in the matter before council, (2) the pecuniary interest must be beyond what the councillor holds in common with the other citizens in the municipality, and (3) a reasonably well-informed person would conclude that the pecuniary interest might influence the exercise of that duty.

[46] While the analysis in *Old St. Boniface* is helpful, the starting point for the interpretation of the Nova Scotia *Act* is the *Act* itself. As Elmer Dreidger wrote, the only principle or approach to statutory interpretation is that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of parliament. See: *Rizzo and Rizzo Shoes Ltd. RE*, [1998] 1 SCR 27 and *Slauenwhite v Keizer*, 2012 NSCA 20.

[47] In *Raymond v Royal & Sun Alliance Insurance*, 2014 NSCA 13, after citing the seminal principle, Bryson JA wrote at para. 30:

> Moreover, when interpreting provincial legislation it is common to consult legislation of other provinces. In Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Markham, ON: Butterworths Canada Ltd., 1994), the author says as follows at pp. 291 and 294:
>
> > Where two statutes dealing with the same subject or enacted to achieve the same purpose use similar or identical words, the courts may readily conclude that the words have the same meaning and effect. Conversely, where statutes that otherwise are similar use different words or adopt a different approach, this suggests that a different meaning or purpose was intended. Although there is no presumption that a legislature is bound by the drafting conventions and patterns of expression found in the legislation of another jurisdiction, the cross-jurisdictional comparison can still be instructive.

> When statutes enacted by different jurisdictions are similar in purpose and structure, and particularly where they respond to similar pressures for social reform, the courts may presume that despite minor differences the statutes all express the same policies and implement the same solutions.

[48] The Driedger principle of statutory interpretation divides the analysis into three parts: contextual meaning, legislative intent and established legal norms. The three analyses are sometimes turned into three questions: What is the meaning of the text? What goals (purposes) and methods did the legislature intend to adopt? What are the consequences of the adopted proposed interpretation? A resulting interpretation must be justified in terms of plausibility (compliance with text), efficacy (promotion of legislation intent) and acceptability (compliance with accepted legal norms).

Grammatical Meaning of Text

[49] The term "pecuniary interest in any matter" is not expressly defined in the *Act*. The definitions of an "indirect pecuniary interest" and "deemed pecuniary interest" do not interpret the term. In this case, the Respondent's interest in the Hatfield Lane property is both indirect (held with a partner) and deemed (his spouse is also a titleholder).

[50] The Respondent's interest in the Hatfield Lane property is, without question, pecuniary in that it involved money or money's worth. On its face, a pecuniary interest in land in the municipality could constitute a pecuniary interest in a matter. The first question is whether the Respondent's ownership interest in the Hatfield Lane property was a pecuniary interest in a matter before the municipal council.

[51] Even if the Respondent's interest in the Hatfield Lane property is a pecuniary interest in a matter before council, s. 5 of the *Act* sets out instances where a member's pecuniary interest in a matter does not require that the member disclose his interest and abstain from participation. Two such instances are advanced by the Respondent as applicable to this matrix. Section 5(1) provides that: "The Act does not apply to any interest in any matter that a member may have . . . (j) by reason of having a pecuniary interest that is an interest in common with electors generally; [or] (k) by reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."

[52] By s. 5(1)(j), if the pecuniary interest is "in common with electors generally", it does not contravene the *Act*. Section 2(c) defines "interest in common with electors generally" as "within the area of jurisdiction of the municipality or local board or, where the matter under consideration affects only part of the area, an interest in common with the electors within that part". In this case, I conclude that the relevant area is not the municipality as a whole but the area around Garlands Crossing.

[53] The analysis at paras. 44 to 50 in *Fewer* is not applicable because the wording of s. 207(4) of the Newfoundland legislation did not include the same definition of a common interest as contained in s. 2(c) of the Nova Scotia *Act*. The wording in the Act is similar to that in the Ontario legislation. The analysis at paras. 71 to 79 in *Gammie* is relevant to this case. The

Respondent's pecuniary interest in the Hatfield Lane property does not benefit from being in common with other properties at or near Garlands Crossing, only to the extent that the Applicant proves that it benefits differently from other properties in that area.

[54] Finding the grammatical meaning of s. 5(1)(k) is more difficult. Normally words only have meaning in context. I conclude that the plain or grammatical meaning of 5(1)(k) of the *Act* differs from the commonly accepted statement of the third element of the test set out by Sopinka J. in *Old St. Boniface*. An interest so remote or insignificant that 'it cannot reasonably be regarded as likely to influence the member' (*Act*, s. 5(1)(j)) is not the same analysis as 'an interest that a reasonably well informed person would conclude might influence the member's exercise of a duty' (*Old St. Boniface*).)

[55] The grammatical aspect of the statutory interpretation process leads me to conclude that a pecuniary interest not held in common with electors, that is not so remote or insignificant as to require disclosure and abstinence from participation, arises when a reasonably well-informed person would conclude that it is likely to, as opposed to might or could possibly, influence the member's exercise of his or her duty.

Legislative Intent

[56] The second question involves analysis of the purposes and methods intended to be adopted by the legislature.

[57] Section 9(5) of the *Interpretation Act* deems every enactment to be remedial and directs that it be interpreted to ensure attainment of its objects by considering a non-exhaustive list of seven factors: (1) the occasion and necessity of the enactment, (2) the circumstances existing at the time it was passed, (3) the mischief to be remedied, (4) the object to be attained, (5) the former law, (6) the consequences of a particular interpretation, and (7) the history of the legislation on the subject.

[58] In this case, no direct evidence has been advanced with regards to any of the seven factors. No evidence has been tendered with respect to the circumstances existing in 1982; the mischief confronted by the legislature; whether there was prior law or legislative history to the *Act*; or, what objective or purpose the legislative intended to obtain.

[59] In *Stubbs*, the court did not comment on the objects of the *Act* except in respect of the s. 5(1)(j) saving provision. The parties rely upon the analysis of the mischief, objects and remedies advanced in reported decisions in other jurisdictions with similar legislation.

[60] The purpose of the legislation was described by the Ontario High Court of Justice, Divisional Court, in *Re Moll and Fisher*, [1979] OJ No. 4113. Their description has been adopted and quoted in almost every subsequent Canadian decision respecting municipal conflict of law legislation. Paragraphs 9 to 12 read:

> [9] The obvious purpose of the Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in

which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. **There is no need to find corruption on his part or actual loss on the part of the council or board**. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute. And I should say at once, that in so far as this case is concerned there is no suggestion that the appellants acted out of any improper motive or lack of good faith.

[10] **This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose.** And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

[11] **Legislation of this nature must, it is clear, be construed broadly** and in a manner consistent with its purpose. We have been referred to a number of cases in which the purport of similar legislation (although more stringent in that no saving provision such as s. 5(2) was present) has been judicially considered and in which the high standards expected of those elected to public office have been discussed. I shall make brief reference to two of them. In R. ex rel. Slater v. Homan (1911), 2 O.W.N. 1334 (H.C.J.) at p. 1336, the following statement appears:

> The object of this legislation clearly was to prevent any one being elected to, or holding a seat in a municipal council, whose personal interests might clash with those of the municipality ...
>
> It is of the utmost importance that members of a municipal council should have no interests to bias their judgment in deciding what is for the public good, and they should strive to keep themselves absolutely free from the possibility of any imputation in this respect.

[12] In Re Wanamaker and Patterson (1973), 37 D.L.R. (3d) 575 at p. 579, [1973] 5 W.W.R. 193 at p. 197 (Alta. S.C. A.D.), these observations were made:

> The motives expressed by Patterson [the appellant mayor] for his support of the resolutions are admirable, and it may be accepted that all of the other members of Council, and indeed many of the townspeople, knew that he operated the coin laundry. It is not useful to go into these aspects in detail. He did not formally declare his interest at the meetings in which the resolutions were put, and he did vote on them.

And at pp. 581-3 D.L.R., pp. 200-1 W.W.R.:

> The principal[sic, principle] of law which underlies s. 30 [which provides that a member of council ceases to be qualified if he votes on any question in which he has a direct or indirect pecuniary interest] ... is sufficiently expressed for the present purposes by a part of the quotation taken therein ... from Bowes v. City of Toronto (1858), 11 Moo. P.C. 463 at pp. 518-9, 14 E.R. 770:
>
> > "It was incumbent on the Appellant ... not to place himself voluntarily in a position in which, while retaining the office of Mayor, he would have a private interest that might be opposed to the unbiased performance of his official duty."
>
> **Throughout the years the courts have applied, and continued to apply, this principle with unabated rigour. No erosion of it, nor of its application, can, in my opinion, be permitted if confidence is to be maintained in the electoral process in democratic institutions. Integrity in the discharge of public duties is and will remain of paramount importance**, and when the question of private interest arises, the court will not weigh its extent nor amount in determining the issue. In Lapointe v. Messier (1914), 17 D.L.R. 347, 49 S.C.R. 271, Sir Charles Fitzpatrick, C.J.C., discussed briefly at p. 350 the question of interest sufficient to disqualify, and referred, amongst other authorities, to 19 Halsbury, Laws of England, 1st ed., No. 627, p. 304, where, in dealing with the extent of interest, it is stated that the fact that the amount involved is trifling does not make any difference. That statement expresses the law that is applicable here as I understand it. **When the question is whether there has been a breach of duty arising out of a fiduciary or quasi-fiduciary relationship, the breach does not change its character merely because it is of small extent.** If there has in fact been a breach, the prescribed consequences must follow.
>
> . . . . .
>
> The prohibition of s. 30 is against voting on any question in which he has a direct or indirect pecuniary interest. The outcome of the vote is not relevant, nor is the effect or operation of the resolution if passed. The sole issue is whether Patterson had the proscribed interest in the question at the time of the vote. The court is not called on to analyze the nature of the question: if the subject to which it relates holds any measure of pecuniary interest for the Council member, then the provisions of s. 30 apply. The issue is solely whether he has stood aloof from any participation in a question in which his pecuniary interests are in any way involved. [This court's highlighting is in bold].

[61] The decisions cited by counsel to this court adopt the *Moll* statement of purpose, for example, *Magder v Ford* at paras. 34 and 37; *Schlenker* at paras. 35 to 38; and, *Tuchenhagen* at paras. 25 to 28. See also: *Orangeville v Dufferin*, 2010 ONCA 83 at para. 22.

[62] A brief summary of the cases submitted by the parties demonstrates how the legislation has been applied. All courts have emphasized that each decision is specific to the facts of the particular case.

[63] In *Magder v Ford*, the Divisional Court overturned the motion judge because Ford had no pecuniary interest in the first resolution before council; with respect to the second motion to rescind another earlier motion, the earlier motion was *ultra vires* and a nullity. The court made these relevant points:

> [6] Case law has determined that a pecuniary interest for purposes of the *MCIA* is a financial or economic interest. For the *MCIA* to apply, the matter to be voted upon by council must have the potential to affect the pecuniary interest of the municipal councillor …
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> . . .
>
> [43] Moreover, since a pecuniary interest results in a prohibition against participation in a public meeting which, if not [page253] obeyed, attracts a severe penalty, it is appropriate to strictly interpret the pecuniary interest threshold.
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> . . .
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> [77] In our view, the application judge did not err in finding the exemption did not apply. Section 4(k) exempts the member from the application of s. 5(1) if the pecuniary interest is so insignificant that the reasonable person would conclude that it would not likely have influenced the member. As this court stated in *Amaral*, above, the reasonable person, in this context, is one who is "apprised of all the circumstances" (at para. 38).
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> . . .
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> [90] Accordingly, in order to obtain the benefit of the saving provision in s. 10(2), the councillor must prove not only that he had an honest belief that the *MCIA* did not apply; he must also show that his belief was not arbitrary, and that he has taken some reasonable steps to inquire into his legal obligations. In our view, the application judge properly stated that it was relevant to consider the diligence of the member respecting his obligations under the *MCIA* when determining the good faith of the member -- for example, his efforts to learn about his obligations and his efforts to ensure respect for them. Wilful blindness is not confined, as the appellant contends, to a consideration of inadvertence. Therefore, the appellant has demonstrated no error in law by the application judge.

[64] In *Tuchenhagen,* the court held at para. 26:

> The *MCIA*, s. 10 does provide for the penalties to be imposed if a member of council is found to have breached the legislation. The seat of the member is to be declared vacant, he or she may be disqualified from being a member for a period of time not exceeding seven years and, where the contravention has resulted in financial gain, ordered to pay restitution. As such, the *MCIA* is penal in nature. This does not mean that it should be interpreted narrowly, in favour of the member, in case of ambiguity. "Even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied" (see *R. v. Hasselwander* (1993), 1993 CanLII 90 (SCC), 14 O.R. (3d) 800, [1993] 2 S.C.R. 398, [1993] S.C.J. No. 57, at para. 30 as referred to in *Ruffolo v. Jackson*, [2010] O.J. No. 2840, 2010 ONCA 472 (CanLII), at para. 9).

[65] In this case a councillor participated in a meeting respecting the possible sale by public tender of several city properties. He did not disclose his interest in acquiring one of those properties when he crystallized his intent to tender for one. Instead, he participated in closed meeting and only declared a conflict of interest after he made a tender to the city for the property of interest to him. He was found to have a pecuniary interest contrary to the *Act* and was not saved by inadvertence or error in judgment, so his seat was vacated.

[66] Paragraph 26 in *Tuchenhagen* was adopted by the British Columbia Court of Appeal in *Schlenker*, when it overturned the motion judge's finding that two directors of non-profit societies, which societies were awarded service contracts by a public trust (of which the two directors were trustees and who had not disclosed their directorships in the non-profit societies), did not have an indirect pecuniary interest and conflict of interest. The Appeal Court held that the motion judge erred in taking a narrow view of the term "direct or indirect pecuniary interest" and limiting a pecuniary interest to one involving a personal financial gain.

[67] In *Synchyshyn*, a municipality negotiated with a property owner for the purchase of land as a source of gravel. The owner advised the reeve that the sale of the land to the municipality was contingent on the simultaneous sale of an adjacent parcel. The reeve agreed to purchase the adjacent parcel for personal use. The reeve participated in discussions and votes on the municipality's purchase of the land during subsequent council meetings. The motions judge found the reeve in violation of the *Act* and declared the seat vacant.

[68] The Court of Appeal upheld the motion judge's finding that the reeve violated the *Act*. The reeve's interest was no less pecuniary because the linked transactions were not expected to show a profit to the reeve or a loss to the municipality. However, the Court of Appeal overturned the vacating of the seat. Although the reeve was aware of the facts giving rise to the pecuniary interest, he was unaware that he had a pecuniary interest in the matter before council. He was found entitled to the benefit of s. 22 of the Manitoba *Act* (s. 10 of the Nova Scotia *Act*).

[69] In *Greene,* a member of council participated in a decision by North York to approve a substantial high-rise development. His father had been accumulating properties for development close enough to the proposed project so as to entitle him to special notice of the development

proposal approval process. Expert evidence was tendered for the applicant to the effect that the project would have a beneficial effect on the nearby Borins properties. Expert evidence was tendered for Borins to the opposite effect. The motion judge preferred the Borins expert and dismissed the application. The motion judge effectively held that the effect of the project upon the Borins land was "highly speculative and hypothetical". The Divisional Court disagreed with the motion judge's analysis that the Respondent's father's properties were not affected or saved by s. 5.

[70] In *Jafine,* a York Regional Council member voted on resolutions encouraging the province to extend Highway 404 through the municipality. No route was specified in the resolutions, but the member owned for almost 40 years a 100 acre lot, that was along the known preferred route. No conflict of interest was disclosed by the member. The court held that the member had a pecuniary interest that was not exempt under the equivalent of our ss. 5(1)(j) or 5(1)(k). No sanction was imposed because the member's conduct was based on an error of judgment.

[71] In *Bowers*, a municipality obtained funding to launch its own high-speed fiber optic communications network. A councillor who was employed by Bell Canada and owned shares of Bell Canada moved a resolution to dissolve the committee launching the independent network, then participated in meetings and decisions concerning the matter. The motion judge held that the member did not have an indirect pecuniary interest. Simply because Bell provided similar services in other municipalities and was therefore a potential competitor for the town's network in the future did not establish that the councillor was working to undermine the town's proposed network for the benefit of his employer. There was no evidence that Bell was interested in expanding its high speed system to the town.

[72] At paragraph 76, the court stated that the potential for competition in the future or possible future plans of Bell did not qualify as a pecuniary interest under the *Act*. At paragraph 78, the court wrote:

> … There must, in my opinion, be a real issue of actual conflict or, at least, there must be a reasonable assumption that conflict will occur. In this case, the evidence simply does not satisfy me of Bell Canada possessing any pecuniary interest in the matters and, therefore, if Bell Canada had no pecuniary interest, Mr. Delegarde did not have an indirect pecuniary interest.

[73] In *Fewer,* a town councillor and his son lived in two of 16 houses on a road being considered by council for a central water and sewer service. The council was aware of the councillor's residence on the street. The councillor participated in discussions about and voted on the matters related to the extension of sewer and water services. Proceeding under the Newfoundland legislation, the council found the councillor to have a conflict of interest and declared his seat vacated. On an appeal to the Newfoundland Supreme Court, the court upheld the council's decision. In doing so, the court stated at para. 41:

> … That the value of a house may potentially be enhanced by the provision of municipal water and sewer services is an inference that I am quite prepared to draw from the fact of the project and the location of Fewer's residence.
>
> …
>
> [43] To conclude that the addition … may potentially affect the value of a residence is to almost state the obvious.

[74] The court rejected the defence that the interest of the councillor was held in common with "the other citizens or classes of citizens", as defined in the Newfoundland legislation; that is, the citizens living on a particular street could constitute a class of citizens.

[75] In *Lorello*, a municipal councillor was a shareholder and officer of an electrical subcontractor. He did not disclose his interest in the business or refrain from voting regarding applications by developers for development permits from the municipality. The subcontractor did not have any special business relationships with developers or general contractors involved in the voted on projects. The subcontractor followed normal tendering processes, after municipal approvals were obtained, to do work for these developers or general contractors.

[76] The court held that the subcontractor did not have an indirect pecuniary interest in developers' applications. There was no evidence that he voted in favor of the applications on an understanding that his company would be awarded contracts on the projects.

[77] At paragraphs 60 to 65, the court sets out when a contingent interest, based on the possibility of a future benefit, meets the threshold a pecuniary interest not exempt under the legislation. The court rejected both the view that a reasonable possibility of additional work in the future was enough to meet the threshold test and, at the opposite side, that a special relationship between the subcontractor and developer or general contractor need to be found to exist to constitute a conflict. The court wrote:

> [61] In my view, neither of these formulations represents the appropriate legal threshold for determining when a contingent interest becomes a real one. The plaintiff's threshold is, in my view, too broad and too vague. As Power J. said in *Bowers*, there are potentials for conflict everywhere. There must be more than the *potential* for future business. The interest cannot be hypothetical. Almost anything is "possible". The courts typically deal with probabilities, not possibilities.
>
> [62] I am also not persuaded that a "special relationship" is the appropriate test. This test is also too vague. The term "special relationship" is not a term of art. It could mean many things in different contexts. While I agree that a special relationship might well constitute significant evidence of a pecuniary interest, I do not think it constitutes an appropriate legal test on its own.
>
> [63] In *Edwards v Wilson* the Divisional Court accepted as correct the finding of a pecuniary interest based on "a balance of probabilities". The Divisional Court

> held, at para. 21, that a member of council will have an indirect pecuniary interest in a proposal if it "probably" would affect the business he operates.
>
> [64] It is well established that the burden on the plaintiff in these proceedings is to prove, on a balance of probabilities, that the *MCIA* has been breached (see: *Stevens v Rissman*, [1996] O.J. No. 4407 (Gen. Div.) and *Baillargeon v. Carroll*, [2009] O. J. No. 502, 56 M.P.L.R. (4th) 160 (S.C.J.)). This requires proof of the constituent elements of s. 5 of the *MCIA*, including proof that Meffe had a direct or indirect pecuniary interest at the time of the vote.
>
> [65] Having regard to these considerations, in my view, the appropriate test to determine whether a contingent interest constitutes a pecuniary interest for the purposes of the *MCIA* is whether it is probable that the matter before council will affect the financial or monetary interests of the member. With these principles in mind, I then turn to the analysis of the remaining eleven votes in question.

[78] *Fleet v Davies* relates to two members of a municipal council who were respectively the receptionist for, and the wife of, a local doctor. The municipal council was concerned about the dearth of physicians in the area and undertook a project to bring new doctors to the community and establish a medical clinic. The respondents participated in some of these discussions.

[79] In a brief decision, the court rejected the allegation of conflict of interest, stating at para. 18:

> It is not sufficient for the applicant to assert that the respondents are in a conflict of interest when they engage in Council business which *may* have an impact on the medical practice of Dr. Murray Davies. For example, the applicant suggests that if the Methadone Clinic is moved from the clinic to the hospital, as proposed in the Medical Services Assessment Report, this *may* remuneratively benefit Dr. Davies. The applicant must present evidence as to how or why it would benefit Dr. Davies or, more to the point, the two respondents. He has not done so.

[80] *Duncan v Thurlow* involved a municipal councillor who owned a property adjacent to a former railway bed, a narrow strip of valueless land that the municipality decided to offer for sale to the adjacent property owners, including that councillor. The councillor voted at the first meeting on the matter but not thereafter.

[81] The court held that as the strips of land were valueless, and that transfer of the land conferred so remote and insignificant a pecuniary benefit as not likely to have affected the actions of the councillor. To the extent that the councillor had voted at the first council meeting, she was entitled to be excused for her mistake as she had no intention to deceive council.

[82] At paragraph 15, the court stated that the applicant left the court to speculate that the strip of land, adjacent to the councillor's property, must have a value. He added:

> . . . that is not the evidence before me. Accordingly, I must find that the transfer of valueless land is "so remote and insignificant" as not likely to affect the actions of Ms. Thurlow as a councillor.

[83] In *Gammie v Turner*, the respondent was a member of a city council who participated in council's decision to give the Chamber of Commerce a substantial grant to promote tourism. The councillor was the owner of vacant land, the operator of a TV repair business and a member of the Chamber of Commerce in the municipality. The applicant complained that the respondent councillor was in a conflict and would benefit from the grant.

[84] The court held that the councillor's pecuniary interest in the grant, if it existed, was too insignificant to have been likely to influence the respondent's decision to support the grant. If he had a pecuniary interest, it was no greater than the interest of other electors in the area affected by the decision. The court accepted that the councillor honestly believed that neither the ownership of the vacant lot, or his business, or his membership in the chamber, obliged him to disclose those interests or abstain from voting.

Analysis

[85] The West Hants municipal council, and the Respondent, acted improperly in the way they purchased the Mason lot.

- The warden is an elected councillor chosen to preside at all meetings of council. He or she may monitor the administration and government of the municipality as well as communicate information and make recommendations to council (s. 15, *MGA*). The chief administrator officer is responsible for the administration of the municipality in accordance with policies made by council. In this case, the warden acted as the go-between between the municipality and his friend (the president of Mason) with respect to the purchase of the Mason lot.

- With undue haste, and without apparent involvement of the administration of the municipality or prior due diligence, including an appraisal or assessment of the value of the Mason lot, the Respondent promoted the purchase of his friends' property to the municipality. Councillors are trustees. It is difficult to comprehend how such a long-serving councillor as the Respondent could proceed to approve this purchase in such a hasty and cavalier manner with no due diligence.

- This particular purchase was not only negotiated in secret (which is not improper) but was kept secret thereafter at the instigation of the municipality. While it is not unusual or improper for a municipality, before making a deal, to keep negotiations confidential, it is contrary to clear and well-established principles of municipal government that once a deal has been made, it continue to be kept secret in the manner this transaction was kept secret. Not only was there a delay in public disclosure of the purchase, but also, on the instructions of the municipality (not the seller), the parties agreed "to keep the details of this conveyance confidential at all times prior to and subsequent to the purchase, and not to divulge to any person any details with respect thereto." This unusual provision,

contrary to the clear law respecting open municipal government, raises suspicions as to the motive of the municipality in keeping the matter secret.

- This 14-acre vacant property in rural Hants County was assessed for property tax purposes as commercial property for about $14,000. The municipality purchased the property for the seller's asking price of $500,000. The property was not appraised either before or after it was purchased. The next year, newly appointed municipal auditors requested an appraisal to justify the purchase. The professional appraisal obtained by the municipality showed the market value as $185,000. Thereafter, for reasons that were not apparent to the court, the council directed the CAO to obtain two more appraisals. The Warden's explanation as to the reason for the additional appraisals lacked credibility. The second appraisal showed the market value of the Mason lot at $200,000 and the third appraisal, $562,000.

[86] It was the Respondent who proposed to the municipality the purchase of the Mason lot for $500,000, without an appraisal and in great haste. The explanations given by the Respondent for the purchase, the haste with which it was advanced, the absence of discussion of the purpose of the purchase of that land versus other options, and lack of an appraisal, were not reasonable.

[87] The court concludes that there are two possible explanations for the Warden's involvement in promoting the purchase by the municipality of the Mason lot.

[88] The first is the Applicant's submission that the purchase of the Mason lot for an apparently excessive price increased the value of the nearby 25-acre vacant Hatfield Lane property, owned for a long time by the Respondent, his wife and a partner. I note that the Hatfield Lane property had remained vacant and unused for over 30 years. No evidence was tendered in these proceedings as to the market value of the Hatfield Lane property before, or after, the municipality's purchase of the Mason lot. Nor was evidence tendered as to how the payment of an apparently excessive price for the Mason lot could increase the market value of the Hatfield Lane property.

[89] Notwithstanding that, as the crow flies, the Hatfield Lane property was about 1,000 feet distant from the Mason lot, it was separated from the Mason lot by a railway right of way, a public highway and two rows of residence, and was, by road, 7/8th of a kilometre away.

[90] This case is unlike the *Stubbs* matrix where the councillor owned vacant, developable lots that would benefit directly from the change in policy regarding the servicing of lots by the Dartmouth City Council; the *Greene* matrix, in which the councillor's father was actively acquiring lots for development very close to the substantial development proposal before council; the *Jafine* matrix, in which the proposed highway route would likely pass through the councillor's large vacant lot; the *Fewer* matrix, where the councillor and his son would be two of sixteen to receive municipal water and sewer to their residences; and, the *Tuchenhagen* matrix, in which the member with a crystallized intent to bid on the sale of municipal land by tender, continued to not disclose his interest and to participate in closed meetings on the matter.

[91] The matrix is closer to the circumstances described in other cases cited to the court where no conflict was found to exist, such as *Bowers*, in which the Bell employee/shareholder had no conflict because Bell might in future be a competitor; *Lorello*, in which a subcontractor might after approval of a development proposal be hired by the developer or general contractor; *Fleet v Davies*, in which promotion of new doctors and a clinic "may" benefit the spouse and employer respectively of the members; *Duncan v Thurlow*, in which the applicant failed to establish any significant monetary value to the transfer of strips of a railway bed; or, *Gammie v Turner*, in which a grant to the Chamber of Commerce of which the council member was a member and who carried on business in the community was not a conflict.

[92] In my view, absent admissible evidence to the contrary, it would be speculative to conclude that the municipality's purchase and apparent overpayment for the Mason lot can reasonably be viewed as having affected the market value of the Hatfield Lane property, and, therefore, to be seen by a reasonably well-informed person to have likely influenced the Respondent in the exercise of his public duty in respect of the purchase of the Mason lot. There was no evidence upon which a reasonably well-informed person could infer that the municipality's purchase of the Mason lot would, to more than a remote or insignificant degree, affect the Respondent's pecuniary interest in the Hatfield Lane property and therefore have influenced his actions in this matter.

[93] The second possible explanation for the Respondent's conduct is that he was a long-time, close friend of the Wells brothers, who are both constituents and owners of a major business in his rural community. He had grown up with them. This friendship could explain his actions.

[94] I have concluded it is most likely his actions were for the purpose of helping his friends, and that if, contrary to my conclusion that he had no pecuniary interest in the matter, he did have a pecuniary interest in the matter, it was (absent any evidence as to the existence or extent of that interest) so remote that it cannot be reasonably regarded as likely to have influenced him.

[95] The Respondent's leading role in the municipality's purchase of the Mason lot, done in a hasty manner, without an appraisal, at an apparently excessive price, and kept secret at the instigation of the municipality, both during and after the negotiation of the deal, is problematic conduct in respect of the Respondent's duties as warden of the municipality. However, prudent stewardship or good municipal government is not the focus of the *Municipal Conflict of Interest Act*.

[96] As stated in *Moll*, and most of the subsequent decisions, the purpose of the *Act* is to prohibit members of council from engaging in the decision-making process in respect of matters in which they have a personal economic interest. The issue is not the good faith of the member or the propriety of his conduct, but rather, whether a reasonably well-informed person would conclude that the member's pecuniary interest in a matter likely influenced the exercise of his public duty in respect of that matter.

[97] The onus is on the Applicant to establish on a balance of probabilities the fact of a pecuniary interest held by a member in a matter before council; that the interest was not held in

common with other electors; and, that the interest was not so remote or insignificant as to cause a reasonably-well informed person to conclude that it likely influenced the member.

[98] The conduct of the Respondent warden, and the municipal council, in respect of the purchase of the Mason lot was inappropriate by reason of the haste, secrecy, lack of due diligence and apparent excessive price paid. There was good reason for the Applicant to be suspicious of the Respondent's actions and possible motive, but it has not been established that a reasonably well-informed person would conclude that the ownership interest of the Respondent in the Hatfield Lane property likely influenced his conduct in the municipality's purchase of the Mason lot.

[99] For these reasons, the Application is dismissed.

Costs

[100] If counsel is unable to agree on costs, the Respondent shall file written submissions with the Applicant and court within one month; the Applicant shall provide his submissions two weeks after receipt of the Respondent's submissions. The Respondent shall have one week after receipt of the Applicant's submissions to provide any response submissions.

Warner J.