CITATION: Gammie v. Turner, 2013 ONSC 4563
COURT FILE NO.: 12-138
DATE: 2013-07-03

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CRAIG GAMMIE	)	*Self-represented*
	)	
	)	
	)	
Applicant	)	
	)	
	)	
- and -	)	
	)	
	)	
JIM TURNER	)	*Eric Davis*, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** February 21, 2013,
	)	at Owen Sound, Ontario

Price J.

Reasons For Order

NATURE OF MOTION

[1] Jim Turner ("Mr. Turner") is a resident of Wiarton and an elected member of City Council for the Town of South Bruce Peninsula ("the Council"), which includes Wiarton. On April 17, 2012, he participated in the Council's decision to give the Wiarton & District Chamber of Commerce ("the Chamber"), of which he is a member, a $50,000.00 grant ("the Grant"). The Chamber uses the Grant to

run such tourist events as the "Wiarton Willie Festival", a three-day festival marking Groundhog Day, and the largest winter event in Bruce County.

[2] Craig Gammie ("Mr. Gammie") is also a resident of Wiarton and a local blogger. He complains that Mr. Turner was in a conflict of interest when he voted to approve the Grant, on the grounds that:

a) he owned a vacant lot in town whose value Mr. Gammie believes could be enhanced by demand for property by tourists attracted to the Town by the festival;

b) he operates a TV repair business, whose services Mr. Gammie believes may have been in greater demand by reason of the tourists attending the festival; and

c) he is a member of the Chamber of Commerce, which was the recipient of the Grant.

[3] The *Municipal Conflict of Interest Act*[1] ("*MCIA*") requires a member of Council who has any direct or indirect pecuniary interest in any matter, and who is present at a meeting of the Council at which the matter is considered, to disclose the interest and not take part in the discussion or vote on any question in respect of the matter. The *MCIA* does not define "pecuniary interest," and Mr. Gammie's and Mr. Turner's differing views as to what the term means has given rise to the present application.

[4] The court must decide whether Mr. Turner had a pecuniary interest in the Grant that placed him in a conflict of interest in respect of the vote by which it was approved.

[1] *Municipal Conflict of Interest Act*, RSO 1990, c M.50

BACKGROUND FACTS

[5] Wiarton is a community in Bruce County, Ontario, at the western end of Colpoys Bay, an inlet off Georgian Bay, on the Bruce Peninsula. It is the largest community in the amalgamated municipality of South Bruce Peninsula ("the Town"), and is best known for the Wiarton Willie Festival, a three-day event in February each year, when national and international media cover Wiarton Willie and its Groundhog Day weather prediction.

[6] Mr. Turner and his wife live and earn their living in Wiarton. Since 2000, they have owned property at 589 Berford Street in Wiarton. From 2000 until 2010, Mr. Turner used a building on the property to operate his business, Wiarton TV and Electronics ("Wiarton TV"), which services and repairs electronic equipment and components, such as televisions, DVD players, and satellite systems.

[7] In June 2010, a fire destroyed the building on the Berford Street property. Since then, Mr. Turner has operated Wiarton TV from 340 Boyd Street in Wiarton, a property he and his wife lease on a monthly basis for personal, business, and commercial purposes, including use as a constituency office. The Berford Street property has remained a vacant lot, which Mr. Turner and his wife listed for sale in October 2010. They have not yet received any offers to purchase.

[8] Since 2000, Mr. and Ms. Turner have paid a levy to the Town, as all owners of commercial property within the Business Improvement Area ("BIA") are required to do. Since at least 1997, the BIA has approved annual motions to automatically pay each of its members' dues to become members of the Chamber, with the result that Mr. Turner and his wife have automatically been members of the Chamber during that period.

[9] On October 25, 2010, Mr. Turner was elected as a Councillor for the Town. His term began on December 1, 2010, and continues to the present day.

[10] On April 17, 2012, Council approved the Grant to the Chamber, with the rest of Wiarton's 2012 budget. The Grant accounted for 0.7% of the average Town property tax bill. Its purpose was to enable the Chamber to run tourist events such as the "Wiarton Willie Festival".

[11] Mr. Gammie argues that Mr. Turner, as a member of the Chamber and an owner of a business and property within the BIA, should have declared a conflict of interest and abstained from the vote to approve the Grant. He first raised the issue in a commentary on April 6, 2011, in which he stated:

> Councillor Turner is a member of the Wiarton and District Chamber of Commerce, the same that could be the recipient of a $60,000 grant. It seems to me that Councillor Turner has a conflict of interest with respect to the grants discussion, or at very minimum has the appearance of a conflict of interest. In my view, councillor Turner should have sat it out.

[12] It is not disputed that the *MCIA* provides that an elector may, within six weeks after the fact comes to his or her knowledge that a member may have contravened subsection 5(1), (2), or (3), apply to a judge for determination of the matter. Mr. Gammie began the present application on May 11, 2012, which he submits was within six weeks of the final vote on the Grant on April 17, 2012.

ISSUES

[13] The court must decide whether Mr. Turner had a conflict of interest, as defined by the *MCIA* which required him to declare his membership in the Chamber, and his ownership of a business and property in Wiarton, and to abstain from the discussion of the Grant and the vote on its approval.

[14] Additionally, Mr. Turner raises the issue of whether Mr. Gammie brought his application within the time permitted by the *MCIA*.

PARTIES' POSITIONS

[15] Mr. Gammie asserts that Mr. Turner was in a conflict of interest based on the fact that he had a pecuniary interest in the Grant, both directly, as owner of Wiarton TV, and owner of the vacant lot on the Berford Street Property within the BIA, and indirectly, as a member of the Chamber. He argues that events such as the Wiarton Willie Festival benefit local businesses and property owners more than they do other residents, by increasing demand for the businesses' services and the prices paid for local real estate.

[16] Mr. Turner maintains that he never had a direct or indirect pecuniary interest in the Grant, notwithstanding that he was a member of the BIA and the Chamber. He submits that the Grant did not result in any financial gain to the Chamber or to him, and that, while he owned a business and property in Wiarton, the Grant did not benefit him any more than it did other residents. He argues that the *MCIA* was not designed to disqualify members of the Council voting on measures of general benefit in which their interest was no greater than those of other residents.

[17] Additionally, Mr. Turner argues that Mr. Gammie failed to make his application within six weeks after April 6, 2011, when he wrote his commentary, disclosing the knowledge he had at that time that the alleged contravention had occurred. Mr. Gammie maintains that he made his application within six months after the final vote on the Grant, which occurred on April 17, 2012. Additionally, he submits that although he suspected on April 6, 2011, when he wrote his blog, that Mr. Turner had been in a conflict of interest at the time of earlier discussions on the issue, he did not have actual knowledge of the facts until after April 17, 2012, when the final vote occurred.

ANALYSIS AND EVIDENCE

The Legislative framework

[18] The *MCIA* allows an elector to bring an application before a judge of the Superior Court to seek a determination as to whether a member of Council has contravened s. 5(1) and s. 19(1) of that Act. If there has been a contravention, the *MCIA* requires the judge to declare the member's seat vacant. As well, the judge can impose a further period of disqualification from office and order restitution where there has been personal financial gain.

[19] There is a saving provision in s. 10(2) of the *MCIA* for cases in which a contravention was the result of inadvertence or an error in judgment. That provision reads:

> Where the judge determines that a member or a former member while he or she was a member has contravened subsection 5(1), (2) or (3), ***if the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment, the member is not subject to having his or her seat declared vacant and the member or former member is not subject to being disqualified as a member***, as provided by subsection (1). [Emphasis added]

[20] The words of the *MCIA* are to be read in their ordinary sense in the context of the Legislature's objective in enacting that statute. The objective that the *MCIA* embodies is transparency in municipal decision-making, to be achieved by requiring a councillor to declare a conflict when he or she has a pecuniary interest that may affect his or her vote, and by preventing the conflict of interest that would result if a councillor were to vote when he or she could benefit financially from the outcome.

[21] The Divisional Court in *Magder v. Ford*, (2013), stated:

> In our view, the interpretation of the *MCIA* requires a court to apply the modern approach to statutory interpretation adopted by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII),

> [2002] 2 S.C.R. 559 at para. 26: ***the words of the statute are to be read in 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***." The principle that penal statutes are to be strictly construed applies only where there is ambiguity about the meaning of a statutory provision (at para. 28).[2] [Emphasis added]

[22] The Divisional Court stated further:

> Moreover, a purposive analysis does not lead to the narrow reading urged by the appellant. ***A major purpose of the MCIA is to promote transparency in municipal decision making by requiring the councillor to declare a conflict when he or she has a pecuniary interest at stake. However, the legislation is also designed to prevent the conflict in interest that would arise if a member were to vote when he or she could benefit financially from the outcome of the Council decision***. As the Divisional Court stated many years ago in *Moll v. Fisher* (1979), 23 O.R. (2d) 609 at p. 4 (Quicklaw version):
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> > ... ***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.[3]

[23] If Mr. Turner had a pecuniary interest in the Grant, he was required to comply with s. 5(1) of the *MCIA*. That section provides:

> 5(1) ***Where a member***, either on his or her own behalf or while acting for, by, with or through another, ***has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member***,
>
> (a) ***shall***, prior to any consideration of the matter at the meeting, ***disclose the interest*** and the general nature thereof;
>
> (b) ***shall not take part in the discussion of, or vote*** on any question in respect of the matter; and
>
> (c) ***shall not attempt in any way*** whether before, during or after the meeting ***to influence the voting*** on any such question. [Emphasis added]

[2] *Magder v. Ford*, 2013 ONSC 263 (CanLII) (ON SC, Div. Ct.), at para. 34

[3] *Magder v. Ford*, (ON SC, Div. Ct.), above, at para. 37

[24] Additionally, subsection 5(2) requires the member to forthwith leave the meeting or part of the meeting during which the matter is under consideration, unless the meeting is open to the public.

The Onus of Proof

[25] Mr. Gammie bears the onus of proving, on a balance of probabilities, that the *MCIA* was breached.[4]

a) Did Mr. Turner have an indirect pecuniary interest in the Grant, through his membership in the Chamber of Commerce?

[26] A pecuniary interest, for purposes of the *MCIA,* is a financial or economic interest. For the *MCIA* to apply, the matter to be voted on must have the potential to affect the pecuniary interest of the municipal councillor.[5]

[27] The *MCIA* does not define "pecuniary interest." It has been held that a "pecuniary interest" relates to money in some shape or form.[6] Section 5(1) states that its obligations arise where the member, either on his or her own behalf or while acting for, by, with or through another, ***has any pecuniary interest, direct or indirect.***

[28] Sections 2 and 3 of the *MCIA* specify the manner in which an indirect pecuniary interest can be derived from membership in an organization. Section 3

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[4] *Baillargeon v. Carroll*, [1009] O.J. No. 502 (ON SC), at para. 72; *Westfall v. Eedy*, [1991] O.J. No. 2125 (Ont. Ct. Gen'l Div.), at para. 15.

[5] *Re Greene and Borins*, (1985), 50 O.R. (2d) 513 (Div. Ct.) at p. 8 (Quicklaw version)

[6] *Bowers v. Delegarde*, [2005] O.J. No. 689 (ON SC), at para. 83; *Campbell v. Dowdall*, [1002] O.J. No. 1841 (Ont. Ct. Gen'l Div.), at p. 5; *Tuchenhagen v. Mondoux*, [2011] O.J. No. 4801 (ON SC, Div. Ct.), at para. 31.

deems the interest of certain family members to be those of the member, and s. 2 defines an "indirect pecuniary interest" as follows:

> For the purposes of this Act, a member ***has an indirect pecuniary interest*** in any matter in which the council or local board, as the case may be, is concerned, if,
>
> (a) the member or his or her nominee,
>
> (i) ***is a shareholder in, or a director or senior officer*** of, a corporation that does not offer its securities to the public,
>
> (ii) ***has a controlling interest in or is a director or senior officer*** of, a corporation that offers its securities to the public, or
>
> (iii) is a member of a body, that has a pecuniary interest in the matter; or
>
> (b) the member ***is a partner of a person or is in the employment of a person or body*** that has a pecuniary interest in the matter. [Emphasis added]

[29] Mr. Turner argues that he did not have a pecuniary interest derived from his membership in the Chamber because he was not a shareholder, senior officer, or director of that corporation. He further argues that because sub-sections 2(a)(i) and (ii) refer specifically to corporations, sub-section 2(a)(iii), which refers to members of a "body", must not apply to corporations.

[30] I do not agree. Giving the word "body" in s. 2(a)(iii) its ordinary meaning, read in the context of the purposes of the *MCIA*, it includes both corporate and unincorporated bodies.

[31] As early as 1892, section 27(1) of the *Insurance Corporations Act*, 55 Vict., c. 39, provided:

> 27(1) After the 31st day of December, 1892, ***no person or persons, or body corporate or unincorporated***, other than a corporation standing registered under this Act and persons duly authorized by such registered

> corporation to act in its behalf, shall undertake or effect, or offer to undertake or effect, any contract of insurance. [Emphasis added]

[32] More recently, section 20(3) of *The Workers' Compensation Act*, RSO 1990, c W.11 provided:

> 20(3) The notice may be served by delivering it at or sending it by registered mail addressed to the place of business or the residence of the employer or, ***where the employer is a body of persons, corporate or unincorporate,*** by delivering it at or sending it by registered mail addressed to the employer at the office or, if there are more offices than one, at any of the offices of such body of persons. [Emphasis added]

[33] Similarly, section 90 of the *Colleges Collective Bargaining Act*, RSO 1990, chapter C.15 provided:

> 90. A prosecution for an offence under this Act may be instituted against any body, association or organization in the name of the body, association or organization ***whether or not the body***, association or organization ***is a body corporate*** and, for the purposes of any such prosecution, any unincorporated body, association or organization shall be deemed to be a body corporate. [Emphasis added]

[34] As noted above, the principal purposes of the *MCIA* are to promote transparency in municipal decision-making by requiring councillors to declare a conflict when they have a pecuniary interest at stake and to prevent the conflict in interest that would arise if a councillor were to vote when he or she could benefit financially from the outcome of the Council decision.

[35] The intention of the *MCIA* has been described, as follows:

> 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.....

> 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.[7]

[36] The *MCIA* is cast in broad terms to ensure transparency and integrity in municipal decision-making. As Hackland J. noted in *Magder v. Ford*, (2012):

> The applicant observes, correctly in my view, that there is no authority in the case law to support the proposition that the *MCIA* is restricted to business or commercial matters of the municipality or is inapplicable when there are no transparency concerns. ***The MCIA is cast in broad terms to protect the integrity of government decision-making at the municipal level***. I respectfully adopt the observations of the Divisional Court in the recent case of *Tuchenhagen*, in which Lederer J. stated, at para. 25:
>
> > ***The MCIA is important legislation***. It seeks to uphold a fundamental premise of our governmental regime. Those who are elected and, as a result, take part in the decision-making processes of government, should act, and be seen to act, in the public interest. ***This is not about acting dishonestly or for personal gain; it concerns transparency and the certainty that decisions are made by people who will not be influenced by any personal pecuniary interest in the matter at hand. It invokes the issue of whether we can be confident in the actions and decisions of those we elect to govern. The suggestion of a conflict runs to the core of the process of governmental decision-making. It challenges the integrity of the process***.[8] [Emphasis added]

[37] One can conceive of circumstances in which a councillor could derive a pecuniary interest from his or her membership in a body such as a Chamber of Commerce or service club as, for example, if the funds the body received from

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[7] *Moll v. Fisher, supra*, at p. [612]; see also: *Ruffolo v. Jackson,* [2009] O.J. No. 1488 (ONSC) at para. 9; *Lovatt v. Glenwood (Rural Municipality)*, [2003] M.J. No. 157 (Q.B.) at para. 11). *Orangeville (Town) v. Dufferin (County),* [2010] O.J. No. 429 (C.A.) at paras. 22-26

[8] *Magder v. Ford*, 2012 ONSC 5615 (CanLII), per Hackland J. at para. 26

the Town were to enable members to travel or earn income from the organization. There is, therefore, no reason why, in all circumstances, a member of such a body should be exempt from the operation of the *MCIA*.

[38] Legislation similar to the *MCIA* in two other provinces specifically exempts interests derived from a councillor's membership in a not-for-profit corporation or service club.

a) *The Cities Act* of Saskatchewan,[9] in s. 115(1), provides that a member of council has a pecuniary interest in a matter if "the member or someone in the member's family has a controlling interest in, or is a director or senior officer of, a corporation that could make a financial profit from or be adversely affected financially by a decision of council…" s. 115(2), however, provides that, "a member of council does not have a pecuniary interest by reason only of any interest (g) that the member or a closely connected person may have by being a member or director of a non-profit organization as defined in section 125 or a service club."

b) *The Municipal Government Act of Alberta,*[10] in s. 170(1), provides that, "Subject to subsection (3), a councillor has a pecuniary interest in a matter if (a) the matter could monetarily affect the councillor or an employer of the councillor, or (b) the councillor knows or should know that the matter could monetarily affect the councillor's family. Subsection 170(2) provides that, "For the purposes of subsection (1), a person is

[9] *The Cities Act*, SS 2002, c C-11.1, s. 115

[10] *Municipal Government Act*, RSA 2000, c M-26, s. 170

> monetarily affected by a matter if the matter monetarily affects (a) the person directly, (b) a corporation, other than a distributing corporation, in which the person is a shareholder, director or officer….or (d) a partnership or firm of which the person is a member." Here again, however, subsection (3) provides that: "A councillor does not have a pecuniary interest by reason only of any interest (g) that the councillor or a member of the councillor's family may have by being a member or director of a non-profit organization as defined in section 241(f) or a service club.

[39] A similar exception was enacted, but never proclaimed in force, in Ontario. Section 4 of The *Local Government Disclosure of Interest Act*, 1994, Statutes of Ontario 1994, c 23, Sch B ("the *LGDIA*") provided, in s. 4:

> 4.(1) If a member has a pecuniary interest in any matter and is or will be present at a meeting at any time at which the matter is the subject of consideration, the member,
>
> (a) shall, before any consideration of the matter at the meeting, orally disclose the interest and its general nature;
>
> (b) shall not, at any time, take part in the discussion of, or vote on, any question in respect of the matter;
>
> (c) shall not, at any time, attempt, either on his or her own behalf or while acting for, by or through another person, to influence the voting on any such matter or influence employees of or persons interested in a contract with the council or board in respect of the matter;
>
> (d) shall immediately leave the meeting and remain absent from it at any time during consideration of the matter; and
>
> (e) shall, as soon as possible, complete and file with the clerk of the municipality or secretary of the board a written disclosure, in the prescribed form, setting out the interest and its general nature.

[40] Section 2(3) of the *LGDIA* defined "pecuniary interest", in part, as follows:

> 2(3) For the purposes of this Act, a member shall be deemed to have a pecuniary interest in a matter in which a council or board is concerned, if,
>
> (a) the member or his or her nominee,
>
> (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,
>
> (ii) has a controlling interest in, or is a director or senior officer of, a corporation that offers its securities to the public,
>
> (iii) is a partner or agent of a person,
>
> (iv) is a member of a body, that has a pecuniary interest in the matter;

[41] The *LGDIA* provides for the following exception:

> **Exceptions**
>
> 3. Section 4 does not apply to a pecuniary interest in any matter that a member may have,
>
> (k) as a member or volunteer for a charitable organization or a not-for-profit organization with objects substantially similar to those provided by section 118 of the *Corporations Act* if the member receives no remuneration or other financial benefit from the organization and the pecuniary interest is in common with other persons in the organization;

[42] If the *LGIDA* had been in force when Mr. Turner voted on the Grant, s. 3(k) of that Act would have made it clear that he would not have derived an indirect pecuniary interest in the Grant by reason of membership in the Chamber. The *LGIDA* was, however, repealed without ever having been proclaimed in force.[11]

[11] The *LGDIA* was, by subsections 2(1) and 92, to come into force on a day to be named by proclamation of the Lieutenant Governor. On March 9, 1995, a proclamation was issued naming April 15, 1995 as the day when the *LGDIA* would come into force, but on April 13, 1995, a proclamation was issued revoking the proclamation of March 9, 1995, and on January 1, 2003, the *LGDIA* was repealed by S.O. 2001, c. 25, ss. 484 (2), 485 (1).

It is therefore necessary for the court to decide this issue, based on the particular circumstances of the present case.

[43] Mr. Turner implies in his argument that even the Chamber of Commerce, which was the intended recipient of the Grant, did not have a pecuniary interest in the Grant, within the meaning of the *MCIA*. He states in his factum:

> 46. The Funds were never to be given to the Chamber directly to use as the Chamber wished. The Funds were to be used to reimburse the Chamber for costs incurred in relation to the Special Events, after the Chamber submitted an adequate financial report to the Town.

[44] I cannot conclude from the fact that the Grant involved a reimbursement that the Chamber did not have a pecuniary interest in it. In *Magder v. Ford*, (2013), the Divisional Court held that the discussion of whether Mayor Ford would be required to reimburse an amount he had solicited for a soccer team for which he served as coach by using his position and City letterhead amounted to a pecuniary interest for purposes of the *MCIA*. The court stated:

> However, the matter before Council changed when thereafter a motion was made to rescind Decision CC 52.1. From that point, ***Mr. Ford clearly had a pecuniary interest in the matter before Council, as he would be relieved of the reimbursement obligation if the motion passed***. Therefore, the application judge correctly found that Mr. Ford had a direct pecuniary interest when he voted on that motion, and s. 5(1) of the MCIA was engaged.[12] [Emphasis added]

[45] While the Chamber had a pecuniary interest in the Grant, it must still be determined whether Mr. Turner derived a pecuniary interest from his membership in the Chamber. In this regard, it is helpful to understand the relationship between Mr. Turner, the Wiarton Business Improvement Area ("BIA"), the Chamber of Commerce, and the Town.

[12] *Magder v. Ford*, 2013 ONSC 263 (CanLII), at para. 46

[46] The BIA was created by By-Law No. 1980-20, passed by the Council of the Corporation of the Town of Wiarton on May 12, 1980 ("the By-law"). The boundaries of the BIA are set out in the By-Law and include the vacant lot that Mr. Turner and his wife own at 589 Berford Street and the property that Mr. Turner leases at 340 Boyd Street, where he operates Wiarton TV. Mr. Turner and his wife have therefore been members of the BIA since they bought 589 Berford Street in 2000.

[47] All commercial property owners within the BIA are required to pay a levy to the Town. Mr. Turner has paid a levy to the Town every year since 2000, when he and his wife bought 589 Berford Street.

[48] The Board of Management of the BIA ("the BIA Board") has approved, since at least 1997, annual motions to automatically pay, for each of its members, dues to also become members of the Chamber of Commerce. The Chamber of Commerce is a not-for-profit corporation that does not offer securities to the public. There is no "opt out" process to ensure that, as a member of the BIA, one does not also become a member of the Chamber of Commerce. In 2011, 79 members of the BIA were also members of the Chamber. In 2012, 77 members of the BIA were members of the Chamber.

[49] Each year, the BIA Board sets and approves its budget. As part of the BIA Budget process, the BIA Board identifies the amount of money it needs to collect that year via the Levy in order to offset the BIA's proposed expenses. The BIA Board then submits the proposed BIA Budget to the Town.

[50] The BIA Budget is incorporated into the overall budget for the Town (the "Town Budget") and approved when the Town Budget is approved. The amount of the Levy is based upon the amount indicated in the BIA Budget.

[51] The Town has never amended or refused to implement the proposed BIA Budget, as it only affects the members of the BIA and those members can address any questions or concerns they might have through the BIA Board. Once the Town Budget has been approved, the Town imposes and collects the Levy for the BIA. The Town never gives the money it collects via the Levy directly to the BIA; it pays third parties directly, based on the BIA Budget and the invoices it receives.

[52] The monies that the Town Council allocated to the Chamber of Commerce in the Grant were to enable the Chamber of Commerce to fund certain special events, such as the Wiarton Willie Festival. The funds were never to be given to the Chamber directly to use as the Chamber wished. They were to reimburse the Chamber for costs incurred in relation to such special events, after the Chamber submitted an adequate financial report to the Town. The Grant was conditional on a Memorandum of Understanding being entered into between the Town and the Chamber of Commerce, which would be negotiated by Town staff.

[53] It is evident from the manner in which the BIA raised the funds for the Grant that the Chamber ultimately used to run special events for the Town, that the members of the Chamber do not derive a pecuniary interest from the Grant. The funds move from the BIA members to the Town, in the form of the Levy, to the Chamber, in the form of the Grant, to the third parties who provide services in the operation of the special events. There is no evidence that the Chamber pays any funds, either from the Grant or other sources, to the Chamber's members. Rather, the BIA members, including Mr. Turner, fund the Grant, from which the Town derives a benefit. Accordingly, I find that Mr. Turner did not have an indirect pecuniary interest in the Grant by reason of his membership in the Chamber.

b) Did Mr. Turner have <u>a direct pecuniary interest</u> in the Grant?

[54] Mr. Gammie argues that subsidizing public events such as the Wiarton Willie Festival, designed to bring tourists to the Town, employs public revenues for projects that provide greater benefit to some residents, including Mr. Turner, than they do to others. In particular, he argues, they benefit local business interests that stand to gain from hotels, motels, and restaurants that service a transient, tourist population, at the expense of local residents who may not enjoy such events or benefit from the revenues they generate, and who do not value the growth that such events may promote by drawing tourists who may decide to settle in the area.

[55] Mr. Gammie invokes the "bread and circus"[13] debate, well-known in the context of municipal politics and other forums for public policy decision-making. In modern usage, the phrase is employed to characterize politicians' use of frivolous entertainment to distract the public from more expensive, substantial, and serious public priorities. Mr. Gammie's argument, while a legitimate subject of political debate, must be distinguished from the potential problem of self-interested voting by councillors that the *MCIA* was intended to remedy. Failing to make this distinction would tend to undermine the very public discourse that Mr. Gammie seeks to promote and would cause its burden to fall unfairly on Mr. Turner.

[56] It is possible residents of Wiarton who own businesses that supply services to hotels, motels, and restaurants that cater to tourists will benefit more than other residents from the increased demand for such services from visitors who are drawn to the area by the entertainment that an event such as the Wiarton Willie Festival offers. It is also possible that visitors to Wiarton, drawn by

[13] From the Latin: *panem et circenses,* a metaphor coined by the Roman satirist and poet Juvenal, in about 100 A.C. in Satire X, p. 77 to 81.

an event such as the Wiarton Willie Festival, who may be impressed with its beauty and decide to purchase property there, will benefit residents such as Mr. and Ms. Turner, who own property that they are trying to sell more than residents who do not own property, or have no intention of selling the property they do own, from a general increase in property values resulting from increased demand for property for sale.

[57] Even if a benefit from the Wiarton Willie Festival could be said to amount to a "pecuniary interest," which I find it does not, the fact that Mr. Turner may derive a benefit from the Festival, or has a greater likelihood than other electors of deriving such a benefit, is not an adequate substitute for evidence that he derived an indirect pecuniary interest from the Grant. Our courts have often cautioned against relying on speculation based on hypothetical circumstances to support an allegation that the benefit a politician may derive, in common with others, from a decision of his or her council, amounts to a pecuniary interest sufficient to give rise to a conflict of interest.

[58] The case of *Fairbrass v. Hansma*,[14] (2010), in the British Columbia Court of Appeal, involved allegations that the mayor of a small township had a direct or indirect pecuniary interest in a proposed amendment to the Official Community Plan that would have facilitated subdivision of parcels of land of a certain size if requested by the owner. The mayor and his sons were owners of adjacent parcels of land in the township. The amendment would have affected the sons' land but not the mayor's. The court held that the mayor did not have a pecuniary interest of any kind in the proposed amendment. Saunders J.A. commented on the burden of proof placed on the petitioners and held that speculative potential future effects do not engage the conflict provision:

[14] *Fairbrass v. Hansma*, [2010] B.C.J. No. 1242 (C.A.)

> The proposition that the person asserting a fact has the burden of proving it, is fundamental. Here the petitioners alleged a pecuniary interest, either direct or indirect. Yet they adduced no evidence to the effect that the bylaw, were it to pass, would make the respondent's four acre but still un-subdividable property more valuable. Whether the change in set-back requirements would have this effect is speculation. So too, as the judge said, is the possibility of the respondent acquiring land, thereby to subdivide the property. Even more speculative is the possibility of accretion making the four acre parcel more valuable now.
>
> Likewise, the suggestion that a future bylaw may be proposed that permits lots smaller than 2.5 acres is too speculative to found a conclusion the respondent had a forbidden interest in the bylaw. I do not consider that any legislative proposal could be found to provide a direct or indirect pecuniary interest only on the basis the council may pass, in the future, further bylaws replacing the one in issue. [Emphasis added].[15]

[59] Whether the residents of Wiarton will derive any benefit at all from the Wiarton Willie Festival, and from the use of public revenues for this purpose, or whether, if they do, some will benefit more than others, is a valid subject of political debate among those who support or oppose the use of public revenues in this way. The debate itself is a means by which those who, for whatever reason, regard such a benefit as more likely may persuade others of the value of the measure to the populace generally, and that the measure is one that deserves public support and the spending of general revenues. This is not a compelling argument for automatically preventing those who are more likely than others to benefit, or who may benefit in some ways more than others, from engaging in the discussion or decision-making.

[60] It is often the potential benefit of a measure to members of council and those, such as other property owners or owners of businesses in the area, that informs their debate of it. Protecting the right of such members to participate is necessary in order to preserve the vitality of informed debate that is to take place in Council. Restricting debate to those who are entirely disinterested, who own

[15] *Fairbrass v. Hansma*, per Saunders J.A., at at paras. 22 and 23

no property, and operate no businesses, would deprive public debate of its vitality and make it less likely that measures of value to all would be proposed, or that those who are most likely to benefit by them will have an opportunity to advocate to those who may benefit less, but benefit still, as to their value to the community as a whole.

[61] There is no evidence that Mr. Turner had a direct pecuniary interest in the matter of the Grant, such as to impose an obligation on him to declare the fact that he owned property or operated a business in the BIA or to abstain from discussion or the vote on the Grant.

c) If the potential benefit of the Grant to Mr. Turner were a "pecuniary interest", would it be exempt from the obligations that may arise by reason of the operation of s. 5 of the MCIA?

[62] Section 4 of the *MCIA* sets out 11 enumerated categories of pecuniary interests which are deemed to be exempt from the application of s. 5 of the *MCIA*. Among these categories are pecuniary interests that are "common with electors generally" (*MCIA*, s. 4(j)), and interests "so remote or insignificant" (*MCIA*, s. 4(k)) as not to be reasonably regarded as likely to influence the member.

(i) The exemption in s. 4(k) of the MCIA

[63] Mr. Turner submits that if the potential benefit of the Grant to him amounted to a pecuniary interest, it was so insignificant that it did not influence him. He relies on the enumerated exemption in s. 4(k) of the *MCIA*, which states:

> 4. Section 5 does not apply to a pecuniary interest in any matter that a member may have,

> (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

[64] Mr. Turner argues that the potential benefit to him of the Grant was very modest. He submits that "No objectively reasonable person could conclude that he would jeopardize his position for the remote possibility of an increased demand for the services of Wiarton TV or for the vacant lot that he and his wife had listed for sale."

[65] The issue posed by s. 4(k) of the *MCIA* is whether Mr. Turner's pecuniary interest in the matter of the Grant was so insignificant that it was unlikely to influence him in his consideration of that matter. That is, did it raise a reasonable apprehension that his decision-making would be biased. Section 4(k) provides for an objective standard of reasonableness.

[66] In *R. v. Lippé*, (1991), the Supreme Court of Canada considered whether the Quebec municipal court's employment of magistrates who continued to practice law on a part-time basis raised a reasonable apprehension of bias and lack of judicial impartiality. The court in *R. v. Lippé,* in upholding the constitutionality of the municipal court, confirmed that the test to be applied in determining whether judicial impartiality[16] existed was the "reasonable apprehension of bias" test that de Grandpré J. had articulated in *Committee for Justice and Liberty v. National Energy Board*, (1978),[17] and that the court had adopted in *Valente v. The Queen*, (1985).[18]

[16] The Court held that the test applied to both judicial independence and institutional impartiality and that if the municipal court met the test generally, the issue could only be addressed on a case by case basis, applying the same test.

[17] *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, per de Grandpre J., at p. 394

[18] *Valente v. The Queen*, [1985] 2 S.C.R. 673, per LeDain J., at pps. 684 and 689

[67] Lamer C.J., speaking for himself, Sopinka and Cory JJ., and whose conclusions the majority agreed with and whose reasons they substantially agreed with, stated, citing de Grandpré J.:

> ... ***the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude".***
>
> . . .
>
> It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.
>
> ***This is also the test that is to apply to institutional impartiality***.

[68] The disclosure and abstention requirements that the *MCIA* imposes on municipal councillors are similarly designed to ensure the impartiality of their decision-making, as well as its transparency. The "reasonable apprehension of bias" test is equally applicable in this context.

[69] The Legislature has not defined "pecuniary interest," in all likelihood, because the multiplicity of circumstances in which financial interests in an outcome can undermine a councillor's impartiality defy an exhaustive definition. In the absence of such a definition, the reasonable apprehension of bias test, generally, and the particular exclusions set out in the *MCIA*, must be applied on a case by case basis to determine whether the evidence supports a finding that a conflict of interest existed.

[70] Given that there is no evidence as to any actual benefit, or of what the potential benefit was, I find, applying the standard of reasonableness, that Mr.

Turner's pecuniary interest in the Grant, if such an interest existed at all, was too insignificant to have been likely to have influenced his decision to support the Grant. Therefore, the exemption in s. 4(k) of the *MCIA* applies.

(ii) The exemption in s. 4(j) of the MCIA

[71] Mr. Turner further submits that if the potential benefit of the Grant to him amounted to a pecuniary interest, it was no greater than the interest of other electors in the BIA who paid the Levy from which the Grant funds were derived. He relies, in this regard, on sub-section 4(j) of the *MCIA*. That sub-section sets out a further category of pecuniary interest that is exempt from the obligations imposed by s. 5 of the *MCIA*. Sub-section 4(j) provides:

> 4. Section 5 does not apply to a pecuniary interest in any matter that a member may have,
>
> (j) by reason of the member having a pecuniary interest which is an interest in common with electors generally.[19]

[72] Both this exemption and the one in s. 4(k), (pecuniary interests so remote as unlikely to affect a councillor's vote), can be regarded as involving circumstances in which an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the pecuniary interest would not affect the councillor's ability to make an impartial decision.

[73] Mr. Gammie argues that Mr. Turner, as an owner of property in the BIA and as operator of Wiarton TV, cannot be said to have an interest in common with electors of the Town generally, since some electors do not own property whose value may be enhanced by tourists or operate a business offering services that may be sought by those providing accommodation to tourists.

[19] . Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50, s. 4; 2002, c. 17, Sched. F, Table; 2006, c. 32, Sched. C, s. 33 (1).

There are two answers to this argument. The first is that it was the owners of commercial property in the BIA who paid levies to the Town, based on the budget the BIA Board prepared and submitted to the Town, from which the funds allocated to the Grant were derived. There is no evidence that any benefit that Mr. Turner may have derived from the Grant was any greater than the benefit derived by other owners of commercial property in the BIA.

[74] Second, just as there is no evidence that the value of Mr. Turner's vacant lot was actually enhanced by the Festival, or that the revenues of Wiarton TV increased by reason of the Festival, there is no way of determining his "pecuniary interest," so defined, or of comparing it with that of other electors.

[75] For the foregoing reasons, I find that if Mr. Turner had a pecuniary interest in the matter that was the subject of the vote to support the Grant, it was no greater than the interest of other electors in the area affected by the decision.

[76] The purpose of s. 5 of the *MCIA,* as qualified by s. 4(j), is to restrict participation in the debate of a measure by Council to:

a) those whose interest in it is no greater than that of all other electors affected by the decision; or

b) those whose potential interest in it, if it exceeds that of others, is still so insignificant as to be unlikely to affect their decision.

[77] Restricting the debate on Council in this way, but no more, will best ensure that the debate on Council will be fully informed by those who understand the potential benefit of the measures, as well as by those who, like Mr. Gammie, observe and comment on their actions.

[78] As indicated above, there is no evidence that Mr. Turner actually benefitted or was likely to benefit from the Grant more than other electors, especially those in the BIA who were affected by the decision, or to an extent that was likely to influence his vote. Additionally, there is no evidence that the vote approving the Grant reflected solely the interests of property owners and business operators in the Town. It is equally likely that the Council supported the Chamber's work because it appreciated the levies paid by the BIA members and the work the Chamber does on their behalf to make the Wiarton Willie Festival and other special events a reality, and regard those events as a benefit to all residents, by promoting the Town and improving the quality of life in the community. While Mr. Gammie may not share this view, this is a matter of political debate and does not displace the application of the exemption in s. 4(j) and (k).

[79] In the absence of any evidence to support Mr. Gammie's assertion that Mr. Turner had a financial interest in the decision concerning the Grant, I find that if there was such a benefit to him at all, it was so remote or insignificant in its nature that it cannot reasonably be regarded as likely to have influenced Mr. Turner's decision on the measure, and that it was no greater than the benefit derived by other electors in the area affected.

d) If Mr. Turner contravened s. 5(1) of the MCIA, did he contravene the section through inadvertence or an error in judgment?

[80] Under s. 10(1) of the *MCIA*, where the court determines that a member of Council has contravened s. 5 of that Act, by speaking or voting on a matter in which the member has a pecuniary interest, the *MCIA* requires that the judge: "(a) shall, in the case of a member, declare the seat of the member vacant."

[81] There is, however, a saving provision at s. 10(2) of the *MCIA*, in which removal from office is not required; that is, "if the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment…."

[82] As Hackland RSJ noted in *Magder v. Ford*, (2012), the jurisprudence has given the concept of an error in judgment a much restricted meaning. The Divisional Court held in *Edwards v. Wilson*[20] (1980), and re-stated in *Magder v. Ford*,[21] (2013), that an error in judgment can arise from either a mistake of law or of fact. However, the determination of whether the error occurred honestly or in good faith is a question of fact.

[83] Hackland R.S.J. in *Magder v. Ford*, cited *Campbell v. Dowdall,* (1992), for the test for an error in judgment that has been applied in many cases. In Campbell v. Dowdall, Rutherford J. stated:

> In one sense, every contravention of a statute based on deliberate action can be said to involve an error in judgment. A criminal act, for example, involves a serious error in judgment. The purpose of this second branch of this saving provision in subs. 10 (2) of the Act must be to exonerate some errors in judgment which underlie contraventions of the Act, but obviously not all of them. The Legislature must have intended that contraventions of s. 5 which result from honest and frank conduct, done in good faith albeit involving erroneous judgment, should not lead to municipal council seats having to be vacated. Municipal councils require the dedicated efforts of good people who will give of their time and talent for the public good. What is expected and demanded of such public service is not perfection, but it is honesty, candour and complete good faith.[22]

[84] The Divisional Court approved of this test in *Magder v. Ford*.[23] As Hackland R.S.J. noted, good faith involves such considerations as whether a

[20] *Edwards v. Wilson* (1980), 31 O.R. (2d) 442 (ON SC, Div. Ct.), at para. 35

[21] *Magder v. Ford* (ON SC, Div. Ct.), above, at para. 81

[22] *Campbell v. Dowdall*, 1992 CarswellOnt 499, 12 M.P.L.R. (2d) 27 (Gen. Div.), at para. 36

[23] *Magder v. Ford* (ON SC, Div. Ct.), above, at para. 83

reasonable explanation is offered for the respondent's conduct in speaking or voting on the resolution involving his pecuniary interest. There must be some diligence on the member's part; that is, some effort to understand and appreciate his obligations. Outright ignorance of the law will not suffice, nor will wilful blindness as to one's obligations.[24]

[85] As the Divisional Court noted in *Magder v. Ford*:

> …The appellant is correct that there are two distinct lines of inquiry within s. 10(2): inadvertence and error of judgment. He seeks to rely on error of judgment, not inadvertence, and argues that wilful blindness should not be considered in relation to "error of judgment."
>
> In one of the early cases interpreting the *MCIA*, Killeen J. concluded that "error in judgment" was broader than "inadvertence" (*Re Blake and* Watts (1974), 2 O.R. (2d) 43 (Ont. Co. Ct.) at p7 (Quicklaw version)). He also stated that an error in judgment is to be determined on an objective standard.
>
> …
>
> 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.[25]

[86] I find that Mr. Turner honestly believed that neither his ownership of a vacant lot and of Wiarton TV, nor his membership in the Chamber, amounted to a pecuniary interest that he was obliged to disclose or that obliged him to abstain from discussions or the vote to approve the Grant. There was, for the reasons stated above, good reason for him to come to this conclusion. He has

[24] *Magder v. Ford* (ON SC), above, per Hackland RSJ, at para. 53

[25] *Magder v. Ford* (ON SC, Div. Ct.), above, at paras. 86 to 90.

discharged the burden to show that his contravention of the *MCIA*, if it occurred, was the result of a good faith error in judgment.

e) Did Mr. Gammie bring the present application within the period allowed by the MCIA?

[87] Having regard to my findings on the substantive issues, I do not propose to address the limitation issue in detail. Mr. Gammie's application was not, in my view, foreclosed by the time requirements of the *MCIA*. While Mr. Turner argues that the decision regarding the Grant was made before April 17, 2012, and was merely ratified on April 17th, it is not disputed that the vote on April 17th was the culmination of the discussions and votes that preceded it, and they were all part of a continuing process of decision-making. A conflict of interest would have obliged Mr. Turner to abstain from all of the discussions and votes. His participation in any of them, in that event, would have attracted the same sanctions under that Act. Distinguishing between the meetings or votes that occurred before the six week period preceding Mr. Gammie's application, and those that occurred during the period, would not have affected the outcome.

f) Costs

[88] This is not a case in which costs are appropriate. The repeal of the *LGDIA* in 2003 without its having ever been proclaimed in force, left an unanswered question as to whether a councillor must disclose his/her membership in a not-for-profit corporation or service club and abstain from voting on any measure affecting the organization.

[89] In *Magder v. Ford*, (2013), the Divisional Court made no order as to costs in a case involving the *MCIA*. Justice Then noted in that case that Courts have exempted public interest litigants from an adverse costs order where the litigants

have no direct pecuniary or other material interest in the proceeding or where their pecuniary interest is modest in comparison to the costs of the proceeding.[26]

[90] Justice Then further noted that courts have not taken the view that there is a blanket public interest exemption for electors who pursue an application under the *MCIA*. Costs have been awarded in a number of such cases.[27] Nevertheless, he concluded:

> In general, costs follow the event, and the successful party can expect to receive costs. However, in the present case, we are of the view that no costs should be awarded for three reasons. First, success in the proceeding was divided. While the appellant succeeded on the appeal, he was unsuccessful on three of the four grounds he raised on appeal - namely, the interaction of the municipal code of conduct and the MCIA, the impropriety of voting when a code sanction has a financial aspect, and the lack of a defense under s. 10(2) because of wilful blindness. Second, ***this proceeding raised novel legal issues with respect to matters of public importance, with the result that there has been a clarification of the interaction between municipal codes of conduct and the MCIA, as well as the scope of the defense of inadvertence or error in judgment in s. 10(2) of the MCIA. While we would not characterize the respondent as a "public interest litigant" just because he brought this litigation as an elector, the clarification of significant and novel legal issues is in the public interest***. We note that the Court of Appeal adopted the same approach to costs in *Orangeville (Town) v. Dufferin (County)*, [2010] O.J. No. 429 at para. 34, stating, "...this case raises novel issues of interpretation of the *MCIA* and is a matter of public interest. As a result, I would make no order as to costs." Third, at the time that the respondent launched this application, the decision imposing the sanction of reimbursement on the appellant had not been found to be invalid, and the appellant had not challenged its validity. In the circumstances, it was reasonable for the respondent to pursue the application. Accordingly, we order that each party bear his costs of the appeal, the stay motion and the application.[28] [Emphasis added]

[91] In the present case, success was not divided. However, the litigation may have been avoided by Mr. Turner, in the interests of complete transparency,

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[26] *Magder v. Ford*, 2013 ONSC 1842 (CanLII) (ON SC, Div. Ct.), per Then J., citing *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 S.C.R. 263 at para. 76).

[27] *Sharp v. McGregor*, (1988), 64 O.R. (2d) 449 (Div. Ct.); *Van Schyndel v. Harrell*, (1991), 4 O.R. (3d) 474 (Gen. Div.); *Downes v. Kingston (Mayor)*, [2008] O.J. No. 3102 (S.C.J.).

[28] *Magder v. Ford* (ON SC, Div. Ct.), per Then J., para. 6 to 10.

having announced, before participating in the discussion and vote, that he was a property owner and businessman in Wiarton and a member of the BIA and Chamber of Commerce. The principal reason, however, for not awarding costs is that the issue of whether an indirect pecuniary interest derived from membership in a not-for-profit corporation or service club arose from the silence of the MCIA on this specific issue. The silence of the legislation in this regard gave rise to the need for the court to elaborate on how the more general exemptions in sub-sections 5(j) and (k) apply to such interests. It was in the public interest that this novel legal issue be clarified.

CONCLUSION AND ORDER

[92] For the foregoing reasons, the application is dismissed. There shall be no costs payable by either party.

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Price J.

Released: July 3, 2013

CITATION: Gammie v. Turner, 2013 ONSC 4563
COURT FILE NO.: 12-138
DATE: 2013-07-03

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CRAIG GAMMIE

Applicant

- and –

JIM TURNER

Respondent

REASONS FOR ORDER

Price J.

Released: July 3, 2013