CITATION: HAZINEH v. McCALLION, 2013 ONSC 2164
COURT FILE NO.: CV-12-1130-00
DATE: 2013-06-14

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ELIAS HAZINEH	)	Thomas A. Richardson and Monique Atherton, for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
HAZEL McCALLION	)	Elizabeth J. McIntyre and Freya J. Kristjanson, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** April 3, 8-12, 15-19, 2013

REASONS FOR JUDGMENT

SPROAT J.

Table of Contents

INTRODUCTION

The Issues

[1] This is an application brought by Elias Hazineh ("Mr. Hazineh") seeking to have Hazel McCallion ("Mayor McCallion"), the Mayor of the City of Mississauga ("the City"), removed from office for violating the *Municipal Conflict of Interest Act* ("the *MCIA*").

[2] In brief, Mr. Hazineh alleges that:

(a) Mayor McCallion's son Peter McCallion ("Peter") incorporated and was an owner of World Class Developments Inc. ("WCD"). WCD agreed to purchase land for the purpose of constructing a hotel, conference centre and condominium towers.

(b) Mayor McCallion knew Peter had a financial interest in WCD. As such, the *MCIA* deems her to have the same financial interest as Peter for conflict purposes.

(c) Mayor McCallion cast a number of votes at Peel Regional Council ("Regional Council") in September-October, 2007 ("the Votes"), related to increased development charges. As enacted, the by-law contained provisions ("the Transitional Provisions") by which developers who met certain requirements, including the filing of a

complete site plan application by October 7, 2007, continued to be eligible to pay the lower rate.

(d) WCD was eligible to qualify under the Transitional Provisions. As such, WCD and Mayor McCallion had a financial interest in the Votes.

(e) It was not until reading an October 11, 2011 article by municipal lawyer Clay Connor that Mr. Hazineh learned of Mayor McCallion's conflict of interest at Regional Council. As required by the *MCIA* he then commenced a court application within six weeks of learning of the conflict.

[3] The issues are as follows:

(a) What was Peter's interest in WCD?

(b) What did Mayor McCallion know about Peter's interest in WCD?

(c) Had WCD filed a complete site plan application prior to October 7, 2007, such that it was eligible to qualify under the Transitional Provisions?

(d) If WCD was eligible, and so had a financial interest in the Transitional Provisions, do any of the following *MCIA* exemptions apply?:

(i) Was Mayor McCallion's deemed financial interest an interest in common with electors generally?; or

(ii) Was Mayor McCallion's deemed financial interest remote and insignificant such that it cannot reasonably be regarded as likely to have influenced her?; or

(iii) Were the Transitional Provisions a benefit offered on terms common to other persons?

(e) If Mayor McCallion contravened the *MCIA*, was the contravention committed through inadvertence or an error in judgment such that she should not be removed from office?

(f) Did Mr. Hazineh commence the application in time?

The Witnesses

[4] The witnesses and their affiliations are as follows:

Applicant

Elias Hazineh	Applicant
Carolyn Parrish	Supporter and friend

Respondent

Hazel McCallion	Mayor

The City

Edward Sajecki	Commissioner of Planning and Building
Marilyn Ball	Director of Development and Design
Angela Dietrich	Manager, City Wide Policy Planning
Bentley Phillips	Development Planner

Region of Peel

Robert Elliott	Manager of Development Financing

WCD

Leo Couprie	Lender, Trustee of shares
Scott Walker	Planner, N. Barry Lyon Consultants

Other

Marolyn Morrison	Mayor of Caledon
Susan Fennel	Mayor of Brampton
Ken Lusk	Representative of land owner

The Municipal Conflict of Interest Act

[5] Section 3 provides that if the child of a member of council has a financial interest (the *MCIA* refers to "pecuniary interest", however, I will use the more familiar expression "financial interest") that is known to the member, the member is deemed to have the same financial interest as the child.

[6] Section 5 provides that if a member has a financial interest in a matter that is considered at council the member shall disclose the interest, not take part in the discussion or vote on the matter and not attempt to influence the voting.

[7] Section 4 provides that s. 5 does not apply to a financial interest in any matter that the member may have:

(a) by reason of the member being entitled to receive on terms common to other persons any benefit offered by the municipality (s.4(b));

(b) by reason of the member having a financial interest that is an interest in common with electors generally (s.4(j)); and

(c) by reason only of an interest of the member that is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member (s.4 (k)).

[8] Section 10 provides that if a judge determines that a member has contravened s. 5, the judge shall order that the member be removed from office unless the judge finds that the contravention was committed through inadvertence or by reason of an error in judgment.

[9] Section 9 provides that an elector may apply to a judge for a determination of whether s. 5 has been contravened within six weeks after it comes to the knowledge of the elector that the member may have contravened s. 5. Any application must, however, be brought within six years of when the alleged contravention occurred.

The Mississauga Judicial Inquiry

[10] On November 11, 2009, City Council passed a resolution requesting a judicial inquiry ("the Judicial Inquiry") into matters including whether Mayor McCallion had a conflict of interest in matters related to WCD and Peter. The resolution requesting the Judicial Inquiry did not refer to any issues related to Regional development charges.

[11] The *Public Inquiries Act*, S.O. 2009, ch. 33 sch. 6 provides that no answer given by a witness, such as Mayor McCallion, can be used against her in a subsequent hearing. The transcript of the evidence of other Judicial Inquiry witnesses is also not admissible as it is hearsay.

OVERVIEW OF THE FACTS

[12] There is undoubtedly much that I do not know about this saga. None of the WCD decision makers provided evidence although they could have been compelled to do so. It remains that I must decide the case based upon the evidence before me.

[13] The parties filed over 5,000 pages of affidavits and documents and 2,500 pages of transcript of out of court examinations and cross-examinations. Mr. Hazineh and Mayor McCallion also testified in court.

[14] I first provide an overview of the essential facts as I find them. Most are not in dispute. Without such an overview it would be difficult to comprehend the discussion of the individual legal issues that follows.

[15] Mayor McCallion has served as Mayor for 34 years. As of 2005, she had three significant outstanding projects she wished to accomplish, one of them being the building of a first class hotel adjacent to the City's Living Arts Centre to accommodate conferences, tourists and business travellers.

[16] On February 22, 2005, Peter incorporated WCD. According to Mayor McCallion, in 2005 Peter told her that he was the real estate agent for WCD which was interested in developing a hotel and convention centre adjacent to the

Living Arts Centre. The lands were owned by OMERS and the Alberta Pension Fund. I will simply refer to the owner as OMERS.

[17] In March 2005, WCD offered to purchase the OMERS lands. Peter did not have the funds to pay a substantial deposit. There is little evidence as to what resulted from this initial offer.

[18] In 2006, Peter approached Leo Couprie ("Couprie"), a business man that he and Mayor McCallion had met on a trade mission trip to China. By August, 2006, Couprie agreed to lend WCD $750,000 for the purpose of making a deposit on the purchase.

[19] Couprie gave evidence that Peter brought in Murray Cook ("Cook"), a businessman and McCallion family friend as a 20 per cent shareholder in WCD. Peter authorized Cook to negotiate with OMERS.

[20] Mayor McCallion intervened and pressured OMERS to sell the land to WCD. Mayor McCallion's evidence is that she did so because this was an essential first step to realize her objective of a first class hotel and conference centre. Mayor McCallion's evidence, which was not challenged, was that she recommended to OMERS that it stipulate that hotel construction must precede any condominium development.

[21] By agreement dated January 29, 2007 Couprie agreed to lend WCD $750,000. WCD agreed to repay Couprie $750,000 and pay an additional $750,000 fee to him if the land purchase was completed. Peter guaranteed the payments to Couprie. It was further agreed that the WCD shares would be registered in Couprie's name although a Declaration of Trust was signed in which Couprie promised Peter that he would hold 80 per cent of the shares of WCD for Peter as "the beneficiary".

[22] WCD entered into an Agreement of Purchase and Sale ("APS") dated January 31, 2007 to purchase the OMERS lands. The purchase price was $14,492,500. Peter authorized Cook to sign the agreement on behalf of WCD.

[23] On February 28, 2007, WCD, Couprie and Cook entered into a Shareholders Agreement that provided that even though Couprie held 80 per cent of the WCD shares, and Cook 20 per cent, they would jointly make decisions as if each held 50 per cent of the shares. Couprie's evidence, however, is that he had little interest in the affairs of WCD. Couprie had no expertise in land development. He deferred to Peter in relation to all significant decisions affecting WCD. This makes sense as Couprie's only economic interest was in either doubling his money if the APS was completed (meaning the development was proceeding) or getting a return of his $750,000 deposit if it was not completed.

[24] Mayor McCallion's evidence was that at all material times she understood that Peter's only interest was as a real estate agent. The evidence is overwhelming and, as later explained, I find as a fact that Peter was an owner of WCD.

[25] On July 31, 2007, WCD filed a "Master Site Plan Application" that included a hotel, conference centre and eight high-rise condominium buildings and paid a $50,000 fee being 10 per cent of the ordinary site plan application fee.

[26] Couprie gave evidence that there was a dispute between Peter and Cook that led to Peter replacing Cook with Tony DeCicco ("DeCicco"). DeCicco was a developer known to Peter and Mayor McCallion. By agreement dated August 1, 2007 between Couprie and Landplex Inc. (DeCicco's company), Couprie agreed that he held 80 per cent of the shares in WCD in trust for Landplex. It was always recognized that for the development to proceed WCD would have to secure a major developer-investor and a hotel operator.

[27] Municipalities have the power to impose development charges to assist in paying for the increased infrastructure necessitated by development. The philosophy of the Mayor, and the Region of Peel, ("the Region"), was that "growth should pay for growth".

[28] The Region initiated a periodic review of its development charges in 2006. On August 13, 2007, Regional staff recommended an 85 per cent increase in development charges with a transition period whereby the increased charges would not be payable by developers who had:

(a) submitted a site plan application by September 13, 2007;

(b) submitted a building permit application by February 1, 2008; and

(c) obtained a building permit by April 1, 2008.

[29] At the General Committee Meeting of The Regional Council on September 6, 2007, a motion was made to adopt the staff recommendation. Caledon Mayor Morrison's evidence, which I accept, was that she told Mayor McCallion that Caledon would benefit from a one month extension of the time to obtain a building permit. Mayor McCallion offered to move a motion as a favour to Mayor Morrison given the belief that, as the senior Mayor in the Region, Mayor McCallion's views would be given greater weight. The motion, which was adopted, extended the time to obtain a building permit to May 1, 2008.

[30] Brampton had a particular concern that the imposition of increased development charges would impede its downtown development initiatives. Brampton Council passed a resolution on September 12, 2007, asking the Region to amend the transition provisions to allow developers in downtown

Brampton an additional 18 months, to November 1, 2009, to obtain a building permit.

[31] On September 13, 2007, Mayor Fennell of Brampton presented a motion at Regional Council based on the wording of the Brampton resolution the previous day. Mayor Fennell's evidence was that the Regional clerk "regionalized" the wording of the Brampton specific resolution. As presented at Regional Council the motion provided that developers, in any area designated by an area municipality (Mississauga, Brampton or Caledon), would have an 18 month extension of the transition period. Mayor McCallion seconded this motion which passed.

[32] There is no evidence that Mayor McCallion played any role in the decision to "regionalize" the language of the motion presented at the Regional Council, or that suggests to me she viewed the 18 month extension proposed by Mayor Fennell as a fortuitous opportunity to help WCD. I find as a fact that Mayor McCallion seconded this motion as a matter of routine and to be supportive of Mayor Fennell.

[33] Regional staff were quite surprised by this motion and requested an opportunity to report back on the cost implications. On September 14, 2007, the Chief Financial Officer of the Region wrote to the senior planning officials of the

three Regional municipalities indicating he believed the intention of Regional Council was to extend the transition period for "identified areas of intensification". He also requested a map showing areas of intensification and a list of pending site plan applications in those areas.

[34] By letter dated September 19, 2007, Edward Sajecki ("Sajecki"), the Commissioner of Planning for the City, listed the WCD project as one of eighteen projects within the area the City had previously identified as its Urban Growth Centre.

[35] I do not construe the Sajecki letter as purporting to bind the City as to the area of intensification. Sajecki was simply advising of the projects in an area the City had already determined to be an area of intensification. If the Regional by-law had passed in that form, it would still have been up to the City Council to identify areas of intensification within the meaning of the by-law.

[36] On September 24, 2007, Marilyn Ball ("Ball") the Director, Development and Design of the City emailed staff at the Region indicating that WCD had only filed a "Master Site Plan" and not a standard site plan. She advised that the Master Site Plan "will not be sufficient to satisfy the condition for site plan approval to obtain a building permit for the hotel or any other buildings".

[37] At the September 27, 2007, Regional General Committee meeting staff presented an array of concerns about the extended transition period including that it would cost $25-$30 million and be contrary to the Regional policy that "growth should pay for growth."

[38] On October 4, 2007, Regional Council passed a by-law ("the Transitional Provisions") that adopted the transition period originally recommended by staff, plus the one month extension moved by Mayor McCallion. (Regional Council did enact an exception for Brampton in accordance with the City of Brampton resolution of September 12, 2007.) The Transitional Provisions applied to developments for which:

(a) "an application for site plan approval that is complete" is made by October 7, 2007;

(b) "an application that is complete" for a building permit is made by February 1, 2008; and

(c) a building permit is issued by May 1, 2008.

[39] In November 2007, WCD decided to accelerate its efforts in order to enable it to qualify under the Transitional Provisions. WCD took the position that its Master Site Plan filed July 31, 2007, met the first Transitional Provisions requirement, that being a complete application for site plan approval by October 7, 2007.

[40] WCD worked feverishly toward addressing various planning issues that needed to be resolved before building permits could issue. WCD met the second requirement by filing building permit applications for phase one of its development which included the hotel and conference centre. WCD went to the extent of requesting that a special meeting of council be convened on April 30, 2008, in the hope it would meet the May 1, 2008, deadline for issuance of building permits. WCD could not, however, satisfy all of the City's requirements and withdrew the request for a special meeting.

[41] WCD effectively strung the City along to the last minute and circumvented the by-law requirement that site plan applications not be processed prior to payment of the application fee. WCD never paid the complete site plan application fee of $440,000 or even a lesser fee related to the phase one development. WCD never found a major developer-investor or hotel operator. The project did not proceed. OMERS remained the owner of the land.

[42] I now turn to the issues that must be decided and make further findings of fact on contentious matters.

DID MAYOR MCCALLION HAVE A DEEMED FINANCIAL INTEREST IN WCD?

The Law

[43] Section 3 of the *MCIA* provides that if the child of a member has a financial interest, known to the member, the member is deemed to have the same financial interest as the child.

The Financial Interest of Peter McCallion in WCD

[44] In support of her position that Peter was not an owner, Mayor McCallion placed considerable reliance on a series of answers given by Couprie in cross-examination. Couprie agreed that, as of September-October, 2007, Peter was not a shareholder, director or officer of WCD and that he had no other financial relationship with WCD. Mayor McCallion made further reference to Couprie's evidence that Peter's only financial interest was contingent, being the possibility that the developer might agree to retain Peter as the listing agent for the condominiums. On that basis, Mayor McCallion submitted that Peter was not an owner and any financial interest was remote and insignificant.

[45] Couprie is a businessman not a lawyer. His legal conclusion that Peter had no ownership interest in WCD does not follow from the evidence he gave. As Couprie himself described, "... I would control the shares and wouldn't give them back to Peter until such time I got the money [$750,000] back and I wouldn't give them to anyone else". In other words, they were Peter's shares

held by Couprie as security. On that basis, alone Peter had a beneficial ownership interest in WCD as of September-October, 2007.

[46] The evidence is overwhelming, and I find, that Peter was an owner of WCD:

(a) Peter caused WCD to be incorporated.

(b) Peter recruited Couprie to fund the required $750,000 deposit to purchase the OMERS lands.

(c) Peter and Couprie entered into the January 29, 2007, Declaration of Trust in which Couprie agreed that he held 80 per cent of the shares of WCD in trust for his "beneficiary" Peter.

(d) Peter recruited Cook to play a leading role in WCD, including negotiating and signing the APS.

(e) While the February 28, 2007, agreement between Couprie and Cook provided that they would jointly make all decisions, Couprie's evidence was that Peter decided "who was staying and going" and brought in DeCicco to replace Cook.

(f) Peter deposited over $100,000 into the WCD bank account to pay WCD consultants and withdrew certain amounts for personal

purposes. Couprie took no objection to this because WCD funds were Peter's money.

[47] After the APS was signed, the hunt was on for a major developer who could fund and/or finance a development in the hundreds of millions of dollars. The developer would have to do a deal with WCD. It is contrary to common sense and experience to think that the deal with the developer would not reward Peter for his equity in WCD. Whether this was a lump sum payment for his WCD shares, a consultancy agreement and/or as a real estate agent for condominium sales is immaterial. If this development went ahead, Peter was going to have a big pay day.

What did Mayor McCallion know about Peter's Interest in WCD?

[48] Mayor McCallion's evidence was that, at the time of the Votes, she understood that Peter's only interest in WCD was as a real estate agent. In deciding what Mayor McCallion knew I will consider:

(a) her relationship with Peter and long-standing interest in the development of a hotel and conference centre;

(b) that in January 2007, she witnessed documents signed by Peter and Couprie which indicated clearly that Peter was an owner of WCD; and

(c) that within one month after the Votes, she was engaged in the internal affairs of WCD to the extent that documents to do with the shareholdings of Cook and DeCicco in WCD were faxed to her home, and DeCicco solicited her advice and assistance to resolve issues he had with Cook.

[49] Mayor McCallion was enthusiastic about attracting a first-class hotel to the City centre as this was a long time goal. She acknowledges intervening to encourage OMERS to sign the APS with WCD. Mayor McCallion said she had regular contact with OMERS representatives. The signing would inevitably have been raised at such meetings. Mayor McCallion must have known of the APS by February-March 2007.

[50] This was not only a project near and dear to Mayor McCallion's heart. It was also clearly a transaction that would generate a large commission for the real estate agent. As a matter of common sense and experience, it would be natural for Mayor McCallion to inquire about WCD. Mayor McCallion had frequent contact with Peter. He often drove her to events. Given their close relationship, it would be natural for Peter to want to tell her about his pivotal role at WCD.

[51] Mayor McCallion, however, denies that she ever discussed the status-progress of the WCD project with Peter. Couprie's evidence was that Peter did not want his mother to know too much about the deal until it got closer to fruition.

[52] I appreciate that how people usually act can only take the analysis so far. Each family dynamic is different. I, therefore, turn to documentary evidence and admitted facts.

[53] Mayor McCallion admits that she witnessed the Peter-Couprie Loan Agreement and the Declaration of Trust at a restaurant in late January 2007. She said the restaurant was dimly lit and she witnessed the signatures without reading any part of the documents.

[54] The slightest glance at the documents would have revealed that Peter had an interest in WCD beyond that of a real estate agent. On the "Loan Agreement" her signature ends less than two inches from the description of Peter as "Guarantor" and WCD as "Borrower". On the "Declaration of Trust" her signature ends less than two inches from the description of Couprie as "trustee" and Peter as "beneficiary".

[55] Couprie's evidence was that the documents were passed across the table and Mayor McCallion did not read them before signing. Obviously only Mayor McCallion can say what she did or did not notice when signing. If, however,

Peter was concealing his ownership interest in WCD, it is highly unlikely that Peter would allow Couprie to pass these documents to her.

[56] Next I turn to what transpired only one month after the Votes. I regard this as relevant because Mayor McCallion's evidence was that, both before and after the Votes, she had no specific knowledge of the ownership or internal arrangements at WCD. This is, however, contradicted by the following evidence.

[57] An unsigned Shareholder's Resolution and Transfer Agreement between Cook, Couprie and WCD was faxed by a lawyer representing DeCicco to Mayor McCallion at her home on October 26, 2007. This agreement is two pages long. A cursory review reveals that it provides that, in return for $28,000 and reimbursement for all reasonable consulting fees of Lyon Consulting incurred by WCD, Cook is to resign as a director and officer of WCD and transfer his WCD shares to Couprie. Reference is also made to a "Put and Call Agreement".

[58] Couprie gave evidence that he attended a meeting at Mayor McCallion's home because Peter wanted him to give Mayor McCallion his opinion regarding the Cook-DeCicco dispute.

[59] DeCicco left Mayor McCallion three voicemail messages on November 5, 2007, as follows:

(a) 8:52 A.M. – indicating that he had spoken with Barry [Lyon] at length about his outstanding accounts and "when Peter comes back we'll look at the budget and move forward [. . .] thanks for your help".

(b) 9:03 A.M. – "Were you able to or have you considered getting Murray [Cook] to sign the agreement terminating the call. The sooner we get it the better off we are".

(c) 11:36 A.M. – "I just wanted to keep you updated on this . . ." followed by reference to Murray [Cook] and outstanding amounts, budgets and bills.

[60] Mayor McCallion testified that she does not recall reading the agreement faxed to her home. She does not recall if she ever responded to DeCicco's voicemail messages. The content of the voicemail messages, however, makes clear that Mayor McCallion was in the loop. DeCicco thanked her for her help and referred to looking at the budget when Peter gets back. DeCicco spoke of terminating the "call" which obviously references the "Put and Call" referred to in the agreement faxed to Mayor McCallion.

Analysis and Conclusion

[61] Taking into account the totality of the evidence including:

(a) The close relationship between Mayor McCallion and Peter and her interest in what he and WCD were doing.

(b) The fact that Peter was prepared to have her witness documents which clearly disclosed he was an owner of WCD.

(c) That she witnessed documents which indicated clearly that Peter was an owner of WCD.

(d) That within one month of the Votes, Mayor McCallion was provided with draft agreements and effectively asked to intervene in a WCD shareholder dispute.

I find as a fact that, at the time of the Votes, Mayor McCallion knew that Peter had an ownership interest in WCD. As such, according to s. 3 of the *MCIA*, Mayor McCallion had a deemed financial interest in WCD.

COULD WCD QUALIFY UNDER THE TRANSITIONAL PROVISIONS?

Introduction

[62] To qualify under the Transitional Provisions "an application for site plan approval that is complete" had to have been filed by October 7, 2007. Mayor McCallion submitted that the Master Site Plan application was not "a site plan application that is complete" and so WCD was not eligible under the Transitional Provisions. If correct, then WCD had no financial interest in the by-law and so Mayor McCallion cannot have contravened the *MCIA*.

The Evidence

[63] Ball's evidence was that a Master Site Plan is sometimes used for large developments, to be built over many years, to identify the locations of buildings,

access points and the general attributes of the site. A general layout for the entire property is necessary before the planning department will consider a site plan for any one building. A site plan application is then required before a building permit can be obtained.

[64] A City by-law governed the fees payable for various applications. The fee for a site plan application for the entire WCD development was initially estimated by the City to be $500,000. The by-law further provided that no site plan application shall be processed until the fee is paid. Master Site Plans are sufficiently rare that the by-law, which appears to be directed to providing a comprehensive list of fees for the processing of applications under the *Planning Act* R.S.O. 1990, ch. P. 13 ("*Planning Act*"), does not even refer to Master Site Plans.

[65] WCD retained N. Barry Lyon Consultants ("Lyon Consulting"). Scott Walker ("Walker") of Lyon Consulting was the WCD project manager. WCD and Lyon Consulting engaged other consultants to assist.

[66] On July 12, 2007, Ball emailed Carol Munroe ("Munroe"), a planner working for WCD, advising that the City would charge 10 per cent of what would be the total site plan application fee to review the Master Site Plan.

[67] On July 24, 2007, Bentley Phillips ("Phillips"), the City planner handling the WCD file, emailed Munroe explaining the City's position that the Master Site Plan was not itself a site plan under s. 41 of the *Planning Act* because its purpose was to serve as the basis for future site plan applications. Phillips made a note of a conversation the same day in which Walker indicated that legal counsel for WCD understood that other GTA municipalities had approved Master Site Plans under s. 41 of the *Planning Act* subject to an agreement requiring detailed site plan applications prior to any building permit applications.

[68] On July 25, 2007, Munroe confirmed that no building permits would be sought based on the Master Site Plan. Further, on July 25, 2007, Phillips emailed Munroe confirming the position of the City that a Master Site Plan would not be considered for site plan approval under s. 41 of the *Planning Act*.

[69] On July 31, 2007, WCD filed a Master Site Plan Application. A place for the City planner to list the "general requirements" of the plan and the "building elevations" was not completed. Phillips' evidence was that it was given a site plan number because the City had no numbering system for a Master Site Plan.

[70] The City kept a running list of pending site plan applications. WCD did not appear on that list prior to September 19, 2007. The list submitted by Sajecki to the Region with his letter of September 19, 2007 listed WCD, but, unlike all

other entries, the floor area was not specified. This caused Robert Elliott ("Elliott") the Manager of Development Financing of the Region to inquire about the WCD project. Ball advised Elliot on September 24, 2007, that WCD had only filed a Master Site Plan, and that was not sufficient to obtain a building permit. Effectively Ball was communicating that WCD could not qualify under the Transitional Provisions.

[71] Walker's evidence was that, when Cook was leading the project, WCD was not attempting to qualify under the Transitional Provisions. Cook thought WCD could not reasonably meet the requirements. A financial analysis indicated that the project was viable even with the increased development charges. Further, given that it would be built over many years, large parts of the project would be subject to increased development charges regardless. When DeCicco took over he thought differently, and the push was on to have at least part of the project qualify under the Transitional Provisions.

[72] WCD and its consultants held a meeting on November 21, 2007. The minutes record that its goal was now to submit building permit applications for the hotel site by January 31, 2008. WCD was going to try to use the "existing site plan application" (being the Master Site Plan application) to attempt to qualify under the Transitional Provisions.

[73] It was not until a meeting on January 11, 2008, that WCD advised City staff that it was seeking to qualify under the Transitional Provisions. This change in position on the part of WCD led to a January 25, 2008, legal opinion from the Assistant City Solicitor which concluded that the July 31, 2007, Master Site Plan application was a complete application for site plan approval under both s. 41 of the *Planning Act* and the Transitional Provisions. Ball's evidence was that she did not agree with "the way the opinion was set out" because, in fact, it was only by January 2008, that WCD had submitted the detail required in a site plan application.

Analysis and Conclusion

[74] I have had the benefit of reviewing extensive document briefs, approximately 600 pages of transcript evidence from City planning officials and hearing extensive legal submissions. I have relatively little information as to the factual basis for the opinion of the Assistant City Solicitor. In any event, I am obliged to reach my own conclusion.

[75] For the reasons that follow, I find that as of October 7, 2007, WCD had not filed a "site plan application that is complete" within the meaning of the Transitional Provisions.

[76] Neither the *Planning Act,* nor the by-law incorporating the Transitional Provisions, define the terms "site plan" or "site plan application that is complete".

[77] The City distinguished between "site plan" applications that require payment of a fixed fee before being processed and "Master Site Plan" applications that can be filed on major projects based upon a fee to be negotiated. The two types of applications are radically different in terms of the level of detail. The City charged, and WCD paid, only 10 per cent of the site plan application fee because the work required of City staff to process WCD's Master Site Plan application would be roughly 10 per cent of that required to process a site plan application.

[78] At issue is the proper interpretation of the Transitional Provisions which require "an application for site plan approval that is complete". Mississauga is the largest of the three municipalities in the Region. Mississauga recognized a clear distinction between site plan applications and Master Site Plan Applications. (There is no evidence as to Brampton and Caledon). Just prior to the vote on the Transitional Provisions, the City had advised the Region that WCD had filed a "Master Site Plan". The distinction between a "Master Site Plan" and a site plan was, therefore, evident to the Region. I, therefore, conclude that if the intent of the Transitional Provisions was to allow a "Master Site Plan" to qualify that would have been specified. Put differently it defies common sense, in

the context of the Transitional Provisions, to include in the definition of site plan application a conceptual plan containing roughly 10 per cent of the detail of a site plan application.

Further, and in any event, the Transitional Provisions require an application for approval "that is complete". Those words can and should be given meaning. The "City Application for Site Plan Approval" form lists what the application is to "consist of". One listed requirement is a checklist completed by the City planner at the time of submission. (Part of the process is that a City planner reviews the application at the time of submission). Counsel for Mr. Hazineh agreed that this checklist had to be completed to constitute a "complete" application.

[79] On the WCD application, all of the checklist boxes under the headings "general requirements" and "building elevations" were left blank. Phillips, the City planner, simply noted this was a "Master Site Plan". The only three boxes ticked off were under the heading "Floor Plans Note". Counsel for Mr. Hazineh submitted that this was sufficient to constitute this as a "complete" application. I do not agree. When Phillips made the notation "Master Site Plan" and wrote "okay" beside the unticked boxes, I conclude he did so to indicate that the form was not complete but that was "okay" because it was a Master Site Plan application. Phillips' evidence was that he would have ticked off the appropriate

boxes if he regarded this as a site plan application. If this was a site plan application, WCD would be required to pay the full $440,000 fee.

[80] Counsel for Mr. Hazineh made the point that the APS contained a provision requiring that WCD file a "full and complete" site plan application by July 31, 2007. What constituted a "full and complete" site plan application within the meaning of the APS might well be different from a "site plan application that is complete" within the meaning of the Transitional Provisions. In any event OMERS had no obligation to terminate the APS due to non-compliance with a condition. The fact that OMERS proceeded with the transaction, following the filing of a Master Site Plan, is of little or no significance in interpreting the Transitional Provisions.

[81] The fact that the City allowed WCD to use a site plan application form, and assigned a site plan application number, is relatively weak evidence that the Master Site Plan application is a site plan application within the meaning of the Transitional Provisions. As Phillips explained, there simply was no form for a Master Site Plan application.

[82] While that is sufficient to reach my conclusion, I add the following. Mayor McCallion testified, and common sense supports, that the rationale for a transitional period is that at some point a developer is so far along in the process

that it would be unfair to impose the higher development charges. As the staff presentation to Regional Council on September 27, 2007 stated: "The purpose of a transition is to recognize applications that are imminently proceeding to approvals stage and thus have difficulty in absorbing notable rate increases." This underlying rationale has little application to WCD which, as of October 7, 2007, had only filed a conceptual Master Site Plan and paid 10 per cent of the site plan application fee.

[83] I, therefore, conclude that WCD could not qualify under the Transitional Provisions since it had not filed a "site plan application that was complete" by October 7, 2007. As such, WCD had no financial interest in the development charges by-law adopted by the Region. On that basis alone Mr. Hazineh's application must be dismissed.

[84] In case I am in error in reaching that conclusion, I will consider whether certain exceptions and defences in the *MCIA* are applicable.

WAS MAYOR MCCALLION'S DEEMED FINANCIAL INTEREST AN INTEREST IN COMMON WITH ELECTORS GENERALLY?

The Law

[85] Section 4(j) of the *MCIA* provides an exception to the conflict of interest prohibition if the financial interest of the member is one "which is an

interest in common with electors generally". Section 1 provides the following definition:

> "interest in common with electors generally" means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part";

[86] In *Tuchenhagen v. Mondou*, 2011 ONSC 5398 (CanLII) (Div. Ct.), the court referred to the fact that the ordinary interpretation of "generally" means "in most cases" or "widely".

[87] The fact that electors generally have an interest in common relating to the level of development charges and taxes does not preclude Peter and WCD having a distinct interest. For example, in *Kizell v. Bristol*, [1993] O.J. No. 3369 (Gen. Div.), the respondent councillors were owners or employed in retail businesses. They voted on matters to do with the granting of exemptions under the *Retail Business Holidays Act*, R.S.O. 1990, c. R.30. O'Flynn J. concluded that, although the general public had an interest in the proposed exemptions, the respondents had contravened the *MCIA* because they had a financial interest that was distinct from the interest of electors generally.

[88] The jurisprudence clearly shows that even though a by-law may apply to the entire body of electors – what Mayor McCallion's counsel termed a "by-law of

general application" – this does not preclude an elected official from having an additional or distinct personal interest in a matter. Indeed, both can be present.

[89] In *Kizell*, O'Flynn J. also quoted from *Edwards v. Wilson* (1980), 31 O.R. (2d) 442 (Div. Ct.) in which Callaghan J. considered whether councillors who owned or were associated with businesses near a proposed shopping mall had acted in a conflict of interest when they voted on two proposals which ultimately defeated the mall project. Though the mall would have equally served all residents of the town, this did not preclude these councillors from having an additional interest. Callaghan J. wrote:

> ... while it is true that all ratepayers were interested in the economic and social development of the community in a general sense, the respondents had an "added" interest as persons who might be expected to benefit directly from the failure of the project

The Evidence

[90] WCD stood to save several million dollars in development charges if even phase one of its proposed development qualified under the Transitional Provisions.

[91] In cross-examination Mayor McCallion testified that she would not have declared a conflict of interest even if she understood that WCD could save $11 million in development charges as a result of the Transitional Provisions.

Analysis and Conclusion

[92] Mayor McCallion's first submission was that voting on development charges can never give rise to a conflict of interest. This is because higher development charges (assuming prospective developers do not opt to go elsewhere) tend to reduce taxes and lower development charges tend to increase taxes. Because all residents have an interest in tax levels, development charge by-laws are of general application. Thus it was not possible for Mayor McCallion, or anyone else, to have an interest in the vote on the Transitional Provisions other than the interest that was shared with electors generally.

[93] I put to counsel the following. Assume a council member is a developer. Development charges are going up. If a three month transition period is allowed the developer cannot qualify. If, however, a six month transitional period is allowed the developer can qualify. Can the member move a motion to allow for a six month transitional period? On behalf of Mayor McCallion it was submitted "yes". My conclusion is "no".

[94] It is necessary to first identify the financial interest of the member. In my example, the financial interest of the member is as a developer who stands to save a substantial amount of money depending on the wording of the transitional by-law. The proper question is whether this financial interest, namely money riding on whether the transitional period is three or six months, is an interest "in

common with electors generally". To ask the question is to answer it. It is obviously not an interest in common. The developer has a specific financial interest quite different from electors generally.

[95] Mayor McCallion further submitted, and I agree, that generally development charges get passed on to the ultimate purchaser. It is elementary that to stay in business people need to sell products at a price in excess of the cost. That does not mean, however, that a developer has no financial interest in qualifying under a transitional provision. For example, take a condominium developer who is close to the line in terms of being far enough advanced in the planning process to qualify under a transition provision. If the developer qualifies under the transition provision, the condominiums are sold at market prices and the savings in development charges is money in the pocket of the developer. If the developer is delayed one month, and fails to qualify under the transitional provision, the condominiums are sold at the same market prices and the developer absorbs the increased charges.

[96] The alternative submission on behalf of Mayor McCallion is that WCD had an interest in common with all other developers who might qualify under the Transitional Provisions. I do not accept that an interest in common with other developers in the Region qualifies as an interest in common with electors generally.

[97] Counsel for Mayor McCallion raised at the hearing the further argument that s. 4(b) of the *MCIA*, which provides a member is not in a conflict by reason of the member being entitled to receive any benefit offered by the municipality on terms common to other persons, was applicable. A charge or tax would certainly not ordinarily be characterized as a "benefit". Similarly, a transition or delay in implementing an increased charge or tax is not, in my opinion, a "benefit".

WAS MAYOR MCCALLION'S DEEMED FINANCIAL INTEREST REMOTE AND INSIGNIFICANT?

The Law

[98] Section 4(j) of the *MCIA* provides an exception if the interest of the member is so remote or insignificant that it cannot reasonably be regarded as likely to affect the member.

[99] The parties agree that I should apply the objective test formulated by Mackenzie J. in *Whiteley v. Schnurr*, [1999] O.J. No. 2575 (Gen. Div.) as follows:

> 10. [...] Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question? In answering the question set out in such test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise that could result depending on the manner in which the member disposed of the subject matter before him or her.

The Evidence

[100] I now turn to the circumstances that might be considered by the reasonable elector in determining whether Mayor McCallion's deemed financial interest in WCD was likely to influence her vote.

[101] I focus first on the plans and preparedness of WCD as of the Votes. While no one from WCD testified, there is reliable evidence from Walker of Lyon Consulting. The project could only move forward by securing the necessary planning approvals. Effectively Lyon Consulting was driving the bus and WCD was providing directions. Walker gave direct evidence as to WCD's instructions which effectively dictated whether and how the project proceeded.

[102] A July 19, 2007 meeting was attended by 11 City staff and 11 WCD representatives. Cook and Munroe, on behalf of WCD, advised that a detailed site plan application for phase one, including the hotel and conference centre, would likely be filed in the spring of 2008 with "hopes" of securing a building permit by fall 2008.

[103] Walker stated that DeCicco first mentioned the proposed increase in development charges in September-October, that being about the time of the Votes. Minutes record that, at the start of a meeting on November 21, 2007, attended by 13 WCD owners and consultants, a plan to try to use the Master Site

Plan application to try to qualify for the lower development charges was announced. Walker's evidence was that he had been informed of this intention a number of weeks before. Given the urgency, it would only make sense that this change in plan would be communicated to the entire WCD team as soon as possible. As such, I find that it was only in November that WCD decided to accelerate its efforts.

[104] As of the Votes, WCD did not plan to file a site plan application until the spring of 2008. In that event, WCD would not meet the second requirement of the Transitional Provisions, namely a complete building permit application, by February 1, 2008. (As discussed, the Master Site Plan, as of the Votes, lacked detail and so could not be the basis to apply for or receive a building permit.)

[105] Secondly, WCD lacked money. In this regard:

(a) Couprie made it clear he would not advance funds beyond the deposit amount.

(b) Peter lacked resources. Couprie said he had previously loaned money to Peter, secured by Peter's house. When Peter defaulted, Couprie assumed ownership of the house. Peter borrowed the entire $50,000 that WCD paid to the City as an application fee for the Master Site Plan.

(c) Lyon, the principal of Lyon Consulting, took a "sliver" of equity presumably in lieu of some portion of fees.

(d) Walker said that the unwillingness of WCD to pay the requisite City fees was the main stumbling block to obtaining the necessary approvals.

(e) As of April 30, 2008, Walker said it became apparent Lyon Consulting might not get paid for its services. It started to do work for WCD on a handshake agreement between Lyon and Cook, who knew one another, and then failed to "paper" the financial arrangements when Cook stepped aside.

(f) When Cook was taking the lead, his intention was to seek not only a hotel operator but also a developer partner with deeper pockets.

Analysis and Conclusion

[106] The parties agreed that, applying the test from *Whitely*, a reasonable elector apprised of all the circumstances would take into account that:

(a) As of the Votes, the intention of WCD was to not apply for building permit until the spring of 2008, which would not meet the second requirement of the Transitional Provisions.

(b) As of the Votes, the Master Site Plan was not sufficiently detailed to allow building permits to issue.

(c) As of the Votes, WCD did not have in place a hotel chain or a major financial investor.

(d) WCD itself lacked the resources to pay the site plan application fee and proceed to the building permit stage.

[107] Counsel for Mr. Hazineh, however, submitted that the reasonable elector would also take into account that:

(a) WCD's plan from the outset involved moving from the Master Site Plans to a more detailed plan.

(b) The process of seeking planning approval commenced in 2006, even before the APS, and considerable progress had been made by WCD's planners, architects and lawyers.

(c) The existing official plan and zoning permitted the proposed development subject only to removal of the "H" (hold) designation.

(d) The APS had been signed.

(e) This project was supported by Mayor McCallion, Council and staff.

(f) The considerable efforts by WCD after the Votes nearly put it into position to qualify under the Transitional Provisions.

[108] While I accept that the additional circumstances identified by counsel for Mr. Hazineh should be considered, the primary focus must be on the situation as of the Votes. At that time there were multiple layers of improbability. WCD had no intention of taking the steps necessary to meet the second and third requirements under the Transitional Provisions. No hotel operator was on board.

No major financial investor was on board. WCD lacked the funds to pay the site plan application fee.

[109] A reasonable elector would also consider that Mayor McCallion had demonstrated greater concern for the public's interest than for Peter's interest by suggesting that the APS contain a provision requiring that the hotel be built first. This provision caused, or contributed to causing, the project to not proceed.

[110] In my opinion, a reasonable elector, apprised of all of the circumstances as of the Votes, would not regard the deemed financial interest of Mayor McCallion as likely to have influenced her vote. As of the Votes, the chance that WCD would qualify under the Transitional Provisions was miniscule. A reasonable elector would have concluded there was no likelihood that Mayor McCallion's deemed financial interest would influence her vote.

[111] Lastly, I consider the fact that Mayor McCallion also seconded and voted on Mayor Fennel's September 13, 2007 motion which recommended an extension of the transition period to November 1, 2009, for areas to be identified by each municipality. I consider this separately as the proposed 18 month extension arguably presents a different set of circumstances for the reasonable elector to consider. As passed, the resolution stated it was to amend

"Recommendation GC-174-2007" contained in the Minutes of the General Committee of Council held September 6, 2007.

[112] The actual wording of the September 13, 2007 resolution is ambiguous; it simply refers to the transition period being extended to November 1, 2009. It would certainly not make sense to change all three milestone dates to fall on November 1, 2009. The Regional staff presentation to Council on September 27, 2007, is, however, crystal clear. Under the heading "Interpretation of Proposed Amendment", staff interpreted the intention as being:

(a) to maintain the requirement to have submitted a site plan application by September 13, 2007; but

(b) to extend the date to obtain a building permit to November 1, 2009.

[113] While Brampton staff may have had a different intention, the considered interpretation of Regional staff is reasonable. It was based upon the wording of the resolution and informed by experience. I find that a reasonable elector would so interpret the resolution. On this interpretation, the resolution required a site plan application by September 13, 2007, even earlier than the Transitional Provisions date of October 7, 2007.

[114] As previously discussed, WCD had not filed a complete site plan application as of October 7, 2007. If I am wrong, and if WCD can be considered

as having filed a complete site plan application on July 31, 2007, the September 13, 2007 resolution presented additional layers of improbability.

[115] The distinction between a resolution and a by-law was discussed by Bielby J. in *Tanner v. The Municipality of Brockton*, 2011 ONSC 6329 (CanLII). The *Municipal Act*, S.O. 2001, ch. 25, provides that a municipality must exercise its power by by-law. A resolution is usually employed to indicate the intention of council relating to a particular matter of a temporary nature.

[116] The reasonable elector would have to consider the likelihood of the recommendation to extend the transition period to November 1, 2009 ever being enacted. In this regard:

(a) The resolution was akin to a trial balloon proposed with virtually no advance notice to council members.

(b) The sole impetus for the resolution was a Brampton-specific concern and the wording was "regionalized" by the clerk according to routine practice.

(c) The financial implications of the resolution had not been analyzed.

(d) Regional staff, drawing on Regional Council policy that 'growth should pay for growth", were strongly opposed to implementing the resolution.

[117] Considering all the circumstances, I conclude that the likelihood that the September 13, 2007 recommendation would be incorporated in a by-law was remote. Even if it was, it remained uncertain whether the City would identify an area that included the proposed WCD development.

[118] As previously discussed, a reasonable elector would also consider that Mayor McCallion's suggestion that the APS require the hotel be built first put the public interest ahead of the interest of WCD.

[119] In my opinion, a reasonable elector would not regard the deemed financial interest of Mayor McCallion as likely to have influenced her in seconding Mayor Fennel's motion and voting on September 13, 2007.

[120] As such, I conclude that Mayor McCallion did not contravene the *MCIA.* I will, however, for the sake of completeness address whether the defences of error in judgment and inadvertence would be available to her.

WAS ANY CONTRAVENTION DUE TO INADVERTENCE OR BY REASON OF AN ERROR IN JUDGMENT?

The Law

[121] The *MCIA*, s. 10(2) provides that if a contravention was committed through inadvertence, or by reason of an error in judgment, the member is not subject to having his or her seat vacated.

[122] In *Magder v. Ford*, 2013 ONSC 263 (CanLII), the court stated that inadvertence and error in judgment are "two distinct lines of inquiry". As to error in judgment the court stated:

> [90]. . . 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.

[123] As to inadvertence, in *Baillargeon v. Carroll*, [2009] O.J. No. 502 (S.C.J.), Kelly J. stated:

> The defence of inadvertence applies where the breach can be linked to an oversight of fact or law that was not reckless or wilfully blind. (See *Benn v. Lozinski*, [1982] O.J. No. 3356, 1982 CarswellOnt 772 at paras. 33-34 (Co. Ct) and *Re Blake and Watts et al* (1982), [1973] O.J. No. 2225, 1973 CarswellOnt 372 at pars. 24-31 (Co. Ct.)

[124] In *Re Blake and Watts et al.* [1974], 2 O.R. (2d) 43 (Co. Ct.) Killeen J. stated:

> The weight of authority, in fact practically all the authorities, are to the effect that "inadvertently" is a wide enough term to include ignorance of the law, carelessness, negligence, or inattention... The dictionaries give various meanings for the word, including inattention, carelessness or negligence, and for the purpose of this decision I shall hold that the term "inadvertently" includes ignorance of the law, inattention, neglect or carelessness, on the part of the deputy returning officer.

The Evidence

[125] Mayor McCallion knew that Peter was an owner of WCD. She knew that she had a deemed financial interest in WCD. WCD had proposed a major development that had been in the City planning process for many months. Mayor McCallion's evidence, which is supported by other City witnesses and I accept, was that she was not briefed on the details or even the status of the WCD project. She decided that she did not want to know anything.

[126] When Mayor McCallion participated in the Votes she did not know whether or to what extent a transitional period would benefit WCD. She participated in the Votes based upon her interpretation of the *MCIA* which was that a development charge by-law, and transitional provisions in particular, cannot give rise to a conflict of interest.

Analysis and Conclusion

[127] As discussed, I reject the argument that the *MCIA* permits a member with an actual or deemed financial interest in a development to vote on the development charges applicable or potentially applicable to the development. In my opinion, the belief by Mayor McCallion that she could vote is "arbitrary" within the meaning of *Magder*. First, such a belief is contrary to common sense. It does not pass the "smell" test. Secondly, Mayor McCallion testified she had attended many municipal education sessions, and read many publications, on the subject of conflict of interest prior to the Votes. Nothing from these sessions or publications was cited as supporting her interpretation of the *MCIA*. As such, the defence of error in judgment is not available.

[128] Further, having a deemed financial interest in WCD, Mayor McCallion states that she made no inquiry as to the status of WCD's application for planning approval. In my opinion, this constitutes wilful blindness. For all she knew, the WCD project might have been far enough along that the Transitional Provisions could have saved WCD several million dollars on the initial phase of the project.

[129] In my opinion, the defence of inadvertence is also not available. Mayor McCallion's evidence was that she deliberately participated in the Votes based upon her judgment that there can be no conflict in relation to a

development charge by-law. Further, as discussed, Mayor McCallion was wilfully blind in relation to what WCD was doing which also precludes reliance on the defence of inadvertence.

DID MR. HAZINEH COMMENCE THE APPLICATION IN TIME?

The Law

[130] Section 9 of the *MCIA* provides that an elector has six weeks to commence a court application after it comes to the elector's knowledge that a member may have contravened the *MCIA*.

The Evidence

[131] Mr. Hazineh's affidavit indicates that in the fall of 2009, he became interested in allegations of conflict of interest against Mayor McCallion. He generally followed the Judicial Inquiry that took place from December 14, 2009 to February 11, 2011. The Judicial Inquiry Report was released October 3, 2011. He read an October 11, 2011 article in the Mississauga News written by Clay Connor, a municipal lawyer, entitled, "McCallion may not be out of the woods". From the article he learned that, in 2007, Mayor McCallion had voted at Regional Council on transitional development charge provisions which had the potential to save WCD $9 million. Mr. Hazineh commenced this Application on November 21, 2011.

[132] At an out of court cross-examination on his affidavit, Mr. Hazineh was shown an article in the National Post dated July 17, 2010, which reported that Parrish and six other councillors alleged that Mayor McCallion had violated the *MCIA* when, in 2007, she voted at Regional Council on transitional provisions which could save Peter $11 million on the proposed WCD development. Ms. Parrish was quoted as saying "I'm absolutely convinced there was a conflict of interest there . . ." The article went on to note that Ms. Parrish and the councillors have a six week window, following their discovery of the conflict of interest, to launch a legal action.

[133] Mr. Hazineh was asked a number of questions about the article over five pages of transcript. Mr. Hazineh was then asked:

> Q. Did you read this article at the time?
>
> A. I'm sure I did. The picture looks familiar, so I probably read it.

[134] Mr. Hazineh testified in court. He was directed to the apparent conflict between his affidavit evidence indicating that he first learned about Mayor McCallion's conflict of interest from the October 11, 2011 Connor article and his evidence when cross-examined on his affidavit that he had read the July 17, 2010 National Post article at the time it was published.

[135] Mr. Hazineh explained that he had come across the National Post article during the preparation of his court application and incorrectly assumed that he had read it at the time. He went on to state that he did not read the National Post on principle given its editorial stance on the Middle East. He said that his evidence when cross-examined on his affidavit was a mistake, and that he had not been aware of any possible conflict on the part of Mayor McCallion at Regional Council prior to the October 11, 2011 article. He also cited the fact that in filing his Court Application he used the $9 million figure used in the 2011 article, and not the $11 million figure used in the 2010 article, as additional evidence that he had not read the 2010 National Post article.

[136] Mr. Hazineh and Parrish could not be much closer. They have been friends since 1991. He worked as a special assistant to her while she was a federal M.P. He managed campaigns for her federally and provincially. Their families socialized. In July 2010, Mr. Hazineh was managing her election campaign for municipal council.

Analysis and Conclusion

[137] Let me first consider the two matters Mr. Hazineh identified as supporting his explanation for the discrepancy in his evidence.

[138] First, his aversion to the National Post. When Mr. Hazineh was cross-examined on his affidavit, the July 17, 2010, article was reviewed at length before he was asked if he had read it at the time. He knew it was from the National Post. If Mr. Hazineh in fact had a principled objection, and so never read the National Post, he would have said so. I conclude the National Post aversion was an after the fact rationalization to explain the discrepancy in his evidence. Further, while a person might refuse to purchase a particular paper on principle, it does not make sense that Mr. Hazineh would refuse to even read an article featuring a picture of his close friend and political ally.

[139] Secondly, his use of the $9 million figure in his Application. I accept that Mr. Hazineh read the October 11, 2011 article, and it was utilized as the triggering event beginning the six week period. It follows that he would use the $9 million figure from that article. Mr. Hazineh would not want to use the $11 million figure from a July 2010, article as it would tend to prove he was out of time to bring the application.

[140] The two reasons suggested to prefer Mr. Hazineh's corrected evidence in court, over his evidence when he was cross-examined on his affidavit, carry no weight for the reasons discussed. I find it more probable that Mr. Hazineh's evidence when cross-examined on his affidavit was true than his evidence in court. By the time he testified in court, he appreciated that his earlier

evidence might doom his application to failure. As such, I find as a fact that Mr. Hazineh read the National Post article in July 2010.

[141] The National Post article contained essentially the same information as the Connor article. As such, the fact that Mayor McCallion may have contravened the *MCIA* came to Mr. Hazineh's knowledge in July 2010. He commenced this application long after the six week period prescribed by s. 9 of the *MCIA*. Mr. Hazineh's application must, therefore, also be dismissed on this ground.

SHOULD THERE BE AN ADVERSE INFERENCE AGAINST MAYOR MCCALLION?

[142] For the sake of completeness, I will explain why in assessing the evidence I have not drawn an adverse inference against Mayor McCallion on the basis that she did not call evidence from Peter, Cook and DeCicco. Whether to draw an adverse inference must be assessed in light of the issues to be decided.

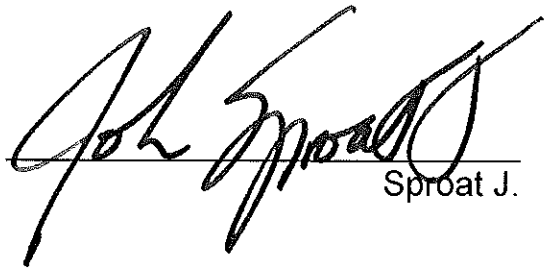
[143] Peter could have provided evidence regarding his interest in WCD and whether Mayor McCallion had knowledge of it. For the reasons provided, I have concluded that Peter was an owner of WCD, and that Mayor McCallion knew that, without the necessity of resorting to an adverse inference.

[144] Cook and DeCicco's evidence would have been most relevant to WCD's plans and preparedness as of the Votes. Walker was managing the project for WCD. Walker was relatively independent and provided detailed evidence in that regard. At its highest, Mayor McCallion had a friendly relation with Cook and DeCicco. In my opinion, it would not be appropriate to draw an adverse inference due to her failure to call these witnesses.

CONCLUSION

[145] The application is dismissed. I would like to thank all counsel for their thorough and helpful submissions.

[146] If costs cannot be agreed upon Mayor McCallion shall make written cost submissions within 14 days. Mr. Hazineh shall respond within 14 days. Any reply by Mayor McCallion shall be filed within a further seven days.



Sproat J.

Released: June 14, 2013

CITATION: HAZINEH v. McCALLION, 2013 ONSC 2164
COURT FILE NO.: CV-12-1130-00
DATE: 2013-06-14

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RE: ELIAS HAZINEH

Applicant

v.

HAZEL McCALLION

Respondent

REASONS FOR JUDGMENT

Sproat J.

Released: June 14, 2013