The claim asserted directly by the statutory beneficiaries can be joined with the injured person's claim in one action (see *Weatherall et al. v. Britten*, [1951] O.W.N. 137), as was recognized by Judge Killeen, or failing this, it can be tried together with the injured person's claim.

For procedural reasons, the Court of Appeal refused the request of the respondent before that court to include a motion under Rule 136 by the parents of the plaintiff to be added to the style of cause. That dismissal was said to be without prejudice to the making of such a motion.

To join the claim asserted directly by a statutory beneficiary, the plaintiff's spouse, is precisely what was requested in the motion before Haley Co. Ct. J. In my view, she was not bound by authority to dismiss the motion and she correctly exercised her discretion to grant it in the circumstances.

The appeal from Her Honour Judge Haley will therefore be dismissed and the respondent will have his costs.

Appeal dismissed.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Graham v. McCallion

O'LEARY, CRAIG AND WHITE JJ. 30TH SEPTEMBER 1982.

Municipal law — Conflict of interest — Mayor owning property recommended for release for residential development — Participation of mayor in meeting of council at which resolution passed — Prior declarations of conflict of interest — Finding of conflict of interest at relevant time — Breach of statute resulting from bona fide error in judgment — Mayor's seat on municipal council not declared vacant — Municipal Conflict of Interest Act, R.S.O. 1980, c. 305, ss. 2(1), (2), (4)(a), 5(1), (2).

Practice — Costs — Motion to declare conflict of interest of member of municipal council required to be brought in County Court — Costs awarded on Supreme Court scale — Error in principal — Municipal Conflict of Interest Act, R.S.O. 1980, c. 305, s. 3.

The respondent, who was the mayor of the City of Mississauga, was the owner of a five-acre parcel of land on which she and her husband resided. This property was included in an area that was being considered and recommended by the municipal council as one of several that should be released for residential development. Prior to a special meeting of the council held on November 2, 1981, the respondent, recognizing that she had a pecuniary interest in the matter under discussion, declared her interest. On November 1st, a private meeting of council was held at which seven councillors reached a consensus as to a revised resolution to be submitted to a public meeting to be held on November 2nd. The resolution recommended the release of certain areas for development, some of which, including the area in which the respondent's property was located, differed from those that had been included in a staff

report submitted to the council. Until November 1st, the respondent had adamantly refused to discuss, either publicly or privately, the proposed selection. Although present at the meeting of November 1st, the respondent did not participate in any of the discussions leading up to the reaching of the consensus. However, she did chair the meeting of November 2nd which had before it the resolution which had been revised in accordance with the discussions of the previous day and which was attended by a large number of persons. All members of council other than the respondent spoke in the debate, but she did reply to questions put by one of two members of council opposed to the resolution. After all members of council had spoken, the respondent declared a conflict of interest in relation to the area that included her property and said, "I have no biases, I'm going to vote quite freely on it". In fact, she declared a conflict of interest and did not vote in respect to the area in which her property was located. The appellant, a ratepayer, applied for an order declaring that the respondent had contravened s. 2(1) of the *Municipal Conflict of Interest Act*, R.S.O. 1980, c. 305 and for an order declaring the respondent's seat vacant pursuant to s. 5(1) of the Act. It was held by West Co. Ct. J., 137 D.L.R. (3d) 432, that the respondent had breached the provisions of s. 2(1)(*c*) of the Act because she had a pecuniary interest in the resolution when it came before council on November 2nd. However, she had done so through a *bona fide* error in judgment and, therefore, pursuant to s. 5(2) of the Act, she was not subject to having her seat declared vacant. Although the applicant was heard in the County Court, party and party costs were awarded to the appellant on the Supreme Court scale. The appellant appealed against the failure of the trial judge to invoke s. 5(1) of the Act and the respondent cross-appealed on the ground that the trial judge had erred in not finding that she had a community of interest in the resolution together with a great number of other property owners and was, therefore, exempted from s. 2(1) by the provisions of s. 2(4)(*a*) of the Act. The respondent also cross-appealed on the question of costs.

Held: the appeal and cross-appeal on the substantive issues should be dismissed: the cross-appeal on the question of costs should be allowed and they should be reduced to the scale of the County Court.

The question for determination on the respondent's cross-appeal was: what was the respondent's common interest with other persons who were not members of the council that would make s. 2(1) inapplicable? The matter under consideration by the council was a staff report entitled the "Residential Development Program", which was submitted following six years of study. The community under consideration was the seven undeveloped planning districts referred to in that report from which land was to be released for residential purposes. The respondent's land was selected for development while other lands were not. She stood to benefit because her land was released; those owners whose lands were not released did not stand to benefit. The respondent's interest was different "in kind" from those owners who were not able to develop their properties. Before the vote was taken and during the deliberations of council on November 2nd, there was not a common interest with others who were not members of council and whose lands were not recommended for release. Accordingly, s. 2(4)(*a*) of the Act had no application.

The trial judge had found that although the respondent had previously recognized her conflict of interest and had observed what was required of her by the Act, she had committed a substantial error in judgment and contravened s. 2(1) on November 2nd. However, having regard to all of the circumstances, her contravention was the result of a *bona fide* error in judgment and, therefore, pursuant to s. 5(2) of the Act, she was not subject to having her seat declared vacant. There was ample evidence to support the finding of *bona fide* error in judgment.

The award of costs on the Supreme Court scale had been made against the respondent to emphasize the strict standards required by the Act; because she failed to admit to facts and thereby lengthened the proceedings; because she contested throughout the hearing a finding of conflict of interest which the trial judge said "was the only finding that could be made"; because she breached the Act in all four of the ways in which the Act could be breached. Pursuant to s. 3 of the Act an application of this kind had to be brought in the County Court and if costs were awarded, then, *prima facie*, costs on the County Court scale would be appropriate. Whether or not it might be appropriate to award costs on the Supreme Court scale, there were no circumstances in the instant case that should attract an award of costs on that scale. The Act, being penal in nature, prescribed strict standards which an award of costs could not emphasize or deter from contravention. The award of costs in this case amounted to a form of penalty not prescribed by the Act. The respondent was never asked to admit any facts other than on her cross-examination, which she did. She was entitled to defend the charges against her in the most full and complete way she could, without fear of additional penalties being imposed. Furthermore, she was entitled to advance the argument against conflict of interest at the hearing notwithstanding that she had admitted a conflict of interest on numerous occasions. Any breaches of the Act found to have been committed by the respondent were committed through a *bona fide* error in judgment and there was no evidence of any pecuniary gain to her or that her actions had any effect on the vote on the subject resolution. Although the respondent should be required to pay the costs of the application, the trial judge erred in principle in awarding costs on the Supreme Court scale.

[*Elliott v. City of St. Catharines* (1908), 18 O.L.R. 57; *Re L'Abbé and Corp. of Blind River* (1904), 7 O.L.R. 230, consd; *Re Blustein and Borough of North York*, [1967] 1 O.R. 604, 61 D.L.R. (2d) 659; *Re Casson and Reed*, 60 D.L.R. (3d) 455, [1975] 6 W.W.R. 431, refd to]

APPEAL and CROSS-APPEAL from the dismissal by West Co. Ct. J., 137 D.L.R. (3d) 432, of an application under the *Municipal Conflict of Interest Act* to declare a conflict of interest and to declare vacant the seat of a member of a municipal council. CROSS-APPEAL as to costs.

J. I. Laskin, for appellant.
D. K. Laidlaw, Q.C., and *J. Finlay*, for respondent.

The judgment of the Court was delivered orally by

CRAIG J.:—This is an appeal by the applicant, John J. Graham, and a cross-appeal by the respondent, Hazel M. M. McCallion, from the order of His Honour Judge West [137 D.L.R. (3d) 432] of the County Court of the Judicial District of Peel, following a motion brought under the *Municipal Conflict of Interest Act*, R.S.O. 1980, c. 305 ("the Act"). His Honour Judge West determined that the respondent, the mayor of the City of Mississauga, contravened the provisions of s. 2(1) of the Act but held that she was not subject to having her seat declared vacant by virtue of s. 5(2) of the Act. While the applicant's motion was accordingly dismissed, he was awarded his costs on the Supreme Court scale.

The applicant's appeal is against the failure of the learned judge to invoke s. 5(1) of the Act and declare the seat of the mayor vacant. The respondent's cross-appeal is on the basis that the trial judge erred in not finding that the respondent had a community of interest in Resolution 595 along with a great number of property owners of the City of Mississauga, and therefore was exempted from the provisions of s. 2(1) of the Act by virtue of the provisions of s. 2(4) of the Act.

The applicant Graham is a ratepayer in the City of Mississauga, and has resided there for the last 15 years. He is a practising lawyer, having been called to the bar in 1955, and at one time in the late 1960s was the mayor of Streetsville. The respondent McCallion is in her second term as the mayor of the City of Mississauga. Her present term of office expires on November 30, 1982.

The facts are not in dispute; the motion before Judge West was disposed of on affidavit material and cross-examinations thereon without oral testimony at the hearing. The trial judge dealt with the factual background as follows [at pp. 434-438]:

> The relevant facts are not in dispute. The motion arises out of a meeting of council held Monday, November 2, 1981, and the events leading up to it, and also as a result of the attendance by the mayor at a meeting of the Peel Board of Education on November 24, 1981. The court was provided with a verbatim record of proceedings at both of these meetings. The matter under discussion at both meetings was a resolution of council arising out of a staff report entitled "Residential Development Program" which will be hereafter referred to as "the Report."
>
> The Report which was prepared by the city manager and the commissioner of planning was tabled at city council on October 14, 1981. Its completion marked the culmination of six years of study. Its conclusions were supported by all of the staff persons consulted in the course of its preparation. The Report addressed two basic questions:
>
> (1) Is it necessary to release more land for residential development?
>
> (2) If more land is needed for residential development, how much and where?
>
> The answer in the Report to the first question was that the city's residential inventory of lots for detached and semi-detached dwellings and townhouses should be increased. It was considered that a sufficient supply of land for apartment units was available.
>
> In determining which lands should be released for development an evaluation was made of undeveloped planning districts in consultation with the staff of the city, the Regional Municipality of Peel, Hydro Mississauga and both the public and separate boards of education. Seven distinct planning districts, each of which was divided into neighbourhoods, were identified. A ranking of districts in order of priority was made by each of the city, the region and the school boards and a composite ranking of the districts was then prepared. Finally, the authors of the Report considered options of releasing one, two or three districts for development. The conclusion reached was that parts of three districts should receive priority. These lands were specifically designated as Central Erin Mills, Neighbourhoods 1, 2, 3, 10 and 11; Erin Mills West, Neighbourhood 1; and Hurontario, Neighbourhoods 3, 4, 5, 6 and 7.

The major specific recommendations of the Report were:

1. That secondary plans be prepared for each of the three districts named.
2. That development applications for the neighbourhoods named not be released until secondary plans were resolved and provincial legislation enacted to authorize development agreements in respect of development levies and special agreements.

It will thus be observed that the Report dealt firstly with what lands should be released for development and secondly, with the implementation of that selection.

The contents of the Report were kept secret until it was tabled on October 14, 1981. It was then read for the first time by the mayor and the nine other members of council. A special meeting of council was called for November 2nd to consider the Report. In the meantime, a number of private meetings took place amongst some of the members of council. Seven members of council, not including the mayor, did not agree with the selection of the districts and neighbourhoods contained in the Report. As a result of the private meetings a consensus was reached by those several members as to a different selection of areas. Memoranda outlining the consensus were distributed. Finally, a private meeting of council was held on Sunday, November 1st. This meeting was attended by all members of council including the mayor. The members had before them at that meeting a draft resolution prepared by Councillor Mahoney identifying the districts and neighbourhoods to be released as determined by consensus. The selection of the specific lands to be released was not further discussed. The meeting dealt with general matters of implementation, discussed some variations to the draft resolution and concluded with a direction to Councillor Mahoney to submit a revised resolution at the meeting on November 2nd.

The consensus of the seven councillors was that instead of the selection contained in the Report, the following lands should be released for development:

Central Erin Mills, Neighbourhoods 1, 10 and 11.

East Credit, Neighbourhood 1.

Credit Valley Meadows, Neighbourhood 1.

Lisgar, Neighbourhood 1.

Hurontario, Neighbourhoods 4, 5, 6 and 7.

The staff proposals contained in the Report involved the release of 3,120.8 acres. The draft resolution involved the release of 3,799.8 acres. The effect of the draft resolution was to reduce the portion of Erin Mills Centre by approximately one-half, to eliminate completely Erin Mills West and to reduce slightly Hurontario. In place of the lands excluded the draft resolution included 410.2 acres in Lisgar, 1,103.1 acres in East Credit and 360.5 acres in Credit Valley Meadows.

The mayor did not participate in any of the discussions leading up to the reaching of the consensus. The reason for her detachment from the discussion was that she and her husband were and still are the owners of a five-acre parcel of land at 1560 Brittania Rd. W. They have owned this property since 1951 and reside in a house built on it. At the time of purchase a five-acre parcel was the minimum size lot which could be created in that particular location. The mayor recognized that she had a pecuniary interest in the matter under discussion by council. That matter was the consideration of the selection of lands for development, a selection which might include her own land. She declared this interest early in the events leading up to the completion of the Report. She consistently maintained that position up to November 1st and adamantly refused to discuss either publicly or privately the proposed selection. The property owned by the

mayor and her husband is included in East Credit, Neighbourhood 1. It was excluded from the properties listed in the Report. It was included in the list contained in the resolution presented to council.

The meeting of November 2nd was attended by a large number of persons. Numerous submissions were made, most of them in support of the proposed resolution. After hearing the delegations, council proceeded with a formal debate. The meeting was chaired by the mayor and had before it Resolution 595 which had been revised in accordance with the discussions of the previous day.

Resolution 595 contained lengthy recitals outlining the pressures on the municipality to permit further development, the financial burdens which would be involved and the need for special agreements to protect the municipality against deficits both anticipated and unanticipated. The operative part of the resolution read as follows:

> "Therefore be it resolved that the secondary plans for the following districts be prepared and the following neighbourhoods be released for processing of secondary plans subject to the conditions outlined in Appendix C attached to this resolution and representing the number of low, medium and high density units as outlined in Appendix D attached to this resolution."

After listing the relevant districts and neighbourhoods the resolution continued:

> "And further that notwithstanding the conditions outlined in Appendix C attached hereto and prior to the adoption of the secondary plans on any of the above neighbourhoods that the Province enact the "Special Legislation" requested by the City of Mississauga on August 26, 1981 confirming special agreements and lot levies."

All members of council other than the mayor spoke in the debate. The mayor did not at first declare her conflict of interest. When Councillor Taylor, one of two members opposed to the selection in Resolution 595, asked the mover and seconder for an explanation of the resolution, the mayor said that she did not consider it necessary. Councillor Taylor said that he did not expect his words would have any impact on the outcome of the resolution which had already been decided upon by seven members of council, but wished to draw public attention to the issue. When he later asked whether the public school board had been consulted about the proposed resolution, the mayor informed him that she was chairman and that she would answer him if she saw fit. She also said that all ten members of council had worked on the resolution, not seven members as Councillor Taylor had suggested.

After all members of council had spoken, the mayor then declared a conflict of interest in relation to East Credit, Neighbourhood 1. She continued, however, in her words, to "retract" some comments that had been made in the course of the debate. Addressing Councillor Taylor she said: "I have no biases. I'm going to vote quite freely on it." She also expressed pride in the consultation in which council had engaged. Reference was made to the city solicitor's opinion of the need for statutory authority for development levies and special agreements. The solicitor expressed his opposition to the release of districts for processing before the legislation was enacted. He was reminded by the mayor that his function was to see that the proposed resolution was properly worded to reflect council's wishes. As he had some reservations as to the wording, a recess was called to permit him to reword the resolution. Before recessing, the mayor made some further remarks and concluded by saying: "And I would challenge you, Mr. Taylor, to join us and vote for this resolution which I think is second to none."

After the recess the mayor read the operative portion of the resolution. She did not read the lengthy recitals which preceded the operative portion. A recorded vote was held on each of the four sets of districts and neighbourhoods, East Credit and Credit Valley Meadows being taken as one. All of the votes carried with Councillor Taylor voting in opposition in all cases and Councillor Marland voting in opposition in all cases except in respect to the Hurontario district. Mayor McCallion declared a conflict of interest and did not vote in respect to the East Credit and Credit Valley Meadows districts, but voted in favour of the other three proposals.

The *Municipal Conflict of Interest Act* provides in part as follows:

2(1) Where a member of a council or of a local board, either on his own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect,

(*a*) in any contract or proposed contract with the municipality or local board, as the case may be;

(*b*) in any contract or proposed contract that is reasonably likely to be affected by a decision of the council or local board; or

(*c*) in any other matter in which the council or local board is concerned,

and is present at a meeting, including a committee or other meeting, of the council or local board at which the contract, proposed contract or other matter is the subject of consideration, he shall, as soon as practicable after the commencement of the meeting, disclose his interest and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract, proposed contract or other matter, or attempt in any way to influence the voting on any such question.

After discussing certain general principles the trial judge then found as follows [at p. 442]:

I therefore find that the respondent had a pecuniary interest in Resolution 595 when it came before council on November 2, 1981, and that she was bound by the proscriptions contained in s. 2(1).

The proscriptions of the subsection are fourfold. There is an obligation on a member having a pecuniary interest in any matter in which council is concerned: first, to disclose that interest as soon as practicable after the commencement of the meeting; second, to refrain from taking any part in the consideration or discussion of the matter; third, to refrain from voting on any question with respect to the matter, and fourth, to refrain from attempting in any way to influence the voting on the matter.

Although a breach of any one of these proscriptions constitutes a contravention of s. 2(1), on the material before me I must find that the respondent has breached all of them.

Those findings are not attacked in this Court by counsel for the applicant Graham. The trial judge went on to find that the respondent, while having breached the provisions of s. 2(1) of the Act, had done so through a *bona fide* error of judgment and therefore, pursuant to the provisions of s. 5(2) of the Act, she was not subject to having her seat declared vacant. The trial judge awarded costs to the

applicant on a party and party basis but on the Supreme Court scale.

It is convenient to deal first with the cross-appeal of the respondent McCallion against the alleged failure of the trial judge to find that she had a community of interest in Resolution 595 along with other property owners in the City of Mississauga and that therefore the provisions of s. 2(1) of the Act were inapplicable to her by virtue of s. 2(4). Section 2(4) provides:

> 2(4) Subsections (1) and (2) do not apply to an interest in a contract, proposed contract or other matter that a member may have,
>
> (*a*) as a ratepayer, or as a user of any public utility service supplied to him by the municipality or local board in like manner and subject to the like conditions as are applicable in the case of persons who are not members of the council or local board;
>
> (*b*) by reason of his being entitled to receive on terms common to other persons any service or commodity or any subsidy, loan or other such benefit offered by the municipality or local board;
>
> (*c*) by reason of his purchasing or owning a debenture of the municipality or local board; or
>
> (*d*) by reason of his having made a deposit with the municipality or local board, the whole or part of which is or may be returnable to him in like manner as such a deposit is or may be returnable to all other ratepayers.

It was the submission of counsel for the respondent McCallion that she possessed an interest in common with all the members of a large community, namely, those within the geographic area under consideration by the council. He relies particularly on three cases: *Elliott v. City of St. Catharines* (1908), 18 O.L.R. 57 (Div.Ct.); *Re Blustein and Borough of North York*, [1967] 1 O.R. 604, 61 D.L.R. (2d) 659; *Re Casson and Reed*, 60 D.L.R. (3d) 455, [1975] 6 W.W.R. 431 (Alta. C.A.).

The expression "ratepayer" is defined in the Act as follows:

> 1 (1) In this Act,
>
> . . . . .
>
> (*d*) "ratepayer" means,
>
> (i) in respect of a municipality or a local board thereof, other than a school board, a person entitled to vote at a municipal election in the municipality, and
>
> (ii) in respect of a public, separate or secondary school board, a person entitled to vote at the election of members of such board;

It is apparent that a person entitled to vote is not necessarily an owner of land, but of course an owner of land is entitled to vote and is a ratepayer.

Prior to the hearing before the trial judge the respondent McCallion never took the position that she had a community of interest

within the meaning of s. 2(4)(*a*) of the Act. In her affidavit filed on the hearing she admitted without reservation that she had a conflict of interest, and the evidence is clear that she had declared her conflict on a number of occasions prior to the meeting of November 2, 1981. The issue on the cross-appeal is not whether she had a conflict of interest but whether there was a community of interest under s. 2(4)(*a*) which would make s. 2(1) inapplicable.

The prohibition stated in s. 2(1) of the Act is rooted in the common law principle that no person shall be judge in his or her own cause. The community of interest doctrine was also recognized at common law; that is a member of council was not disqualified merely because he or she possessed an interest in common with other ratepayers. In the case of *Re L'Abbé and Corp. of Blind River* (1904), 7 O.L.R. 230, Chancellor Boyd, at pp. 233-34, expressed the common law rule relating to community of interest as follows:

> Now, the interest or bias which disqualifies is one which exists separate and distinct as to the individual in the particular case — not merely some interest possessed in common with his fellows or the public generally . . . This may be a direct monetary interest, or an interest capable of being measured pecuniarily, and in such case that a bias exists is presumed.

Effect was given to these common law principles by the enactment of certain sections of the *Municipal Act* prior to the passage of the present Act. Prior to the enactment of the present Act of course, the remedy was by way of motion to quash the by-law in question; now the remedy is by way of motion to declare the seat vacant and for disqualification of the member for a period not exceeding seven years.

We find it unnecessary to review all of the cases referred to us, whether dealing with the common law, the *Municipal Act* or the provisions of the present Act. Each case must be decided on its own facts and on the facts of the case at bar we are not in doubt. Here the important question to be asked is: what was Mayor McCallion's common interest with other persons who were not members of the council that would make s. 2(1) inapplicable or, putting it another way, what was the community of interest? The community of interest is a "community in the kind, not in the degree, of the interest": *Elliott v. City of St. Catharines*, at p. 61. As pointed out by Mr. Laidlaw, on behalf of the applicant Graham, there are some matters that obviously give rise to common interest where a member of council is a landowner; for example, questions affecting assessment of property generally within the municipality; the question of the mill rate to be applied to that assessment; and questions affecting the budget of the municipality for which property taxes will ultimately be assessed. On the other hand, it is possible to visualize cases where there obviously is not a common interest; for example, if a

council member is contracting to sell a parcel of land to a municipality. Between these two extremes there are cases which are much less obvious. On a strict interpretation of s. 2(4)(*a*) it is possible to argue that the section requires that the interest in common must be an interest in common with all other ratepayers in the municipality. Prior to the enactment of the present Act, it was held otherwise. See *Blustein, supra*, and *Elliott v. City of St. Catharines*.

In this case the matter under consideration by council was the "Residential Development Program", a report tabled at city council on October 14, 1981, following six years of study. It is our opinion that the community under consideration by council was the seven undeveloped planning districts referred to in that report. Land was to be released for residential development from those seven undeveloped planning districts. In deciding whether there was a community of interest, it is important to consider that a selection process was involved. In that selection process Mayor McCallion's land was released for development while other lands were not. She stands to benefit because her land was released; those owners whose lands were not released do not stand to benefit. That is, those lands released may possibly be subdivided; those lands not released have no such possibility. Her interest was a difference "in kind" from those owners who are unable to develop their properties. Before the vote was taken and during the deliberations of council on November 2, 1981, there was not a common interest with others who were not members of the council and whose lands were not recommended for release. In our opinion s. 2(4)(*a*) has no application herein.

The cross-appeal by the respondent is therefore dismissed in so far as it relates to the finding of the trial judge that she did not have a community of interest in Resolution 595.

We turn now to the appeal by the applicant Graham against the failure of the trial judge to invoke s. 5(1) of the Act and declare the seat of the mayor vacant; and against the finding of *bona fide* error in judgment. The trial judge commented as follows [at pp. 445-46 D.L.R.]:

> It is acknowledged on behalf of the applicant that the respondent's actions were free of corrupt intent. It also appears that the decision taken produced no immediate financial benefit to her. It was apparent to all present that the outcome of the vote was a foregone conclusion. She had previously recognized her conflict of interest and had observed what was required of her by the Act. On the day in question she made some effort to comply with the Act. Given these circumstances, I accept the position taken by her counsel that in the euphoria of the adoption of a resolution supported by a majority of council and as well by most of the competing economic interests, the mayor departed from her previous cautious and correct approach to the issue. On November 2, 1981, she committed a substantial error in judgment and contravened s. 2(1), but having regard to all of the circumstances, I find that her contravention was by reason of a *bona fide*

error in judgment. As a result, by virtue of the provisions of s. 5(2), she is not subject to having her seat declared vacant.

I add, however, that had the respondent not declared an interest and refrained from voting on the most significant portion of Resolution 595, I would have had no alternative but to declare her seat vacant. This is not to imply that any token attempt to comply with s. 2(1) will excuse a member from impeachment. The relevant circumstances in each case will determine the ultimate result.

Mr. Laskin submits that there was no evidence in the record from which the trial judge could make a finding of *bona fide* error in judgment; that the respondent had failed to satisfy the onus of showing *bona fide* error in judgment; that the trial judge never considered what ingredients were necessary to such a finding and that he relied upon irrelevant considerations. We disagree. Considering the matter objectively, and looking at all the circumstances as outlined in the evidence and by the trial judge, there was and is ample evidence to support the finding of *bona fide* error in judgment. Because of the provisions of s. 6 of the Act there may be doubt as to the nature of this appeal. If the appeal is treated as one to an ordinary appellate court, that finding must stand. If it is a hearing *de novo*, then we would make that same finding. In effect, the trial judge has found that Mayor McCallion made an honest error in judgment and with no improper motive. Motive is not relevant on the issue of conflict of interest but in our opinion it is relevant on the issue of *bona fide* error in judgment. We therefore dismiss the appeal of the applicant Graham.

We turn now to the cross-appeal by the respondent in relation to the award of costs in the Supreme Court scale against her. The trial judge found, as we have already stated, that her contravention was a *bona fide* error in judgment and not subject to having her seat declared vacant. He then heard submissions as to costs and made his award for the following reasons:

(1) to emphasize the strict standards required by the Act;

(2) the cross-appellant failed to admit to facts and thereby lengthened the proceedings;

(3) the cross-appellant lengthened the hearing by contesting throughout against a finding of conflict of interest which, in the words of the trial judge, "was the only finding that could be made";

(4) the cross-appellant breached the Act in all four of the ways in which the Act can be breached.

Section 3 of the Act requires that an application of this kind be brought in the County Court and if costs are awarded then, *prima facie*, it was the intention of the Legislature that costs on the County Court scale would be appropriate. It is unnecessary for us to

consider whether it is appropriate to award costs on the Supreme Court scale in any case under this Act but, with great respect to Judge West, it is our opinion that there are no circumstances here that should attract an award of costs on the Supreme Court scale. In particular, and dealing with the reasons given by the trial judge in the order in which we have listed them above, we make the following comments:

(1) the Act, being penal in nature, prescribes strict standards which an award of costs cannot emphasize or deter from contravention; also strict standards are required in every case. In our opinion, the award of costs in this case amounts to a form of penalty not prescribed by the Act;

(2) the cross-appellant was never asked to admit any facts other than on their cross-examination which she did. She was entitled to defend the charges against her in the most full and complete way she could, without fear of additional penalties being imposed. These remarks also apply to (3) below;

(3) she was entitled to advance the argument under s. 2(4)(*a*) at the hearing. She had admitted a conflict of interest on numerous occasions but asserted she had done so without legal advice. Also, any breaches of the Act found to have been committed by the cross-appellant were done so, as found by the trial judge, through a *bona fide* error in judgment and therefore out of a motivation which was consistent with her duty as mayor;

(4) in the result there is no evidence of any pecuniary gain to the cross-appellant; that is, the evidence was that her actions had no effect on the vote of the subject resolution.

We agree with the trial judge that Mayor McCallion should be required to pay the costs of the hearing before him but in our view, and for the reasons given, he erred in principle in the exercise of his discretion in awarding costs on the Supreme Court scale.

We therefore allow the cross-appeal by Mayor McCallion on the question of costs only and reduce those costs to the scale of the County Court.

Success being divided, there will be no costs of either the appeal or cross-appeal.

Appeal and cross-appeal dismissed; cross-appeal as to costs allowed.