ELIAS HAZINEH v. HAZEL McCALLION

SUMMARY OF A DECISION OF

MR. JUSTICE JOHN R. SPROAT

(released June 14, 2013)

INTRODUCTION

[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. (The completion of this transaction was subject to WCD attracting a four star hotel and obtaining all required planning approvals.)

(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 filed a complete site plan application by October 7,

2007; a complete building permit application by February 1, 2008; and who obtained a building permit by May 1, 2008, 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? What did Mayor McCallion know about Peter's interest in WCD?

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

(c) 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?

(d) 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?

DID MAYOR MCCALLION HAVE A DEEMED FINANCIAL INTEREST IN WCD?

[4] 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.

[5] The evidence is overwhelming that Peter was an owner of WCD. For example, he caused WCD to be incorporated, arranged for a $750,000 loan to pay a deposit and decided who would be the shareholders and officers.

[6] 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.

[7] Having regard to the following:

(a) that Mayor McCallion had a close relationship with Peter and a 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.

I find as a fact that, as of the Votes, Mayor McCallion was aware that Peter was an owner of WCD. Section 3 of the *MCIA*, therefore, deems Mayor McCallion to have the same financial interest as Peter.

COULD WCD QUALIFY UNDER THE TRANSITIONAL PROVISIONS?

[8] To qualify under the Transitional Provisions "an application for site plan approval that is complete" had to have been filed by October 7, 2007.

[9] WCD had only filed a Master Site Plan which is conceptual in nature and identifies the location of buildings, access points and the general attributes of the site.

[10] A City by-law required that a site plan application shall not be processed until the application fee was paid. In the case of WCD the application fee for the entire project was initially estimated to be $500,000. WCD paid only 10 per cent of this amount on the filing of the Master Site Plan.

[11] The Master Site Plan application left blank parts of the form intended to list the "general requirements" of the plan and the "building elevations".

[12] I, therefore, conclude that the Master Site Plan application was not a "site plan application that is complete" within the meaning of the Transitional Provisions. WCD could not, therefore, qualify under the Transitional Provisions.

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.

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

[13] 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".

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

[15] Under s. 4(j) of the *MCIA*, it is necessary to first identify the financial interest of the member. In this case, the deemed financial interest of Mayor McCallion was that of an owner of WCD. Depending on the wording of the transitional by-law WCD could save a substantial amount of money. The proper question then is whether this financial interest, namely money riding on the wording of the transitional by-law, is an interest "in common with electors generally". To ask the question is to answer it. It is obviously not an interest in

common. Peter and WCD had a financial interest, and Mayor McCallion had a deemed financial interest, quite different from electors generally.

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

[16] 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.

[17] 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.

[18] The reasonable elector would focus on the plans and preparedness of WCD as of the Votes, and its financial ability at that time to implement its plans.

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

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

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

(c) 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.

[20] A reasonable elector would also consider that Mayor McCallion had demonstrated greater concern for the public interest than Peter's interest by suggesting to OMERS, the owner of the land, that the agreement of purchase and sale require that the hotel be built first. This provision caused, or contributed to causing, the project to not proceed.

[21] 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.

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

[22] 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.

[23] If, contrary to my conclusion, Mayor McCallion contravened the *MCIA*, her participation in the Votes cannot be characterized as an error in judgement or inadvertence.

[24] Mayor McCallion participated in the Votes intentionally having formed the opinion that a vote on development charges cannot give rise to a conflict of interest. Mayor McCallion went so far as to testify that she would not have declared a conflict of interest even if she understood that WCD could save $11 million as a result of the Transitional Provisions. This understanding of her legal

obligations is contrary to common sense. Mayor McCallion was not able to refer to any municipal law educational seminar or publication prior to the Votes that supported this interpretation.

[25] Further, Mayor McCallion was wilfully blind to the status of the WCD development. For all she knew the Transitional Provisions could have saved WCD millions of dollars on the initial phase of the project. Wilful blindness precludes reliance upon the defence of error in judgment or inadvertence.

DID MR. HAZINEH COMMENCE THE APPLICATION IN TIME?

[26] 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*.

[27] Mr. Hazineh stated in his affidavit filed in support of his application that he first learned of Mayor McCallion's 2007 conflict of interest, related to a development charge by-law at Regional Council, from an October 11, 2011 article. When cross-examined out of court, however, he stated that he had probably read a July 17, 2010 article in the National Post which reported the same allegations.

[28] Mr. Hazineh testified in court and was directed to this discrepancy. He testified that on reflection he was in error in stating he had read the National Post article in 2010. He explained that he did not read the National Post on principle because of its editorial stance on the Middle East.

[29] If it was true that Mr. Hazineh never read the National Post it is only logical he would have stated that when first asked about the National Post article at his cross-examination. I conclude Mr. Hazineh's evidence that he never read the National Post on principle was an after the fact rationalization to explain the discrepancy in his evidence. 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.

[30] The National Post article contained essentially the same information as the October 11, 2011 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.

CONCLUSION

[31] The application is, therefore dismissed.