
CITY OF OSHAWA INTEGRITY COMMISSIONER, GUY GIORNO

Citation: Davis v. Carter, 2020 ONMIC 5

Date: February 23, 2020

REASONS FOR DECISION

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CONTEXT

1. Among their responsibilities, municipal Integrity Commissioners in Ontario conduct inquiries into applications alleging that council members or members of local boards have contravened the *Municipal Council of Interest Act*. At the end of such an inquiry, the Integrity Commissioner shall decide whether to apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether the member has contravened section 5, 5.1 or 5.2 of that Act, and shall publish reasons for the decision. Such decision is not subject to approval of the municipal council and does not take the form of a recommendation to council. There is, therefore, no municipal council resolution necessary to give effect to the decision.

THE APPLICATION

2. Section 223.4.1 of the *Municipal Act* allows an elector or a person demonstrably acting in the public interest to apply in writing to the Integrity Commissioner for an inquiry concerning an alleged contravention of section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* (MCIA) by a member of council or a member of a local board.

3. Mr. Jeff Davis (the Applicant) alleges that Mayor Dan Carter (the Respondent) contravened sections 5 and 5.2 of the MCIA by moving, debating, voting on, and trying to influence others on a decision to fund a project jointly sponsored by the Downtown Business Improvement Areas and Carea Community Health Centre, and not declaring a pecuniary interest at committee (September 9) and at Council (September 23).

4. The Application was submitted October 15, 2019.

5. Upon receiving the Application,¹ I conducted an inquiry into the allegation related to Carea Community Health Centre. I exercised my discretion not to inquire into the allegation related to the Downtown BIA.

DECISION

6. Subsection 223.4.1(15) of the *Municipal Act* states that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the MCIA for a determination whether the Member has contravened section 5, 5.1 or 5.2 of that Act.

¹ I assigned the Application file number MCIA-2019-02.

7. After considering all the evidence and the submissions of the parties, I have decided that I will not apply to a judge for a determination whether Mayor Carter has contravened sections 5 and 5.2 of the MCIA.

8. Subsection 223.4.1(17) of the *Municipal Act* requires me to publish written reasons for my decision. These are my reasons.

BACKGROUND

9. Mayor Carter owns a business in the Downtown Business Improvement Area. His spouse is an employee of Carea Community Health Centre, a registered charity.

10. At the Development Services Committee meeting, September 9, Mayor Carter declared an interest in Correspondence DS-19-160, a letter from the Downtown BIA requesting amendments to a by-law. He provided the reason that he is a BIA member [sic] and owner of property within 500 feet of the [affected] area.

11. At the same meeting, the committee considered Report DS-19-146,² related to the Welcoming Streets Initiative. This is a project of the Downtown BIA and Carea Community Health Centre, with the City's support, to assist and to find solutions for unsheltered and vulnerable individuals living in Oshawa. The staff recommendation included a City contribution of \$50,224 to cover costs associated with a community-based outreach worker, de-escalation training for BIA members, and communication materials.

12. The staff report recommended that:

the Development Services Committee recommend that City Council:

1. Endorse the concept of a Welcoming Streets Initiative for Downtown Oshawa as a pilot project for a period of six months from October 1, 2019 to March 31, 2020; and,
2. Authorize the Commissioner of Development Services to enter into a Memorandum of Understanding with the Downtown Business Improvement Area and Carea Community Health Centre, to the satisfaction of the Commissioner of Finance Services and City Solicitor, that outlines the initiative's objectives, the roles and responsibilities of the parties, and any administrative items needed to guide the initiative and ensure its success ...³

² While item DS-19-146 is styled a "Report," it appears to consist entirely of a recommendation.

³ When quoting from documents my practice is to edit capitalization and punctuation for consistency. In this case I replaced "C.A.R.E.A." with the organization's legally registered (and its preferred) name "Carea."

13. Mayor Carter moved, debated, and voted on a motion, “That the Development Services Committee adopt the recommendation contained in Report DS-19-146 concerning Oshawa’s Welcoming Streets Initiative.” The motion carried.

14. I have reviewed the video recording of the meeting. Immediately prior to moving the motion on DS-19-46, the Mayor confirmed that he had not declared an interest.

15. During debate, the Mayor indicated that he had been a part of collaboration among the Downtown BIA, Carea Community Health Centre, and the City’s Economic Development Office, to develop the initiative, including meetings with the City of Guelph (after whose own Welcoming Streets Initiative the Oshawa project was modelled.)

16. The Development Services Committee report was considered by Council, September 23. I have reviewed the recording of that meeting.

17. Mr. Jeff Davis, the Applicant, was present and addressed Council on Item DS-19-146. He alleged a lack of accountability and transparency in how the staff recommendation was developed, and then alleged that the Mayor should have declared a pecuniary interest on the matter. Mr. Davis told Council that he would be filing the present Application.

18. During debate on the committee report, the Mayor left the chair so he could speak to the recommendation contained in Item DS-19-146. The Mayor described the background to the Welcoming Streets Initiative, the stakeholder discussions that led to the proposal, the “health epidemic, mixed with poverty, mixed with addiction, mixed with mental health [issues]” that it is intended to address, and the urgent need for innovative solutions to help individuals by tackling this “complex” challenge.

19. Mayor Carter’s remarks touched on Mr. Davis’s allegation of a conflict of interest:

I spend many hours trying to figure out the best way to be able to address this, and I don’t have the answers, but I am going to do everything I possibly can to be able to meet the needs of individuals in our community. ...I don’t know if it’s going to work, but I’m going to try. ... The indication tonight, [that] I should just excuse myself from this whole thing: I’m not going to. I’m not going to, because people are dying on our streets, and I’m the Mayor of this City and I’m going to do everything I possibly can to make sure that I look at every solution, every idea, and every concept to be able save somebody’s life. You want to hold me accountable, you want to throw me out of my seat because of that, you go ahead and do it.

20. Mr. Davis states that, following the Council meeting, he conducted further research and learned that Mayor Carter and his spouse are donors to the Carea charity. He notes that Carea operates the Hope Centre of Learning and that Carea describes the Hope Centre as “the dream of Dan and Paula Carter.”

21. Upon receiving the Application, I conducted an inquiry.

PROCESS

22. The *Municipal Act* does not direct the procedure that an Integrity Commissioner must follow in handling MCIA applications. I have chosen to follow a process that ensures fairness to both the individual making the application (Applicant) and the Council Member alleged to have contravened the MCIA (Respondent). This fair and balanced process includes the following elements:

- The Respondent receives notice of the Application and is given an opportunity to respond.
- The Respondent is made aware of the Applicant's name. I do, however, redact personal information such as phone numbers and email addresses.
- The Applicant receives the Respondent's Response and is given an opportunity to reply.
- I may accept supplementary communications and submissions from the parties, but generally on the condition that parties get to see each other's communications with me. I do this in the interest of transparency and fairness.

23. In this case, because the Applicant's Reply introduced new issues, I gave the Respondent a right of sur-reply.

24. There was no dispute about the underlying facts, and the submissions and documents provided by the parties were complete. It was unnecessary for me to interview witnesses. I first told both parties that I did not think it was necessary to conduct interviews and invited them to identify any potential witnesses possessing relevant information. They did not.

25. In making my decision, I have taken into account all the submissions of the parties and all of the evidence before me.

SCOPE OF INQUIRY

26. The Application filed by Mr. Davis relies both on the Mayor's connection to Carea Community Health Centre (including his spouse's employment there) and on the Mayor's membership in the Downtown BIA.

27. Under subsection 223.4.1(7) of the *Municipal Act*, whether to conduct an inquiry into an Application alleging breach of the MCIA lies in the Integrity Commissioner's discretion. I determined that I would not conduct an inquiry in relation to the Mayor's

membership in the Downtown BIA and that I would only inquire into the issue related to his spouse's employment with Carea.

28. The Mayor had previously asked for my advice on whether his BIA membership gave rise to a pecuniary interest in Item DS-19-146. I advised him that it did not.

29. It is important to distinguish between the geographic area known as a Business Improvement Area, and the corporation properly known as a Business Improvement Area Board of Management. Owners and tenants of business properties within the geographic area are referred to as members of the Business Improvement Area,⁴ but that does not make them members of the legal entity, that is, members of the corporation that is the Business Improvement Area Board of Management.⁵ The only members of the corporation are the directors of the BIA.⁶

30. It is commonly assumed that so-called BIA members are members of the corporation, when in fact they merely belong to the improvement area. The only members of the corporation are the BIA directors. This has significance under the MCIA, because a Council Member is deemed to have a pecuniary interest in a matter if the Council Member is a member of a body that has a pecuniary interest in the matter. The BIA is not a body, it is an area. If any entity is a body, it is the BIA Board of Management.

31. My written advice to the Mayor included the following:

My advice is that if you, or a family member, owns a business in the Business Improvement Area, then there is no need to declare a pecuniary interest under section 5 of the *Municipal Conflict of Interest Act*.

It appears, from my review of the recommendation, that this recommendation involves the expenditure of money on an initiative of the BIA. This would involve a pecuniary interest of the BIA.

However, the BIA is a local board of the City. Local boards (their members, at least) are themselves subject to the MCIA. In my view, the term "body" in sub-clause 2(a)(iii) of the MCIA does not include a local board.

Even if I am wrong about that, clause 2(a)(iii) refers to members of a body. Legally, the entity (and the local board) is the business improvement board of management. Local business operators are members inside the BIA but they are not members of the board of management. Only directors belong to the board of management. Therefore, members of the BIA (that is, businesses inside the area) are not covered by sub-clause 2(a)(iii) [of the MCIA].

⁴ *Municipal Act*, subs. 204(4).

⁵ *Municipal Act*, subs. 204(2).

⁶ *Ibid.*

In summary, you do not have a pecuniary interest resulting from the BIA membership of self or spouse.

32. Consequently, I determined that I would not inquire into the issue of the Mayor's BIA membership, and would inquire only into the Mayor's connection to Carea Community Health Centre.

POSITIONS OF THE PARTIES

POSITION OF THE APPLICANT (MR. DAVIS)

33. The Applicant relies on the fact that the Mayor has previously declared pecuniary interests in matters related to the BIA and matters related to Carea Community Health Centre. The Applicant argues that the prior declarations are evidence that Mayor Carter does possess a pecuniary interest.

34. Mr. Davis also points out that, under the MClA, the pecuniary interest of a Council Member's spouse is, if known to the Member, also a pecuniary interest of the Member. He observes that the Mayor's spouse is an employee of Carea, giving her (and therefore, also giving the Mayor) a pecuniary interest in matters of pecuniary interest to Carea.

35. In addition, the Applicant argues that the Mayor's words confirm that the failure to declare a pecuniary interest was intentional, not inadvertent.

36. In his reply submissions, Mr. Davis raises the additional argument that the Welcoming Streets Initiative is a personal priority of the Mayor (in a local newspaper column, the Mayor calls the Initiative "near and dear to my heart") and relates to causes (including addressing the opioid epidemic) that Mayor Carter personally champions.

37. According to the Applicant:

Dan Carter's public profile, his political persona and worth, his reputation as a philanthropist, a for-hire motivational speaker, an author, and a community leader were at risk, and all of those things have a monetary value, a direct pecuniary interest.

POSITION OF THE RESPONDENT (MAYOR CARTER)

38. Legal counsel for the Respondent acknowledges that the Welcoming Street Initiative is a personal priority of the Mayor.

39. The Mayor has frequently and diligently declared pecuniary interests on prior occasions, legal counsel observes. Mayor Carter is aware of the requirements of the MCIA and made no declaration on this matter because none was required.

40. Legal counsel acknowledges that Mayor Carter possesses a deemed pecuniary interest in the subject matter of the funding to Carea by virtue of his wife's indirect interest arising from her employment with Carea.

41. However, according to legal counsel, the exception in clause 4(k) of the MCIA applies: The Mayor's pecuniary interest in the matter is so remote that a reasonable elector, apprised of all the circumstances, would not regard this interest as having influenced his actions or decision-making in the matter.

42. Legal counsel provides a several-page summary of all the circumstances that, according to counsel, place this case within the clause 4(k) exception. Though I reproduce only certain aspects of it here, I have read and considered the entirety of the submission.

43. Among the objective considerations cited by the Mayor's counsel are the following:

- Though employed by Carea, the Mayor's spouse is not responsible for managing or hiring staff and is not involved in program delivery.
- Under the agreement with Carea and the Downtown BIA, the City transfers \$50,224 to Carea for the purpose of hiring an outreach worker. The agreement does not state that the City will provide any additional funding to Carea or to the Welcoming Streets Initiative.
- The funding has no impact on the salary or benefits of the Mayor's spouse, the funding goes to activities unrelated to the spouse's continued employment and remuneration, and there is no evidence that the funding is meant to support Carea's continued financial viability.
- Because the funding is used for a specific employee (outreach worker) there is no direct benefit to the Mayor's spouse.
- Carea has no discretion over use of the funding, as it is tied to a specific expense, the hiring of an outreach worker. Counsel argues that this is "flow-through" funding from which Carea derives no general monetary benefit; Carea is only the "nominal" recipient of the funding, and any pecuniary interest that results is "negligible."

44. Subjective considerations relied on by legal counsel for the Mayor include:

- Mayor Carter is an experienced council member who has faithfully served the City and the Region over one term and part of a second term.
- He is not motivated by private profit, or personal or business gain. “It is clear that the Mayor’s intention was to seek to ameliorate the conditions of unsheltered, vulnerable individuals struggling with mental health and addiction challenges, which unfortunately happen to be prevalent in downtown Oshawa.”
- The Mayor acted in good faith and for no interest other than that of the community he was elected to serve.
- The Mayor has been vigilant and conscientious in declaring pecuniary interests in the past, including eight times when the issue was funding or a fee-waiver benefitting Carea.
- The Initiative is of major public interest to the City and his constituents.

45. I should note that the separation of considerations into objective and subjective categories is my own, and not contained in legal counsel’s submissions. I return to these categories under the heading “Issues and Analysis,” below.

46. Legal counsel for the Respondent cited various judicial precedents, including the Court of Appeal decision in *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683, as well as *Amaral v. Kennedy*, [2012] O.J. No. 3766 (Div. Ct.), *Hazineh v. McCallion*, [2013] O.J. No. 2696, and *Craig v. Ontario*, 2013 ONSC 5349.

ISSUES

47. I have considered the following issues:

1. Apart from his spouse’s employment, does the Respondent have a pecuniary interest in the matter of funding to Carea?
2. Does the Respondent have a pecuniary interest by virtue of his spouse’s employment with Carea?
3. Does the exception in clause 4(k) of the MCIA apply?
4. Should I make an application to a judge?

ANALYSIS AND FINDINGS

1. APART FROM HIS SPOUSE’S EMPLOYMENT, DOES THE RESPONDENT HAVE A PECUNIARY INTEREST IN THE MATTER OF FUNDING TO CAREA?

48. No.

49. Mr. Davis essentially argues that Mayor Carter has a pecuniary interest in the Welcoming Streets Initiative because it is a personal and political priority of his.

50. The Divisional Court has defined pecuniary interest as follows: “Generally, it is a financial interest, an interest related to or involving money.”⁷

51. A political interest in a matter does not, on its own, constitute a pecuniary interest in the matter.

52. Further, any impact on the Mayor’s “reputation as a philanthropist, a for-hire motivational speaker, an author and a community leader” is not a financial impact and therefore does not constitute a pecuniary interest. Alternatively, if the impact is financial, then it is too hypothetical, speculative and remote to constitute a pecuniary interest under the MCIA.⁸

2. DOES THE RESPONDENT HAVE A PECUNIARY INTEREST BY VIRTUE OF HIS SPOUSE’S EMPLOYMENT WITH CAREA?

53. Yes. Both parties agree on this point.

54. A pecuniary interest of the employer is indirectly a pecuniary interest of the employee: MCIA, clause 2(b). A pecuniary interest of the spouse is deemed to be a pecuniary interest of the Council Member: MCIA, section 3.

55. Funding paid to Carea is a matter of pecuniary interest for Carea. The Mayor’s spouse is a Carea employee. Consequently, Mayor Carter has a deemed, indirect pecuniary interest in the matter of funding to Carea.

3. IS THE PECUNIARY INTEREST REMOTE AND INSIGNIFICANT UNDER CLAUSE 4(K) OF THE MCIA?

56. Section 4 of the MCIA sets out eleven exceptions to the requirement to declare a pecuniary interest and withdraw from decision-making and voting. One exception is clause (k).

⁷ *Tuchenhagen v. Mondoux*, 2011 ONSC 5398 (CanLII) (Div.Ct.), at para. 31.

⁸ *Gammie v. Turner*, 2013 ONSC 4563, at para. 57; *Darnley v. Thompson*, 2016 ONSC 7466, at paras 59, 63.

Sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have ... (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

57. It should be noted that section 4 does not negate the existence of a pecuniary interest. Section 4 merely provides that the pecuniary interest does not need to be declared and that the Member does not need to withdraw from decision-making, voting and attempting to influence others.

58. The test, under clause 4(k), of what can be reasonably regarded as likely to influence is based on the standard of a reasonable elector fully apprised of all the circumstances: *Ferri v. Ontario*, at para. 16.

59. The wording of clause 4(k) suggests that the nature of the pecuniary interest should be examined to determine whether it is remote and insignificant. However, on several recent occasions the Courts have considered not just the nature of a pecuniary interest but also surrounding factors such as a Council Member's length of service and whether a Council Member was motivated by good faith or private gain.

60. An older view of conflict of interest is that propriety of motive and the presence of good faith are not relevant to the existence of conflict: *Moll v. Fisher* (1979), 23 O.R. (2d) 609 (Div. Ct.) at 612; *Tuchenhagen v. Mondoux* (2011), 107 O.R. (3d) 675 (Div. Ct.) at 686, para. 28.

61. According to this view, a conflict of interest exists regardless of whether personal gain is preferred over private interest: *Cox v. College of Optometrists of Ontario* (1988), 65 O.R. (2d) 461 (Div. Ct.) at 469. Conflict of interest "is not about acting dishonestly or for personal gain": *Tuchenhagen v. Mondoux*, at 686, para. 25. The suggestion that a conflict of interest only arises when a private interest actually interferes with decision making in the public interest is, as the Federal Court of Appeal has observed, to confuse conflict of interest with corruption: *Democracy Watch v. Campbell*, 2009 FCA 79, at para. 51.

62. The Applicant in his submissions refers to the conflict-of-interest education that I provided to Members of City Council. In training sessions for various municipalities, I caution elected officials that a conflict of interest is not eliminated by believing oneself to be acting for one's constituents and motivated by what is best for the municipality. This advice is consistent with the older jurisprudence. Further, it would be rash and unwise to tell Council Members that their pecuniary interests may be ignored, as long as Members deliberate and vote in good faith.

63. Were the interpretation of clause 4(k) entirely up to me, I would assess the remoteness and insignificance of the nature of the pecuniary interest based solely on objective factors, such as the fact that the Mayor's spouse derives no actual economic

benefit from the funding paid to Carea: see *Whiteley v. Schnurr*, [1999] O.J. No. 2575 (S.C.J.), at para.19, and *Lastman v. Ontario*, 47 O.R. (3d) 177 (S.C.J.), which was decided (at paras. 15-16) in favour of the Council Member on the basis of lack any financial benefit to him. On the basis of objective criteria alone, it is possible, though not certain to me, that the clause 4(k) exception applies.

64. Recently, however, the Ontario Court of Appeal, in *Ferri v. Ontario*, has held that several subjective factors must also be considered in determining whether the pecuniary interest of a Member is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Member.⁹ These subjective considerations include, among other factors: a Council Member's length of faithful service, whether the Member is acting in bad faith or good faith, whether the Member is motivated by a potential pecuniary benefit, and whether the matter before Council is of major public interest to constituents.¹⁰ Further, if the case involves a deemed pecuniary interest because of a family member, then an additional consideration is whether the Member is "there for [the Member's] constituents and not for [the Member's relative]."¹¹

65. It is not my place, as a municipal integrity commissioner, to ignore the interpretation of the Ontario Court of Appeal that public-mindedness and unselfish motives may be sufficient to obviate a conflict of interest. The Mayor has stated that he acted in good faith, motivated solely by the public interest, on a matter of importance to his constituents. On the basis of *Ferri v. Ontario*, his deemed, indirect pecuniary interest is of a remote and insignificant nature as described in clause 4(k). The interest did not need to be declared, and Mayor Carter did not need to withdraw from debate, voting, or influencing others.

4. SHOULD I MAKE AN APPLICATION TO A JUDGE?

66. Whether to make an application to a judge is a decision that the *Municipal Act* leaves to the Integrity Commissioner, based on what the Integrity Commissioner feels is appropriate.

67. *Ferri v. Ontario* states the current law of the Province, and is binding on the Superior Court of Justice to which an application would be brought. I will not commence a Court application and take a position opposite to *Ferri*.

68. Further, the costs of a Court application would be borne by the City. I will not consume City resources on litigation that seeks an outcome inconsistent with *Ferri*.

⁹ In this respect, the Court of Appeal was applying the reasoning of the Divisional Court in *Amaral v. Kennedy*, [2012] O.J. No. 3766, and of Justice D.A. Broad in *Craig v. Ontario*, 2013 ONSC 5349.

¹⁰ *Ferri v. Ontario*, at para. 21.

¹¹ *Ferri v. Ontario*, at para. 17, endorsing the test in *Amaral v. Kennedy*, at para. 41.

69. I do not consider it appropriate for me to apply to a judge for a determination as to whether Mayor Dan Carter has contravened the MCIA.

DECISION

70. I will not apply to a judge under sections 5 and 5.2 of the MCIA for a determination as to whether Mayor Dan Carter contravened the MCIA on September 9 and September 23.

PUBLICATION

71. The *Municipal Act* requires that after deciding whether or not to apply to a judge, the Integrity Commissioner shall publish written reasons for the decision. This decision will be published by providing it to the City to make public and by posting on the free, online CanLII database as decision 2020 ONMIC 5.

72. Subsection 223.5(2.3) of the *Municipal Act* states that I may disclose in these written reasons such information as in my opinion is necessary. All the content of these reasons is, in my opinion, necessary.



Guy Giorno
Integrity Commissioner
City of Oshawa

February 23, 2020