CITATION: Cauchi v. Marai, 2019 ONSC 497
COURT FILE NO.: CV-18-7216-00
DATE: 20190204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GEOFFREY FRANCIS CAUCHI, Applicant

AND:

PAUL MARAI, JANE MICHAEL and ARLENE ANNE-MARIE IANTOMASI, Respondents

BEFORE: Regional Senior Justice Peter A. Daley

COUNSEL: Geoffrey Cauchi, Self-Represented

Kim Mullin, for the Respondents

HEARD: September 28, 2018

REASONS FOR DECISION

[1] The applicant sought a variety of relief on this application, including a declaration that the respondents breached s. 5(1) of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("*MCIA*").

[2] The essence of the applicant's position was that the respondents, as members of the Halton Catholic District School Board (the "Board") were in breach of the *MCIA* as a result of an indirect pecuniary interest in the matter before the Board.

[3] Following submissions from counsel, by endorsement dated October 2, 2018, I dismissed the application with my reasons for decision to follow. These are my reasons.

BACKGROUND & EVIDENTIARY RECORD:

[4] The applicant filed a very substantial application record, purportedly in support of the relief sought by him; however, when considered in its totality, the applicant's position was simply based on his disagreement with the respondents as to the interpretation and application of Catholic doctrine and his disagreement with the active participation of the Ontario English Catholic Teachers Association ("OECTA") in the Board's democratic process.

[5] The applicant produced a large amount of information in his application record that was to a large degree inadmissible, as it was in the nature of speculation and innuendo, as well as expressions of his own personal opinions regarding the respondents' alleged disqualifying pecuniary interest. Counsel for the respondents did not seek to have any portion of the applicant's evidentiary record struck out, however, in considering the application. I have concluded that in many instances, the so-called evidence adduced in the informational record submitted was entirely inadmissible for the purposes of the application, and in my review of this matter below, I will make reference to areas of the record which were not and could not be considered as proper and admissible evidence on this application.

[6] As the applicant is a resident of the Town of Oakville and he and his wife have enrolled their child in an elementary school within the jurisdiction of the Board, counsel for the respondents acknowledged that the applicant did have standing to proceed with his complaints against the respondents under the *MCIA*. However, a preliminary objection was taken with respect to whether or not the proceeding was properly brought under r. 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[7] Rule 14.05(3)(d) lists the types of proceedings that may be brought by way of an application under that rule and states as follows:

> 14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,...
>
> > (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution.

[8] While the issues at stake on this application do not obviously fall within the language of r. 14.05(3)(d), it is arguable that some aspects of the application involve the determination of the parties' rights depending on the interpretation of a statute (namely, the *MCIA*). As such, the respondents' preliminary objection was denied and the matter was fully argued.

[9] At the material time, the respondents were each trustees of the Board and had previously held senior positions on the Board, including as chair and vice chair.

[10] The events that triggered the applicant's allegations in this application related to campaign donations of $400 which OECTA paid to each of the respondents in 2014 and endorsements made by OECTA in favour of each respondent during the election campaign in that year. It is undisputed that the respondents also received campaign donations from other donors and that OECTA also endorsed other candidates during the 2014 election.

[11] It is the applicant's position that the campaign donations made by OECTA, along with its endorsement of the respondents, constituted an indirect pecuniary interest contrary to the *MCIA*, which impacted the respondents' views on what is referred to as the Sanctity of Life Motion (the "SOL Motion"), discussed further below.

[12] It is the evidence of the respondents, which is uncontradicted, that they had no discussions with any representative of OECTA regarding the SOL Motion and that they had no agreement or understanding with OECTA to vote in any particular way on a matter before the Board.

[13] The issue of Sanctity of Life initially arose as a matter before the Board at a meeting on November 21, 2017, at which time a trustee, other than the respondents, put forward a motion banning the Board from engaging with contractors or charities who directly or indirectly supported abortion, contraception,

euthanasia, stem cell research or anything considered in breach of the Catholic Church's position regarding "Sanctity of Life".

[14] On the return of this motion in November 2017, the Director of Education, indicated that such a resolution would require the Board to hire full-time staff to carry out the necessary monitoring. As a result of those expressed concerns, and further because of their own personal concerns that the motion was rushed and that the issue should be investigated further, the respondents on this application voted against the motion.

[15] On January 16, 2018, the trustee who first brought forward matters related to Sanctity of Life at the board meeting in November 2017, moved for a new motion, namely the SOL Motion, which dealt only with the issue of charitable donations within the context of Sanctity of Life. In summary, the SOL Motion called for the Board to deny financial donations to any charities or non-profits that publicly supported, either directly or indirectly, abortion, contraception, sterilization, euthanasia or embryonic stem cell research.

[16] The respondents voted against the SOL Motion, and their uncontradicted evidence is that they did so because of the same concerns they had with respect to the original motion. The majority of the board members voted in favour of the SOL Motion, and as such, it carried.

[17] On January 22, 2018, OECTA directed a letter to the Board setting out its disagreement with the Board's approval of the SOL Motion. This letter was included in the board materials for the next scheduled meeting of February 20, 2018.

[18] It is the uncontradicted evidence of each of the respondents that OECTA's letter of January 22, 2018, did not influence their views with respect to the SOL Motion, as they had already voted on that motion before the letter was sent.

[19] The chair of the Board returned the SOL Motion to the Board's meeting agenda for February 20, 2018, asking that that motion be reconsidered. On that date, a majority of the trustees, including the respondents, voted to defeat the original SOL Motion. However, the record indicates that the motion continued to be a subject of debate at this meeting after the initial vote, and ultimately the majority of the trustees voted again in favour of reinstating the SOL Motion, with the Respondents, Michael and Iantomasi, voting against it. The result was that the SOL Motion remained in force.

[20] Following the meeting of February 20, 2018, parents and students offered feedback. Ultimately, the Board heard delegations in March and April 2018 from stakeholders, and it was the respondents' uncontradicted evidence that a majority of the stakeholders opposed the motion. The uncontradicted evidence of the respondent Marai was that the motion was opposed by stakeholders not simply as

a result of the substance of the SOL Motion, but also due to the process by which the issue was addressed: where a major policy change was to be considered, the normal process was that such a change would first be considered by the Board's Policy Committee and then returned to the board for a first reading and debate. If the proposal passed first reading, it would be sent out for stakeholder feedback and then returned to the Board for a second and third reading. None of those steps were taken.

[21] Further, the uncontradicted evidence of the respondent Marai is that during his consultation with constituents and stakeholders, it was apparent that both parents and students were upset by the Board's refusal to allow them to fundraise for hospitals that were caring for their loved ones and, further, the proposal would end already-planned fundraising campaigns before the end of the school year in June, 2018.

[22] As a result, the respondent Marai brought a Motion to Amend with the intention of seeking to allow students to finish their fundraising activities for the school year; allow for a comprehensive community consultation; and, regardless of the ultimate decision, ensure that the decision would be fully integrated into the Board's existing fundraising policies.

[23] The Motion to Amend was placed on the Board's agenda for its meeting on May 1, 2018.

[24] Prior to the May 1 board meeting, the applicant and OECTA communicated with the Board. By his letter of April 30, 2018, the applicant stated in part:

> "...the Trustees intending to vote in favour of the motion to suspend has received financial contributions to his election campaigns in the past, and have good reason to suspect that all of the Trustees have been contacted by OECTA and promised support in the next election campaign if they vote the way the union wants them to vote on this issue, and threatened with active efforts to defeat them in the election..."

[25] The applicant's April 30 letter also referred to an email message from OECTA that had been sent to its membership, inviting them to defeat what was referred to as the "Slate of 5". The parties to this application agree that the reference to "Slate of 5" refers either to the five trustees who voted in favor of the SOL Motion on January 16, 2018, or to the five trustees who voted to reinstate it at the end of the February 20, 2018, meeting.

[26] The respondent Marai acknowledged having received a copy of the OECTA email, referenced above, on April 23, 2018, but testified that he did not recall actually reading the email at the time and only became aware of its contents when he read the applicant's letter of April 30, 2018. His uncontradicted evidence is that he gave no consideration to the email because he had already announced his intention not to run for re-election, and this intention was made known on social media on April 30, 2018.

[27] The respondents Michael and Iantomasi have offered uncontradicted evidence that they were not aware of the OECTA email until after the board meeting of May 1, 2018, and there is no evidence whatsoever to the contrary.

Further, the evidence is that neither of these respondents were running for re-election.

[28] The applicant's letter of April 30, 2018, was the first instance that anyone had raised a pecuniary conflict of interest in respect of the SOL Motion. Marai's evidence is that although he perceived no financial interest giving rise to a conflict of interest in respect of the SOL Motion or the Motion to Amend, he requested that the Director obtain a legal opinion on the issue. As such, at the outset of the board meeting of May 1, 2018, the trustees were provided with a legal opinion from the law firm Miller Thomson, dated May 1, 2018, which concluded that no conflict of interest existed vis-à-vis the respondents within the context of the *MCIA*. The uncontradicted evidence of the respondents is that they did not believe they had any pecuniary interest in the SOL Motion or the Motion to Amend since they had not made any agreement with OECTA to vote in any particular way and, further, they had not had any communication whatsoever with OECTA regarding the matter.

[29] At the conclusion of the May 1, 2018, board meeting and during the public portion of the meeting, the respondent Marai moved on the Motion to Amend, which carried as a majority of the trustees voted in favor of the motion.

LEGAL FRAMEWORK:

[30] The legislative purpose of the *MCIA* is to prohibit any vote by someone who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence in municipal councils and local boards, including school boards, will be maintained.

[31] Section 5(1) requires that every member of a council or local board, including a school board, who is in attendance at a meeting of a council or board and at which time has any pecuniary interest, direct or indirect, in the matter under consideration, disclose the interest, take no part in the discussion or vote and to not in any way attempt to influence the voting on the matter in question.

[32] The present application is premised on the existence of an indirect pecuniary interest held by the respondents and that that interest crystallized on a date no later than May 1, 2018.

[33] The term "pecuniary interest" as used in the *MCIA* (and specifically, in s. 5(1)) is not defined in the legislation; however, it has been held that a "pecuniary interest" must be a financial, monetary or economic interest. The pecuniary interest must be definable and real with the potential to affect the interests of the member and not simply a hypothetical or speculative interest. As such, "it is appropriate to strictly interpret the pecuniary interest threshold": *Magder v. Ford*, 2013 ONSC 263, 113 O.R. (3d) 241 (Div. Ct.), leave to appeal to the S.C.C. refused, [2013]

S.C.C.A. No. 117, at paras. 6, 42-43; *Darnley v. Thompson*, 2016 ONSC 7466, M.P.L.R. (5th) 325, at paras. 59-60; (*Ministry of Attorney General*), 2015 ONCA 683, 127 O.R. (3d) 613, at paras 9-10.

[34] Further, s. 4(k) provides that s. 5 does not apply to pecuniary interests in any matter where the interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member.

[35] Section 2 of the *MCIA* specifically addresses circumstances involving an "indirect pecuniary interest". That section reads as follows:

> 2. For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,
>
> (a) the member or his or her nominee,
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> (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,
>
> (ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or
>
> (iii) is a member of a body,
>
> that has a pecuniary interest in the matter; or
>
> (b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter.

[36] As such, to establish an indirect pecuniary interest in the matter before a board or council, the applicant must demonstrate that the corporation or body that

the member has an affiliation with has a pecuniary interest in the matter before the board or council.

[37] Section 2 has been held by this court and the Divisional Court to expressly define what constitutes an "indirect pecuniary interest". Further, it has been held that s. 2 is exhaustive and that there is no residual discretion to find an indirect pecuniary interest in circumstances other than those stated in s. 2: *Lorello v. Meffe*, 2010 ONSC 1976, 99 M.P.L.R. (4th) 107, at paras. 34-38; *Bowers v. Delegarde* (2005), 5 M.P.L.R. (4th) 157, at paras. 84-85; *Magder*, at para. 5; *Gammie v. Turner*, 2013 ONSC 4563, 11 M.P.L.R. (5th) 177.

[38] Submissions were made by both sides on this application as to the mandated penalty under the *MCIA* in the event there was a finding on the balance of probabilities that an indirect pecuniary interest was established in respect of the respondents. Given my determination that the application must be dismissed, I will not address the issues raised and the submissions made by the parties regarding the appropriate penalty in the event an indirect pecuniary interest were to have been found.

ANALYSIS:

[39] As referenced above, on an application such as this, there must be cogent evidence establishing on the balance of probabiliites that an actual and real pecuniary interest existed at the time of the consideration of the matter by the Board. The applicant has asserted the existence of an indirect pecuniary interest.

[40] The evidentiary record submitted by the applicant is devoid of any cogent and admissible evidence as to the existence of any form of pecuniary interest. The supporting affidavit material submitted by him is largely in the form of his own personal opinions and what he refers to as "social facts", and he also calls upon the court to draw certain inferences based on "common human experience". None of the purported evidence as described by the applicant in these categories, by use of these descriptors, is admissible evidence on this application, and as such, the applicant's personal views and opinions as well as the so-called "common human experience" basis for drawing inferences has not been considered by me in determining the outcome of this application.

[41] It is clear from the statements made by the applicant in his supporting affidavit material that he, as a "separate school supporter" of the Board as defined in the *Education Act*, R.S.O. 1990, c. E.2, s. 1, strenuously disagreed with the role and the position taken by OECTA in the conflict over the interpretation of denominational rights and Catholic doctrine with regards to the SOL Motion.

[42] It is notable that in cross-examination on his affidavit evidence, the applicant acknowledged that the basis for his assertion that the respondents acted in bad faith, in terms of the alleged breaches of the MCIA, was in part founded on his belief that their positions on various issues were not sufficiently in line with Catholic teaching.

[43] The applicant's evidence – his supporting affidavits and his cross-examination – offers no admissible evidence whatsoever to support his assertion that the respondents had any form of direct or indirect pecuniary interest in the matter before the Board, namely the SOL Motion or the Motion to Amend.

[44] He asserted that there are three "primary facts" that support his allegation that the respondents had an indirect pecuniary interest in the motions at issue. The primary facts asserted are as follows: (i) the respondents received campaign contributions and endorsements from OECTA in 2014; (ii) OECTA made its views on the SOL Motion known through its letter of January 22, 2018, wherein OECTA's representative indicated its disagreement with the Board trustees' approval of the SOL Motion; and (iii) in an email from OECTA dated April 21, 2018, it threatened to work against the re-election of trustees who supported the SOL Motion.

[45] It was the applicant's further position that "secondary facts" supported his application, including the fact that campaign contributions were made by OECTA in favour of the respondents.

[46] The applicant submitted that the payment of campaign contributions to the respondents by OECTA in the sum of $400 each in 2014 would lead a "reasonably well-informed Catholic elector" to conclude that the respondents had an indirect pecuniary interest as of May 1, 2018, such that they should have disqualified themselves from participating in the vote on that date. There is no jurisprudence whatsoever for this proposition as put forward by the applicant.

[47] At the time of the campaign contributions by OECTA in 2014, the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched., s. 88.8 (4) did not prohibit campaign contributions from unions or corporations, however the *Act* was subsequently amended in 2016 to prohibit such contributions. The applicant made the extraordinary submission that this legislative change reflected the "social facts" that a reasonable person would draw the inference of an indirect pecuniary interest merely from the fact that a candidate for election received a campaign contribution from a union, and as such, this very remote inference is supportive of his argument that an indirect pecuniary interest must be inferred in the circumstances in this case. Such a submission is entirely rejected, as if it were accepted, it would lead to an absurd result that contributions made prior to the amendment to the legislation would be retroactively illegal. No authorities supporting this extraordinary submission were offered.

[48] The British Columbia Court of Appeal in its decision in *King v. Nanaimo (City)*, 2001 BCCA 610, 94 B.C.L.R. (3d) 51, concluded that a landowner who put

forward a development application before a municipal council and who had made campaign contributions to one of the councilors did not put the councilor in a position where he/she had to disqualify themselves. The court noted that the mere fact of the landowner making media campaign contributions was not enough to disqualify the councilor. This was further applied in the British Columbia Supreme Court decision of *Highlands Preservation Society v. Corp. of the District of Highlands*, 2005 BCSC 1743, 17 M.P.L.R. (4th) 117, at paras. 54-60.

[49] Notably, the applicant acknowledged in cross-examination that he has no evidence that any of the respondents made any agreement with OECTA to vote in any particular way in exchange for the campaign contributions or endorsements, and it is the uncontradicted evidence of each of the respondents that they had no such agreement with OECTA. In the absence of any evidence and on the basis of the admissions of the applicant, I find that there was no such agreement between the respondents and OECTA.

[50] The record is clear that the applicant did not assert that OECTA had any pecuniary interest in the matter of the SOL Motion, but seemingly inferred that it had a political interest in the outcome of the vote on that motion. Such an interest, if it exists, is not one captured by the provisions of the *MCIA* and as such, if such a political interest existed it would not be a basis for finding that the applicant's claim of conflict arose from an indirect pecuniary interest.

[51] Similarly, the applicant's submission that both campaign contributions and endorsements in favor of the respondents by OECTA created a patronage relationship and were intended to purchase influence have no support in any admissible evidence filed by the applicant. He acknowledged that his argument on this point is based entirely on his own opinion and common human experience. Such opinion is completely inadmissible, and the determination of the question of conflict of interest based on an indirect pecuniary interest cannot be based simply on one's common human experience.

[52] As to the OECTA letter of January 22, 2018, wherein OECTA outlined its disagreement with the trustees' approval of the SOL Motion, each of the respondents has offered uncontradicted evidence that this letter had no impact on their views on the SOL Motion or the Motion to Amend.

[53] Similarly, as to the email of April 21, 2018, from OECTA, inviting Board members to defeat five trustees who voted in favour of the SOL Motion, there is no evidence whatsoever that that email impacted the respondents, and the uncontradicted evidence of the respondents is that it did not. Further in the case of the respondents Michael and Iantomasi, both have given evidence that they were not aware of the email until after the May 1, 2018, board meeting.

[54] On this record, I must therefore conclude that the respondents were not influenced by either the campaign contributions or any endorsements or communications received by them from OECTA.

[55] Further, the applicant acknowledged in cross-examination that OECTA's position on various social issues are at odds with his own and his views of Catholic doctrine and further, in spite of his assertion that OECTA's conduct with respect to the SOL Motion was unlawful, no proceeding was commenced by him against OECTA.

[56] Although I have concluded that the respondents did not have any direct or indirect pecuniary interest in the SOL Motion or Motion to Amend, I have further concluded that even if an interest was found to have existed in respect of each of the respondents, it was so remote and insignificant that it could not reasonably be seen as likely to influence the respondents.

[57] Although the applicant asserts that the respondents are not entitled to rely upon the exemption provided for in s. 4(k) of the *MCIA*, I have concluded that they would be entitled to rely on that exemption in the event that it was determined that a pecuniary interest, direct or indirect, existed in this case.

[58] I further find that no objective person could reasonably view the possible loss of a future campaign contribution in the magnitude of $400 as likely to influence the respondents in all the circumstances, which I find as matters of fact

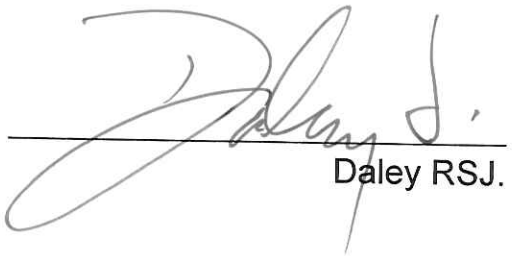
on this record to be as follows: (1) the lengthy history of service of each of the respondents; (2) the fact that each of the respondents had voted against the SOL Motion; (3) the evidence with respect to the views of the Director of the Board as to the difficulties involved in implementing the SOL Motion and the need for community consultation; (4) the community feedback overwhelmingly opposing the SOL Motion; (5) the respondents' uncontradicted evidence about their motivations for taking the positions they did; (6) the absence of any evidence whatsoever of bad faith on the part of the respondents; and (7) the fact that none of the respondents were running for re-election and that the respondent Marai had announced his decision not to run prior to the May 1, 2018, meeting.

[59] In reaching the conclusion that the respondents had no indirect pecuniary interest, I have determined that there is no evidence of any relationship as between the respondents and OECTA that would be captured by s. 2 of the MCIA. Specifically there is no evidence that the respondents were members with the attributes referenced in s. 2 (a) (i), (ii), or (iii) nor as described in s. 2 (b) and as such the potentiality of the respondents having an indirect pecuniary interest did not even exist on the evidentiary record adduced.

CONCLUSION:

[60] For the above reasons, the application is dismissed in its entirety.

[61] In the event that the parties are unable to resolve the issue of costs of this application, counsel for the respondents shall deliver a Bill of Costs and submissions of no longer than 3 pages within 30 days from the date of the release of these reasons, followed by similar submissions on behalf of the applicant within 30 days thereafter. No reply submissions are to be filed.



Daley RSJ.

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