CITATION: City of Elliott Lake v. Pearce, 2021 ONSC 7859
DIVISIONAL COURT FILE NO.: 306/21
DATE: 20211202

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Lederer and Doyle, JJ.

BETWEEN:	
CITY OF ELLIOT LAKE (INTEGRITY COMMISSIONER) Applicant (Appellant)	*Raivo Uukkivi* and *Paul Cassan*, for the Applicant (Appellant)
– and –	
ED PEARCE Respondent (Respondent in Appeal)	*R. Douglas Elliot* and *Timothy J.L. Phelan*, for the Respondent (Respondent in Appeal)
	HEARD at Toronto (by videoconference): October 18, 2021

Lederer, J.

Introduction

[1] This is an appeal of a decision made by Gareau J. on March 11, 2021 pursuant to the *Municipal Conflict of Interest Act*[1] (reported as 2021 ONSC 1851). The judge found that the Respondent, a member of the council of the City of Elliot Lake, had failed to comply with the duties put in place by the legislation. He imposed as a penalty that the Respondent be reprimanded by the court. The Appellant, the Integrity Commissioner for the City of Elliot Lake, who was the Applicant before the judge, believes the penalty to be insufficient, inappropriate and removed from the policy concerns which inform the legislation. He brings this appeal seeking to set aside the penalty and to obtain an order removing the Respondent from his office as a member of council.

[1] R.S.O. 1990, c. M.50

Background

[2] The *Municipal Act*[2] authorizes municipalities in Ontario to appoint an Integrity Commissioner. The individuals appointed to this position are directed, by the legislation, to report to the council of the municipality but to carry out the responsibilities of the position in "an independent manner".[3] Among the responsibilities of an Integrity Commissioner is the application of sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act.*[4] These sections explain the duty of members of council or local boards so as to avoid any conflict of interest. This responsibility extends to allowing for an application to be brought, by an Integrity Commissioner, to a judge to determine whether a member of council has contravened the sections noted.

[3] In this case, acting on this authority, the Integrity Commissioner of Elliot Lake brought an application seeking the removal from office of the Respondent Ed Pearce, a member of the council of the City of Elliot Lake.[5] Ed Pearce was not only a member of council; he was also a member of the Board of Directors of the Elliot Lake and North Shore Corporation for Business Development (referred to by the parties as "ELNOS"). ELNOS is a non-profit corporation established to stimulate economic growth in the City of Elliot Lake and surrounding communities.

[4] The circumstances leading to the application are rooted in a part of the City's recent and not happy history. The Algo Centre Mall, a significant shopping hub located in the City, collapsed. Two people were killed and others injured. A commission of inquiry investigated and reported on the events surrounding the collapse. In time, the council turned to what should be done at the site. Elliot Lake is marketed as a retirement community. The shopping choices that are available to retirees are an important part of that marketing. A new developer constructed a mall to service the community but had difficulty attracting anchor tenants. An untested retailer offered to take up a substantial amount of space. The landlord was concerned about its viability. Both the City and ELNOS had an interest in seeing a functioning shopping mall return to Elliot Lake. An arrangement was struck. ELNOS would loan approximately $200,000 to the retailer to purchase inventory and the City would guarantee the retailer's rent obligation for ten years.

[5] The new store struggled. The Respondent has a background in marketing and communications. He attempted to assist the retailer, on a voluntary basis, with a new business plan. The plan did not succeed. The retailer defaulted on its rent obligations beginning in late 2018 and early 2019. It accumulated $30,000 in arrears for which the City was liable as guarantor.

[6] The situation was embarrassing to the City and its council. This was an election year. The council wanted to find a way to avoid a public expenditure and to avoid questions about its role in the failing business. It was decided that the payment of the arrears to the landlord would, in effect, be "laundered" through ELNOS, minimizing the chances that the public would become aware of

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[2] S.O. 2001, c. 25
[3] *Ibid* s.223.3(1)
[4] *Ibid* s. 223.3(1) para. 3
[5] Although referred to in the style of cause as the Town of Elliot Lake, the municipality was incorporated as a City in 1991.

the arrangement. Payments to ELNOS would not attract public attention in the same way that direct payments to the retailer or landlord would.[6]

[7] I pause to observe that while not central to the issue in this case, the best that can be said for this arrangement is that it contradicts the idea that government should be open and transparent. I will return to this concern later in these reasons

[8] It remained for the City to repay the $30,000 to ELNOS. At a closed session of the council, held on May 13, 2019, the issue of whether this payment should be made was raised. There was a debate. There were those who did not wish to make the payment. The Respondent took a position on the issue and engaged in the discussion. He was in favour of the payment being made. A vote on the issue was deferred to the meeting of council scheduled for June 24, 2019. The vote taken was that ELNOS was to be repaid the sum of $30,000 that was owing to it.

[9] Pursuant to a complaint from an elector, the Integrity Commissioner undertook an investigation. He concluded that the Respondent had contravened the *Municipal Conflict of Interest Act* by failing to recuse himself at the May 13, 2019 meeting of council. The Integrity Commissioner alleged that, in taking part, the Respondent acted in violation of the provisions of the *Municipal Conflict of Interest Act* by virtue of his position as a member of the ELNOS board. The Integrity Commissioner brought an application to the Court.

[10] The judge found that the Respondent had a pecuniary interest, as defined in s. 2(a)(i) of the *Municipal Conflict of Interest Act* in the ELNOS debt pursuant to his role as a director of the corporation. He concluded that the Respondent was in breach of s. 5(1) and (2) of the *Act.* It was left to the judge to impose a penalty pursuant to s. 9. He did so. He noted that the Respondent, having received training that addressed the issue of conflict of interest and having been warned about conflict in the situation at hand nonetheless determined to act based on "his own views". The judge found that despite these failings the penalty should be proportionate to the act and that in this case the act fell "at the absolute lowest level." He also noted that the Respondent had apologized. The judge concluded that a reprimand by the court was "adequate punishment that meets the ends of justice on the facts of this case." [7]

The Appeal

[11] The *Municipal Conflict of Interest Act* s. 11(2) allows for an appeal from the order of a judge to the Divisional Court. This appeal was brought, not by the Respondent who was found to have acted in the face of a conflict of interest, but by the Appellant, the Integrity Commissioner, on the basis that the penalty imposed was insufficient. The root of the appeal is that the judge failed to recognize, appreciate and act on the policy direction on which the *Municipal Conflict of Interest Act* is founded. The Notice of Appeal asserts, among other things, that:

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[6] The judge noted that the facts in this case "are not substantially in dispute". On this understanding, he quoted paras. 14 and 15 of the Factum of the Respondent before him (also the Respondent on this appeal) which establish this understanding of the catalyst for the payment by ELNOS (*Decision of Justice Gareau* at para. 6 (Caselines A20)).

[7] *Decision of Justice Gareau* at paras. 38-41 (Caselines A31)

- the judge failed to appreciate that amendments made to the *Act* were intended to increase, not decrease, accountability of public officials,

- the standard applied by the judge was inconsistent with the statutory requirements of the *Act* and the long-standing jurisprudence holding public officials to a "very high standard" and

- the judge failed to appreciate the significance of the requirement that public officials must conduct government business with integrity and impartiality in a manner that bears the closest scrutiny.

The Appellant argues that the only appropriate penalty in the circumstances was an order to remove the Respondent from office.

Legislative History

[12] To understand the basis for the position being taken, some history is helpful. It sets the context.

[13] The concern that municipal politicians not profit as a result of holding office is one of long standing. The following quotation comes from a decision rendered by the Supreme Court of Ontario in 1911:

> It is of the utmost importance that members of a municipal council should have no interest to bias their judgment in deciding what is for the public good and they should strive to keep themselves absolutely free from the possibility of any imputation in this respect.[8]

[14] In Ontario, the first *Municipal Conflict of Interest Act*, separate from the *Municipal Act*, was enacted in 1972.[9] It represented a change in approach. The pre-existing provision of the *Municipal Act* provided for disqualification only in specific circumstances. It lacked any general or guiding principle. It was penal in nature and strictly interpreted. The new law centred on disclosure, rather than the specification of detailed disqualifying clauses. I note the policy on which this new approach was founded. It was, in part, to respond to the fact that under the old regime, failing to disclose an interest, not involving a contract as the source of a conflict, did not bring about forfeiture of office. At the same time the *Act* took account of the concern that "municipal government can be, and should not be, deprived of the services of good people."[10]

[15] The 1972 *Act* was draconian in its impact. Under that legislation, to avoid any conflict of interest, the principal obligation of a member of council was to disclose any direct or indirect conflict of interest he or she had, as defined by the legislation, and to refrain from taking part in

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[8] *R. v. Homan* (1911), 19 O.W.R. 427 aff'd, 19 O.W.R. 621 quoted in Ian MacF. Rogers Q.C. "Conflict of Interest A Trap for Unwary Politicians"(1973), 11 Osgoode Hall Law Journal at p. 538

[9] S.O. 1972, c. 142

[10] Rogers *supra* at p. 543. The quotation is of the Hon. Dalton Bales Q.C., then Attorney-General, in introducing the legislation in the Legislature.

any discussion or vote with respect to the matter at hand. Failure to disclose would, upon application by an elector and the subsequent order by a judge, result in removal of the member of council and the seat declared vacant. The only exceptions were if the breach was through inadvertence or a *bona fide* error in judgment.

[16] The *Municipal Conflict of Interest Act* was revised in 1983.[11] Conflicts, as defined in the 1972 *Act,* had continued to centre on those caused by involvement (direct or indirect) with contracts to which the municipality was a party or which could be affected by a decision of the council but a catchall had been added ("or, in any other matter in which the council or local board is concerned").[12] The 1983 *Act* had no specific reference to contracts and moved to a more general understanding of how to recognize a conflict ("where the member…has any pecuniary interest…in any matter and is present at a meeting of the council….at which the matter is the subject of consideration".)[13]The 1983 *Act* was uncompromising when a conflict of interest was present. An "elector," within six weeks of learning of a potential conflict, could apply to the court for a determination as to whether the *Municipal Conflict of Interest Act* had been contravened.[14] If there was such a breach the judge had no option. The court was compelled to declare the seat of the member vacant and, in addition, could disqualify the member from returning, as a member, for up to seven years and, where the conflict had resulted in financial gain, could require the member to make restitution.[15] The only exception, as it had been in the 1972 *Act,* was in circumstances where the contravention was through inadvertence or by reason of a *bona fide* error in judgment.[16]

[17] The authority of the judge upon a finding of a contravention of the *Municipal Conflict of Interest Act* remained unchanged until 2017 with the enactment of the *Modernizing Ontario's Municipal Legislation Act*[17]. Schedule 3 of that statute amended the *Municipal Conflict of Interest Act.* It introduced s. 1.1 which provides an overarching and general statement of principle describing the duties of members of council:

> **1.1** The Province of Ontario endorses the following principles in relation to the duties of members of councils and of local boards under this Act:
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> 1. The importance of integrity, independence and accountability in local government decision-making.
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> 2. The importance of certainty in reconciling the public duties and pecuniary interests of members.

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[11] S.O. 1983, c. 8
[12] *Municipal Conflict of Interest Act,* S.O. 1972, s. 2(1)
[13] *Municipal Conflict of Interest Act*, S.O. 1983, c. 8, s. 5(1)
[14] *Ibid* s. 9(1)
[15] *Ibid* s. 10(1)
[16] *Ibid* s. 10(2)
[17] S.O. 2017, c. 10 -Bill 68

> 3. Members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny.
>
> 4. There is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise.

[18] It added to those who could apply to a judge for a determination that the *Act* had been contravened. It was no longer only "an elector" but also "an Integrity Commissioner" and "a person demonstrably acting in the public interest" who were authorized to make such an application.[18] Most importantly, the judge was given flexibility in the options available upon a finding that the *Municipal Conflict of Interest Act* had been breached. The judge was no longer obliged to declare the seat of the member vacant. There were options:

> **9** (1) If the judge determines that the member or former member contravened section 5, 5.1 or 5.2, the judge may do any or all of the following:
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> 1. Reprimand the member or former member.
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> 2. Suspend the remuneration paid to the member for a period of up to 90 days.
>
> 3. Declare the member's seat vacant.
>
> 4. Disqualify the member or former member from being a member during a period of not more than seven years after the date of the order.
>
> 5. If the contravention has resulted in personal financial gain, require the member or former member to make restitution to the party suffering the loss, or, if the party's identity is not readily ascertainable, to the municipality or local board, as the case may be.[19]

[19] The Legislature went further. It provided guidance as to some of the factors that could be considered, by the judge, in exercising her or his discretion in the presence of a breach of the *Act*:

> (2) In exercising his or her discretion under subsection (1) the judge may consider, *among other matters*, whether the member or former member,

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[18] *Municipal Conflict of Interest Act,* R.S.O. 1990, c. M.50, s. 8, as amended by the *Modernizing Ontario's Municipal Legislation Act*, S.O. 2017, c. 10 -Bill 68, Sched. 3, s. 8(1)
[19] *Ibid* s. 9(1)

> (a) took reasonable measures to prevent the contravention;
>
> (b) disclosed the pecuniary interest and all relevant facts known to him or her to an Integrity Commissioner in a request for advice from the Commissioner under the *Municipal Act, 2001 or the City of Toronto Act, 2006* and acted in accordance with the advice, if any, provided to the member by the Commissioner; or
>
> (c) committed the contravention through inadvertence or by reason of an error in judgment made in good faith.[20]
>
> [Emphasis added]

[20] Over time the legislation has evolved. It has moved from a narrow set of specified restrictions, generally associated with contracts involving the municipality and in which the member may have an interest, to a broad understanding that all matters where there is a connection to both the municipality and the member can be the catalyst for a conflict of interest. The last set of changes broadens the participation in the court proceedings that determine if the *Act* has been contravened. The legislation has moved beyond relying on individual electors who *may have* a personal interest, to include the Integrity Commissioner, a public official, with a mandate to ensure compliance with the *Municipal Conflict of Interest Act* in the general interest of the public and to include others who, without the legislative mandate, nonetheless, are concerned in the public interest. With respect to the recourse available to the judge upon determining that a member with a conflict of interest has failed to comply with the duty the *Act* imposes, the legislation has broadened from an obligation to declare the member's seat vacant to a range of escalating options which the judge is to apply in her or his discretion.

[21] To my mind this is all consistent with the intent expressed at the time the 1972 *Act* was brought forward and the principles now found in s. 1.1. The concern was not just to demand, through strict measures, that members act with integrity and impartiality, but also not to go so far as to discourage good and competent people from taking on public responsibilities, both of which are directed to the idea that local government should be open, competent and transparent. There is a balance to be struck.

How the Integrity Commissioner sees the changes

[22] The Integrity Commissioner sees this quite differently. The submissions made on his behalf suggest that amendment to the sanctions available to judges was not a change at all:

> While the application judge acknowledged the availability of a wide range of penalties, he erred in principle and law when he assumed this provided greater discretion than before, all without considering how the changes to section 9 were introduced.

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[20] *Ibid* s. 9(2)

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> Based on this series of changes, there is no principled basis to depart from the approach to penalty in the common law prior to the changes to the MCIA, at least insofar as considering when a breach is serious and warrants something greater than a removal from office. [21]

[23] As perceived by the Integrity Commissioner the only substantive change was to the treatment of situations where a member had breached the duties found in the legislation but had done so through inadvertence or a *bona fide* error in judgment. In the *Municipal Conflict of Interest Act* as it existed before the amendments of 2017, such circumstances were an exception, in essence a defence. If either inadvertence or a *bona fide* error was the reason for the breach, the member was "not subject to having his seat declared vacant."[22] In the legislation as it exists today, contravention through inadvertence or by reason of an error in judgment is one of the factors a judge is to consider in exercising her or his discretion as to the remedy to be applied.[23] The Factum filed on behalf of the Integrity Commissioner explains the breadth of the change as he sees it:

> The changes signal that more conduct will be subject to penalties under the MCIA, ensuring conduct that was previously exempt from penalty is now subject to at least a reprimand. Now, even where a conflict arises through inadvertence or an error in judgment made in good faith, a penalty will be imposed.[24]

[24] According to the Integrity Commissioner, not only do the changes not provide increased discretion to the judge, they are a confirmation that those who fail to adhere to the duties imposed by the *Municipal Conflict of Interest Act* are to be strictly and severely dealt with, regardless of the circumstances:

> Signaled by the legislature with the changes is an acknowledgement that a member of Council is still subject to severe penalties even if a breach occurs through inadvertence or an error of judgment made in good faith.[25]

The import of the legislative changes

[25] It is fundamental that any understanding of legislation begins with the plain and ordinary meaning of the words. The words have changed. The *Act* means something different than it did prior to the amendments of 2017. Judges now have a discretion they did not have before with respect to penalty. Removal from office is no longer a default remedy to be applied without consideration of the circumstances. Now there is a series of possible penalties, any or all of which can be imposed in a given circumstance.

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[21] *Factum of the Integrity Commissioner* at paras. 51 and 58 (Caselines A362 and A364)
[22] *Municipal Conflict of Interest Act*, S.O. 1986, c.8, s. 10(2) and the *Modernizing Ontario's Municipal Legislation Act*, S.O. 2017, c. 10 -Bill 68, Sched. 3, s. 7, which repealed sections 8, 9 and 10 of the *Municipal Conflict of Interest Act*
[23] See fn. 14 (s. 9(2) (c), as quoted herein)
[24] *Factum of the Integrity Commissioner* at para. 52 (Caselines A362)
[25] *Ibid* at para. 56

[26] The question that remains is whether the judge exercised his discretion in a manner inconsistent with what the law allows and whether he provided adequate reasons for imposing the penalty he did.

Standard of Review

[27] In dealing with the issue of the standard of review the Appellant points to what is referred to as competing decisions. On the one hand it has been held that there is no principled reason why the Divisional Court should not afford the usual deference to the "trial judge" on an appeal under s.11 of the *Municipal Conflict of Interest Act.*[26] This is the generally accepted view. On the other hand, it has been suggested that given the importance of our being confident in the actions, honesty and decisions of those we elect to govern, appellate review should not be limited. This is not unlike an allegation of "bias" in an administrative decision-maker. There would be no "standard of review." [27]

[28] In this case, the court is asked to consider only the penalty that was applied following the finding that the *Act* had been contravened. The determination of the appropriate penalty is a matter of discretion.

[29] Contrary to the position taken by the Integrity Commissioner, the amendments to the legislation neither confirm a limited, nor maintain a necessarily strict, exercise of discretion in the consideration of any penalty. On a plain reading of the words, the *Act* now offers to the judge any one of, or any combination of, the listed penalties as the judge may decide is appropriate in the circumstances. The considerations referred in the *Act* that may be brought to bear on a consideration of penalty (as quoted at fn. 20 above) serve to corroborate the wider discretion the legislation provides for.

[30] Decisions on matters of discretion are given great deference by appellate courts. An exercise of discretion should only be interfered with where there has been an error of law or where the discretion is exercised on wrong principles or misapprehended evidence.[28] The test for appellate review of the exercise of judicial discretion has otherwise been described as whether the judge, at first instance, has given sufficient weight to all relevant considerations.[29]

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[26] *Amaral v. Kennedy*, 2012 ONSC 1334 (Div. Ct.) at para. 11 in appeal of 2010 ONSC 3806, 2010 CarswellOnt 11221, 2010 ONSC 3806, 217 A.C.W.S. (3d) 867 and see *Magder v. Ford*, 2013 ONSC 263 (CanLII) at paras. 27-28

[27] *Tuchenhagen v. Mondoux*, 2011 ONSC 5398 (CanLII), 107 OR (3d) 675, 284 OAC 324, 88 MPLR (4th) 234 at para. 25. This was appealed to the Court of Appeal. It did not deal with the merits. Rather it found that the legislation provided that the decision of the Divisional Court was final and that, accordingly, the Court of Appeal had no jurisdiction to hear a further appeal (*Tuchenhagen v. Mondoux*, 2012 ONCA 567 (CanLII)).

[28] *Zeitoun v. Economical Insurance Group*, 2008 CanLII 20996 (ON SCDC) at paras. 40 and 52 and see *1250264 Ontario Inc. v. Pet-Valu Canada Inc.*, 2013 ONCA 279, 115 O.R. (3rd) 653, at para. 40

[29] *Reza v. Canada*, [1994] 2 SCR 394 at pp. 404-05 as quoted in *British Columbia Investment Management*, 2018 BCCA 47 (CanLII), [2018] 7 WWR 235, 5 BCLR (6th) 237 at para. 59 both referring to *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 76-77, *per* La Forest J. and also to *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110, at pp. 154-55

The position of the Integrity Commissioner

[31] The position of the Integrity Commissioner is grounded in the idea that any reasonable application of the facts to the legislative direction and the policy in the *Municipal Conflict of Interest Act* could not lead to a reprimand as a penalty supportable in law and must lead inexorably to the Respondent being removed from office and his seat declared vacant.

[32] There is nothing that supports such an understanding. It is based on a false presumption that the legislation, as amended, far from leading to increased discretion in the determination of what, in any particular circumstance, is an appropriate penalty, remains narrow, even arbitrary in what it directs. On its face this is wrong. The changes to the legislation do more than extend the possibility of a penalty being imposed where the breach of the *Act* involves inadvertence or a *bona fide* error in judgment. Rather they open up a series of possible penalties to be applied alone or in concert with others on the list to any and all circumstances where an individual is found to have acted outside the duties the legislation prescribes. The discretion left to the judge is far broader than whether a councillor, having lost his seat, should also be disqualified from running for election for up to seven years or, where he or she has directly profited from the conflict of interest, should be required to provide restitution to those who suffered losses.

[33] The facts in this case were not disputed.[30] It is not surprising that if a set of facts is applied to an incorrect understanding of the relevant legislation, the resulting determination will not stand. In this case the Integrity Commissioner points to facts to submit that if "properly" applied would lead inexorably to a penalty that would see the seat of the Respondent declared vacant. This is in contradiction of the broadened discretion the *Act*, as amended, provides.

[34] Among the findings relied on by the Integrity Commissioner is that the Respondent, as a director of ELNOS, had a pecuniary interest in the $30,000 the corporation was owed. He was not going to personally profit by the repayment of the funds. It was an "indirect" pecuniary interest but, given that he was a director of ELNOS, he was in breach of the *Act.*

[35] The Factum filed on behalf of the Integrity Commissioner refers to *Adamiak v. Callaghan*[31] as a useful example of the analysis of how a penalty should be imposed. The Respondent, Deborah Callaghan, was a member of council. Her husband was the fire chief. She voted twice (two consecutive years) to increase the salary grid which set the income for municipal employees. This included her husband. She was found to have breached the *Municipal Conflict of Interest Act.* A penalty had to be imposed. This was before the recent amendments. The judge understood that he was "required to apply s. 10(1) to impose a penalty" and was, accordingly, obliged to declare the seat vacant. The member had chosen not to run for re-election. She was no longer on council. The judge exercised his limited discretion to disqualify the member from seeking office for six years but not to require restitution of the salary increases her husband had received.

[36] This case is only helpful if you accept the Appellant's view that the amendments do not broaden the judicial discretion, that the judge is obliged to vacate the member's seat because of

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[30] *Reasons of Justice Gareau* at para. 6 (Caselines A20) referred to and relied on at *Factum of the Integrity Commissioner* at para. 13 (Caselines A350)
[31] *Supra* (fn. 28)

the conflict of interest here, and that the only discretion is limited to the additional penalties of disqualification and restitution. However, there is more to note in this case. Surely a vote to increase a spouse's salary is qualitatively different from voting to have the municipality pay a debt owed to a non-profit organization dedicated to improving the community at large. With the broader discretion the legislation now provides, there is still a breach of the *Act* by the councillor, but the difference could be, I suggest should be, brought to bear on the assessment of the appropriate penalty.

[37] The failure to take the approach proposed by the Integrity Commissioner is not, as he would have it, an error of law. The judge's choice of penalty was an exercise of discretion based on a different balance of the values at stake and an assessment of the facts of the case. He was considering not just the punishing of an individual who breached the *Municipal Conflict of Interest Act*, but weighing the significance of this breach against the danger of creating a disincentive to good people running for office.

[38] I point out that there was evidence before the judge of the Respondent's contribution to the community and the nature of his involvement in the debate concerning the payment of the $30,000. On November 28, 2019 the Respondent swore an Affidavit. Exhibit A to that Affidavit is a letter, from the Mayor with the heading "Re; Councilor Ed Pearce – MCOIA" and the salutation "Your Honour". It says, in part:

> Councilor Pearce has continued to work for the best interest of our community both as a councilor and also prior to being elected to serve the community. I do not personally believe there was a malice intent on his behalf and although we do realize his mistake, it would be a great loss to our community as [a] whole to see councilor Pearce removed from his position. I would like to thank you for your consideration in this matter.[32]

[39] This speaks to how the Respondent is perceived in the community and reflects on the nature and value of his contribution to that community. While acknowledging that the Respondent had made a mistake, he was recognized as a valuable, positive and constructive contributor.

[40] On a broader exercise of discretion this is a value to be taken into account:

> …The decision of the judge on the application is a reflection of the values of the community. In respect of the penalty, some deference should be afforded to the decision he has made.[33]

[41] In his decision the judge referred to and quoted an interview of the Chief Administrative Officer of the City of Elliot Lake where he spoke to the Respondent's efforts to deal with the failure of the retailer:

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[32] *Affidavit of Edmund Pearce*, sworn November 28, 2019, Ex. A, Appeal Book and Compendium-Appellant at p. 296 (Caselines A304)

[33] *Tuchenhagen v. Mondoux, supra* (fn. 25) at para. 69

> So, he's at that ELNOS. So ELNOS – uh Turners owes ELNOS a boatload of money. And Ed has a background in marketing and communications and is, you know, 70-some years old and is no slouch, so uh, he was working for a time, not for payment, but you know, volunteering his efforts to work with Turners to try to get them to turn around their business plan and get their ships together so they could pay the bills.[34]

[42] If a valued member of the community, one who involved himself directly in the problem at hand is, nonetheless, severely punished for his error, it does raise a concern that this could be a disincentive to others who might consider becoming involved in community matters.

[43] The letter from the Mayor also notes:

> Councilor Pearce is a member of the board [of ELNOS] at large and has from time to time provided council with feedback information that has protected the municipality from making harsh or uninformed decisions. In this specific case, if not for Councilor Pearce providing council with information the municipality would have made a dire choice having a negative impact financially for the city and essentially damaging a long standing working relationship with ELNOS.[35]

[44] This reflects on the need that government be transparent. From a community perspective it would be important that any effort to withhold from the public the fact of the commitment the council had made to guarantee the rent of the retailer and the use of ELNOS to "launder" the payment be rendered transparent. The debate of this issue at council, in which the Respondent took part (it would seem a leading part), would have assisted in bringing this into the public domain.[36] This does not necessarily stand to the credit of the Respondent but it does demonstrate that this legislation can have a role to play in furthering transparency in local government, a concern raised earlier in these reasons.

[45] The misreading of the legislation, by the Integrity Commissioner, is furthered by his treatment of the considerations the legislation, in its current form, brings forward to be applied to considerations of penalty and are referred to by the Integrity Commissioner as mitigating factors.[37] The Integrity Commissioner acknowledged that the list found in the legislation was "non-comprehensive" but went on to say:

> What is striking about this list is that all the identified factors are mitigating factors. Lack of personal financial gain <u>is not</u> identified as a mitigating factor in this list.[38]

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[34] *Decision of Justice Gareau* at para. 36 (Caselines A30)
[35] *Affidavit of Edmund Pearce*, sworn November 28, 2019, Ex. A, Appeal Book and Compendium-Appellant at p. 296 (Caselines A304)
[36] I say "assist" because the meeting of May 13, 2019 was closed but the vote taken on June 24, 2019 and any discussion in preparation would have been public. In his submission made in support of the Respondent it was said that the June 24, 2019 meeting was when the actual debate and vote took place (Decision of Justice Gareau at para. 19 (Caselines A25)
[37] See: s. 9(2) of the *Municipal Conflict of Interest Act* quoted at fn. 19 above.
[38] *Factum of the Integrity Commissioner* at para. 64 (Caselines A365)

[46] The legislation does not limit the list. The items in s. 9(2) are noted as being "*among other matters"*.[39] This is demonstrative of the broader discretion that the legislation confers on the judge. It does not limit the factors that act as mitigation, it widens it. There is no reason why the lack of personal gain could not, depending on the circumstances, be a mitigating factor. I return to the case of *Adamiak v. Callaghan* and repeat the question already asked: is there a difference between a conflict that results in an increase in a spouse's salary as opposed to one that results in a non-profit corporation engaged in furthering the interests of the community at large being paid money it is owed? To my mind there is, and it is apparent that the judge reached the same conclusion. The Integrity Commissioner does not agree. He believes:

> Councilor Pearce is deemed to have the same financial interest as ELNOS in the $30,000 decision.[40]

[47] This statement demonstrates the conviction of the Integrity Commissioner that the discretion of the judge remains narrow and limited.

[48] There is no error of law or principle in the exercise of discretion exercised by the judge in his consideration of the penalty to be imposed on the Respondent as a result of his being in breach of the *Municipal Conflict of Interest Act.* The judge considered the gravity of the conduct and the principle of proportionality, concluding that removal should be a penalty in the most egregious cases. In his view, the misconduct of the Respondent was at the "absolute lowest level" of severity. This is a conclusion he was entitled to make, given the record before him.

The Reasons

[49] The only question that remains is whether there is any obligation to provide better reasons supporting the penalty imposed and if so whether the reasons given were, in this case, sufficient. Any penalty imposed cannot be arbitrarily selected. Some rationale for the choice needs to be provided. This does not suggest that reasons for remedy need be long or comprehensive but they must permit meaningful appellate review.

[50] The reasons do not need to repeat what has been said in explaining the decision on the merits; in this case, why the Respondent was found to have contravened the *Municipal Conflict of Interest Act.* No determination of remedy can be separated from the findings on the merits. The decision as to the merits inform the determination of the appropriate remedy:

> *For the reasons set out,* this court finds that Edmund Pearce breached sections 5 (1) and (2) of the *Municipal Conflict of Interest Act* by failing to recuse himself from the May 13, 2019 Elliot Lake City Council meeting in which a matter in which he had an indirect pecuniary interest was being discussed and debated. This court finds that the appropriate penalty for this breach is a reprimand to Edmund Pearce, pursuant to section 9 (1).1 of the Act.[41]

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[39] See fn. 19.
[40] *Factum of the Integrity Commissioner* at para. 64 (Caselines A365)
[41] *Reasons of Justice Gareau* at para. 40 (Caselines A31)

> [Emphasis added]

[51] In dealing with remedy the judge did provide reasons to be considered in company with the determinations made as to the merits:

> Despite these failings on the part of the respondent, it is still *a principle of law that any penalty imposed must be proportionate* to the act committed. The penalty sought by the applicant, Mr. Pearce's removal from office, is, in my view, reserved for the most egregious cases. This is not the case. I agree with counsel for the respondent that on the spectrum, this would be the absolute lowest level. *Mr. Pearce offers an apology* in his affidavit sworn on November 28, 2019.[42]
>
> [Emphasis added]

[52] In providing this foundation (both from the decision as to the merits and these additional reasons) for the remedy he imposed, the judge understood something that the Integrity Commissioner does not. In making his decision as to the penalty to be imposed, as a result of the amendments to the *Act*, he has a broad discretion:

> The Act that governs the issues before the court is the *Municipal Conflict of Interest Act*, R.S.O. 1990, Chapter M.50. This Act was amended in 2017 with the amendments proclaimed on March 1, 2019. The effect of the amendments pertaining to the case at bar concern the penalties that can be imposed for a contravention of the Act, as set out in section 9. This amended section *gives the court more discretion with a range of penalties that include reprimand to removal from office and a disqualification* from office for a period of up to seven years. [43]
>
> [Emphasis added]

[53] In the absence of the increased discretion the Integrity Commissioner would not need to consider anything other than those factors that point to the presence of a conflict and the failure to comply with the duties the *Municipal Conflict of Interest Act* imposes in deciding whether to bring an application before the court. With those established, the Integrity Commissioner believed that there was no option but to remove the Respondent from office. This being so there would be no reason:

- to raise, as the judge did, the fact that the Respondent would not personally gain or lose money as a result of the discussion that the money paid by ELNOS should be repaid;[44]

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[42] *Ibid* at para. 38 (Caselines A31)
[43] *Ibid* at para. 10 (Caselines A21)
[44] *Ibid* at para. 18 (Caselines A25)

- to consider that the positions the Respondent took were all directed to the responsibility of the City to make the payment and the harm that would be caused to its reputation if it did not;[45]

- to address the fact that $30,000 is not an insignificant sum, that the citizens of Elliot Lake would not view it to be insignificant and the forceful and passionate position the Respondent took in response to that understanding;[46]and

- to consider, as the judge did, that while good faith on the part of the Respondent would not negate his responsibility to abide by the legislation it could come into play when considering the penalty to be imposed.[47]

[54] These considerations along with the apology and the desire that any penalty be proportionate provide a rationale for a lesser penalty than loss of office or a suspension.

[55] In summary, as the letter from the Mayor sets out, these facts demonstrate that, viewed in the overall context a broader discretion calls for, the Respondent was a valued and dedicated contributor to the community of Elliot Lake and that while he made an error, the overwhelming fact is that, in the situation at hand, he acted for the benefit of that community and not his own. These facts, all from the reasons of the application judge, demonstrate the basis on which he was able to and did exercise his discretion to impose a reprimand as the appropriate remedy.

[56] In the absence of any recognition of the broader discretion the Integrity Commissioner felt free to make the following absolute statements:

> It is impossible to imagine that a court can characterize an individual acting in a flagrant manner contrary to the MCIA (or any law for that matter), and achieving a $30,000 benefit for an entity that they are associated with, as being an offense at the lowest possible level. Contempt for the law is not a trivial thing.[48]

And

> There is simply no reasons or rational path to judgment. Rather than being provided with the "what" and "why" of the decision, a person reading this decision is left wondering: What, why, and how is that decision possible on these facts?[49]

[57] In the presence of the broader discretion these statements go too far. They are hyperbole made in an attempt to emphasize a point. The problem with hyperbole is that it washes out nuance; nuance which is the result of the application of the wider discretion the legislation, as it stands today, provides for. In this case this approach would ignore mitigating factors the Integrity

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[45] *Ibid* at para. 20 (subparas. 72, 74, 75, 76) (Caselines A25 -A27)
[46] *Ibid* at para. 24 (Caselines A28)
[47] *Ibid* at para. 27 (caselines A28)
[48] *Factum of the Integrity Commissioner* at para. 94 (Caselines A374)
[49] *Ibid* at para. 95 (Caselines A374)

Commissioner had conceded, in its factum before the application judge, should be taken into account:

(a) At no time did the Respondent act in his own monetary self-interest

(b) The Respondent's split loyalties were between two entities that had as their mandate the best interests of the City

(c) The Respondent's involvement with ELNOS was not a secret and was well known to all members of council and the staff of the City

(d) The reckless agreement to guarantee the rent of the failed retailer that the ELNOS transaction was intended to disguise was made without any involvement of the Respondent. It was made before his election as a councillor.[50]

[58] The reasons of the judge could have been more clearly stated but are adequate to allow meaningful appellate review of his penalty decisions. There is no basis for appellate intervention.

Conclusion

[59] The determination of the judge that the penalty imposed be a reprimand was the result of a proper exercise of the discretion left to the Court by the *Municipal Conflict of Interest Act*, as amended. The reasons provided are sufficient. The appeal is dismissed.

Costs

[60] Costs to be paid by the Appellant to the Respondent in the agreed amount of $16,000.

The error in the judge's formal order

[61] The formal order of the judge found in the Appeal Book is dated December 7, 2020. This is an error, as the decision was not given until March 11, 2021. As requested by counsel at the hearing of this appeal, an order is to go amending the date of the order of Gareau J. to March 11, 2021 *nunc pro tunc.*

Lederer J.

Lederer, J.

I agree

K. Swinton J.

Swinton, J.

I agree

A. Doyle J.

Doyle, J.

Released: December 2, 2021

[50] *Factum of the Respondent (Respondent in Appeal)* at para. 57 quoting *Factum of the Applicant*, dated January 20, 2020 (Caselines B138-B139)

CITATION: City of Elliott Lake v. Pearce, 2021 ONSC 7859
DIVISIONAL COURT FILE NO.: 306/21
DATE: 20211202

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Lederer and Doyle, JJ.

BETWEEN:

CITY OF ELLIOT LAKE (INTEGRITY COMMISSIONER)

Applicant (Appellant)

– and –

ED PEARCE

Respondent (Respondent in Appeal)

REASONS FOR JUDGMENT

Lederer J.

Released: December 2, 2021