

Expertise for Municipalities (E4m)
Non-Profit Association
1894 LASALLE BLVD. SUDBURY, ON, P3A 2A4

Integrity Commissioner
for the Town of Cochrane



INQUIRY REPORT/DECISION

ALLEGATION: CONTRAVENTION OF THE
*MUNICIPAL CONFLICT OF INTEREST ACT &
THE TOWN OF COCHRANE CODE OF
CONDUCT*

**BY: (FORMER) COUNCILLOR SHEA
HENDERSON**

I. REQUEST FOR INQUIRY

- [1] On October 22, 2020, E4m as Integrity Commissioner (“IC”) received a request for an inquiry (hereinafter the “Application”) with respect to Shea Henderson (“Councillor Henderson”), an elected member of the Town Council (“Council”) for the Town of Cochrane (the “Town”). The Applicant is an elector under the *Municipal Conflict of Interest Act* (the “MCIA”) and was therefore entitled to make an Application for an inquiry under section 223.4.1 of the Municipal Act. The Applicant declared that the Application was made within six (6) weeks of the applicant becoming aware of the alleged contravention.
- [2] In the application, the Applicant, alleged that Councillor Henderson contravened section 5(1) (a), (b), and (c) of the *MCIA* when he participated in matters Council was considering related to the Cochrane Polar Bear Habitat (the “Habitat”) when he had previously declared a pecuniary interest in matters that Council was considering related to the transition of the Habitat to the Canadian Polar Bear Habitat (the “Charity”), a charitable corporation.
- [3] More specifically, the Applicant alleged that at a Council meeting on October 9, 2020, Councillor Henderson participated in the Special Closed Meeting that was convened to discuss matters related to the transition of the Habitat to the Charity.
- [4] Further, it was alleged that Councillor Henderson requested and received, confidential documents that were previously reviewed/considered by Council at closed meetings where Councillor Henderson had declared a pecuniary interest and did not participate.

II. FINDINGS/CONCLUSION

- [5] Councillor Henderson, on October 6, 2020, October 9, 2020, breached section 5(1) of the *Municipal Conflict of Interest Act* in the following ways:
- a. Councillor Henderson had prohibited pecuniary interests in that he was a volunteer for the Habitat and therefore was a member of a body with a pecuniary interest in the matter being considered by Council (the transition).
 - b. Councillor Henderson had a prohibited pecuniary interest as his spouse was an employee of the Habitat and then an ex-employee of the Habitat and therefore Councillor Henderson had a deemed pecuniary interest.
- [6] Councillor Henderson, breached section 5(2) of the *Municipal Conflict of Interest Act* in the following ways:
- a. Notwithstanding his deemed and indirect pecuniary interests in the Habitat, he attended and participated in closed meetings where the transition and operation of the Habitat was discussed.
- [7] Contraventions of the *Municipal Conflict of Interest Act* are also contraventions of the Code of Conduct.

III. INQUIRY PROCESS

- [8] Upon receipt of the Application, we completed an initial review of the statutory declaration and the accompanying material submitted by the Applicant and determined that there were sufficient grounds to conduct an inquiry into the matter.
- [9] The matter was assigned to Sean Sparling (the “Investigator”), an investigator with Investigative Solutions Network (“ISN”) who interviewed the Applicant, witnesses, and Councillor Henderson.
- [10] The following were interviewed as part of this inquiry:
- a. Mayor Clement on November 17, 2020
 - b. Paul Bradette, Chair of the Charity Board, on November 23, 2020
 - c. Alice Mercier, Municipal Clerk, on December 3, 2020
 - d. Darren Ottaway, CAO on December 12, 2020, and January 13, 2021
 - e. Dean Breathat, Member of the Charity Board, on February 23, 2021
 - f. Alexandre Laferriere, Communications and Public Affairs Advisor at Desjardins, on April 14, 2021
 - g. Councillor Henderson on December 12, 2020, and April 8, 2021
- [11] We queried the Municipal Clerk regarding the registry of written declarations of pecuniary interest and reviewed the agendas, minutes, and audio recordings of Council meetings from February 19, 2019, to November 17, 2020.
- [12] Additionally, we reviewed emails and other pertinent municipal records from both open and closed sessions as they related to the employment/pecuniary interest of Councillor Henderson’s Spouse and the Habitat.
- [13] The conclusions we arrived at with respect to these matters are based upon the standard of a balance of probabilities. Balance of probabilities is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct “more likely than not” [50.1%] took place, and that the behaviour is a breach of the Town’s Code of Conduct. As required, assessments of credibility have been made. These assessments are based on:
- Whether or not the individual has firsthand knowledge of the situation
 - Whether or not the individual had an opportunity to observe the events
 - Whether or not the individual may have bias or other motive
 - The individual’s ability to clearly describe events
 - Consistency within the story
 - The attitude of the individual as they are participating
 - Any admission of dishonesty¹

¹ *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at Para 10, 11. Alberta (Department of Children and Youth Services) v. A.U.P.A. (2009), 185 LAC (4th) 176 (Alta.Arb.)

[14] The Investigator found that the Applicant, the witnesses and Councillor Henderson were all credible.

IV. FINDINGS OF FACT

[15] The circumstances that give rise to the request for inquiry are related to Councillor Henderson's participation in Council meetings whereat Council was considering matters related to the Habitat and in which the Habitat had a pecuniary interest. More specifically the negotiations between the Town and the Charity regarding transition of the Habitat.

Reference: Applicant Request for Inquiry dated October 22, 2020

[16] Councillor Henderson has resided in the Town for almost seven (7) years. He previously resided in a fly-in community where he was teaching. He reported that he loves being a volunteer and became involved in the community through the Farmer's Market and the Rec Board.

Reference: Transcript of Interview with Councillor Henderson dated December 12, 2020

[17] Councillor Henderson was elected to Council for the 2018-2022 Council Term. He advised that he had people in the community encouraging him to run for Council and was surprised to be elected because there were several long-time Cochrane residents who were also running.

Reference: Town of Cochrane Election Results October 22, 2018
Transcript of Interview with Councillor Henderson dated December 12, 2020

[18] Councillor Henderson advised the Investigator that he was a newbie to everything municipally related, but he is learning transferable skills. He also reported that he is a cautious person, not an overt risk-taker.

Reference: Transcript of Interview with Councillor Henderson dated December 12, 2020

Polar Bear Habitat

[19] The Town of Cochrane owned and operated the Habitat. The Habitat was not a separately incorporated body and was operated as a department of the Town.

[20] Councillor Henderson's partner/ common law spouse, Dylan McCart ('Councillor Henderson's Spouse') was an employee of the Town working at the Habitat as the Conservation Coordinator, until October 9, 2020.

Reference: Applicant Request for Inquiry dated October 22, 2020
Transcript of Interview with Councillor Henderson dated December 12, 2020
Transcript of Interview with Darren Ottaway CAO dated December 12, 2020

- [21] Councillor Henderson does a lot of volunteer work in the Town and was a volunteer with the Habitat until he resigned on October 20, 2020, after he requested and received advice from the IC.

Reference: Transcript of Interview with Councillor Henderson dated April 8, 2021
Councillor Henderson Request for Advice from the IC (October 20, 2020)

- [22] The Town does not have a specific protocol for recruiting and approving volunteers. Nor do they have a process for accepting/acknowledging the resignation of a volunteer.

- [23] During the inquiry it was also determined that Councillor Henderson operated a catering business. From time to time his business provided catering services or had been solicited to provide catering services for functions held at the Habitat. This information was not provided by Councillor Henderson and was uncovered when emails between employees of the Habitat and Councillor Henderson were reviewed by the Investigator. When interviewed by the Investigator Councillor Henderson confirmed that he had a business called "Soup! There It Is" which he began in 2015.

- [24] Councillor Henderson also reported that prior to his election to Council in 2018, his business did profit from the catering events at the Habitat. After the election, Councillor Henderson continued to provide catering services for events, volunteering his time and being reimbursed for expenses related to the purchase of items necessary to cater the events.

Councillor Training

- [25] Council, including Councillor Henderson, received training on their responsibilities as members of Council as well as their obligations under a number of pieces of legislation including the *MCI/A*. Council received training on two occasions: June 10, 2019, and January 21, 2020. The training was carried out by Paul Cassan, a lawyer from Wishart Municipal Law Group/Wishart Law Firm ("WMG") who practices municipal and employment law and Peggy Young-Lovelace a representative of E4m (acting as an agent of the IC).

Reference: June 10, 2019, Meeting Recording <https://youtu.be/lvYOfJ-zlwI>
WMG/E4m Power Point Presentation

- [26] During the training Council was advised of the role of the IC to provide advice, training, conduct inquiries as well as public education. Council was encouraged to seek advice

from the IC when they have questions about their responsibilities/obligations under the Code of Conduct, the *MCIA* or other ethical policy adopted by Council. And that it is less costly to seek advice from the IC than the cost of an inquiry. Should a member of Council be found to contravene the *MCIA*, the IC may take the Councillor to court and the Councillor is responsible for their own legal costs to defend the action. If found to have breached the *MCIA*, by the court, the Councillor may be required to pay the legal expenses of the Town.

- [27] Council was further trained on the confidential nature of requests for advice and that the only time an IC can disclose that they have given advice to a Councillor is if the Councillor agrees or if the Councillor has released only part of the advice and the IC deems it necessary to release the whole of the advice.
- [28] Council was also trained that when seeking advice from the IC a member should provide as much detail as possible. They should treat the IC the same as they would their legal counsel and disclose everything that is pertinent. If they do not disclose everything the IC's advice will not be binding and could not be relied upon.
- [29] Council was also trained related to their obligation to not influence a matter they have a pecuniary interest in "before, during or after the meeting" in compliance with section 5 of the *MCIA*.
- [30] When Councillor Henderson was interviewed on whether his participation was potentially an act of influence contrary to the *MCIA* he stated:

"I'm just speaking from my perspective um, you know, if that's seen as influence, I know, I know when the integrity commissioner gave us our training she let us know that a blink of an eye could be seen as influence in some cases, but I'm speaking from what my intent was, my intent was not to try to influence a conversation it was trying to – I'm sorry I was mistaken I thought it was about that report from Jennifer uh but related to the snowmobile museum my intent was not to stop a vote from happening or push a vote forward it was to let the process in place that Council had voted to have in place actually be able to operate without an open Council conversation that really could influence it."

Advice Sought from the Integrity Commissioner

- [31] Councillor Henderson sought advice from the Integrity Commissioner on several occasions regarding his obligations under the *MCIA* as it related to matters Council was debating that involved the Habitat. The IC provided advice to Councillor Henderson on:
- i. November 4, 2019
 - ii. October 20, 2020
 - iii. December 27, 2020
 - iv. January 21, 2021

[32] In all requests for advice Councillor Henderson did not provide the IC with sufficient details for the IC to provide specific advice. Councillor Henderson advised that he was seeking advice as an abundance of caution and that he did not want to contravene the MCI/A. He reported to the IC that he was unable to provide detail about what Council would be considering as the material had not been disclosed and he could only make assumptions based on vague information from the CAO.

[33] The IC opinion included the following statement:

“We assume that you have provided all of the relevant facts to provide this advice, we assume that all facts are correct and true at the time of this advice. Our advice is subject to change and will not bind the office of the Integrity Commissioner (E4m) in the event that relevant facts that have not been provided or it is found that the facts provided are not complete and accurate”.

[34] The written advice from the IC on November 4, 2019, explicitly advised Councillor Henderson that he had a **deemed pecuniary interest**, in matters Council related to the **pecuniary interest** of the Habitat because his spouse was employed by the Town and working at the Habitat. To be clear, Councillor Henderson was prohibited from participating in any discussion or vote that affected the financial interest of the Habitat. Additionally, Councillor Henderson was advised that he ought not attempt to influence any decision affecting the pecuniary interest of the Habitat before, during or after the meeting.

[35] It is important to note that Councillor Henderson, when seeking advice, did not disclose to the IC either that he was a volunteer for the Habitat, until his request on October 14, 2020, nor that he had a catering business that provided services at and in support of the Habitat.

[36] In the November 4, 2019, opinion letter the IC stated:

*“Your Partner would have a financial or pecuniary interest any time Council considers a matter that would either positively or negatively affect their finances. You have advised that you Partner is an employee of the Municipality. Matters before Council wherein you would have a **deemed pecuniary interest** would include, but not be limited to, promotions/demotions, wages, benefits, professional development opportunities, and bonuses/perks.*

You have advised that the Cochrane Polar Bear Habitat operates like a department of the Municipality. Not all matters relating to the operation of the department would directly affect your Partner’s finances. It will be important for you to carefully consider each matter and determine:

- a) If your Partner has a financial [pecuniary] interest; and*
- b) When does that financial interest crystalize?*

[37] The opinion letter explained pecuniary interest and the importance of when the interest crystalizes:

“Case law shows us that there is a point in time when a pecuniary interest becomes absolute. This means that a matter Council is considering may not be in its entirety a conflict of interest as defined by the MCIA. Case Law is also clear that you cannot have a pecuniary interest for something that might happen at a future date.”

[38] On October 20, 2020, the IC responded to a request for advice on October 14, 2020, from Councillor Henderson related to the employment status of his Spouse. The opinion advised Councillor Henderson the following:

“Presently, your partner is not an employee of the Municipality and more particularly is not an employee working at the Polar Bear Habitat.

As such, the deemed, indirect pecuniary interest that you did have, arising from your partner’s employment at the Polar Bear Habitat ended at the same time the employment of your partner was terminated.

Note that if there is a future situation where your partner is returned to work at the Habitat or the Municipality, this pecuniary interest may be revived.”

[39] The opinion further stated:

“Volunteer work for Polar Bear Habitat Causes Prohibited Indirect Pecuniary Interest

We now understand that you are currently volunteering at the Polar Bear Habitat, a fact we were unaware of when providing our advice on November 4, 2019. As a volunteer for the Polar Bear Habitat, you are a “member of a body” pursuant to section 2(a)(iii) of the Municipal Conflict of Interest Act and as such you have a prohibited conflict of interest on all pecuniary interests of the Polar Bear Habitat.

You can choose to act as a Councillor on Polar Bear Habitat pecuniary issues ONLY if you resign as a volunteer before doing so. You need to make a choice about whether you want to act as a Councillor on Polar Bear Habitat issues in which case you must eliminate all prohibited pecuniary interests you have in that facility, OR continue to volunteer for that body in which case you can not participate in Council decisions regarding the pecuniary interests of the Habitat.

Summary

The pecuniary interest arising from your partner’s employment with the Polar Bear Habitat has ended. However, because you continue to volunteer for the Polar Bear Habitat, you are a member of that body and have a prohibited indirect pecuniary interest in all pecuniary matters affecting the Habitat.

As such, you need to declare a conflict and comply with section 5 of the Municipal Conflict of Interest Act by not participating in Council decisions and not influencing Council decisions regarding the Habitat either before, during or after Council meetings.

Alternatively, you could resign as a volunteer at the Habitat which would, once the resignation was properly accepted, remove this pecuniary interest and you could participate in Council decisions about the Habitat if no other prohibited pecuniary interests exist.

This opinion is based on the veracity and completeness of the facts that you have provided. If the facts are not accurate or complete, or if they change in future, that may have an effect on the opinion and the advice provided.

We trust that this information has provided appropriate guidance in regard to your inquiry. Should you require further information, please do not hesitate to contact the undersigned.”

[40] The Applicant and other witnesses alleged that the Charity had been promoting that Councillor Henderson’s Spouse would be the individual to run the Habitat once the transition to the Board was complete. The Board Chair for the Charity denied this but did state that in all likelihood Councillor Henderson’s Spouse would be part of the management after the transition was complete.

[41] At no time did Councillor Henderson report to the IC that he operated a business (Soup! There It Is) and that he catered events held at the Habitat – either for profit or as a volunteer.

Participation at Meetings Whereat the Habitat is a Matter Considered by Council

[42] On each of October 6th, 9th, 19th, and 20th, 2020, Councillor Henderson attended and participated in open and closed meetings of Council whereat they discussed the transition of the Habitat to the Charity. Some of the discussions were held in closed session. We will not reveal details of the closed session discussions in this report, only that they were about the transition of the Habitat and therefore were pecuniary in nature.

Reference: October 6, 2020, Meeting Agenda & Meeting Minutes
Transcription of the October 6, 2020, Meeting Recording
October 9, 2020, Meeting Agenda & Meeting Minutes
October 19, 2020, Meeting Agenda & Meeting Minutes
October 20, 2020, Meeting Agenda & Meeting Minutes

[43] Prior to October 6, 2020, Councillor Henderson declared a pecuniary interest and did not participate in the meetings.

Declared Pecuniary Interest Related to the Habitat

[44] Councillor Henderson declared a pecuniary interest on fourteen (14) occasions related to the Habitat between May 14, 2019, and October 6, 2020. Each time on his written declaration he stated the reason as his partner/spouse is employed at the Habitat. At no time in these declarations did Councillor Henderson report his other prohibited direct or indirect pecuniary interests.

Reference: Written Declaration dated May 14, 2019
Written Declaration dated October 7, 2019
Written Declaration dated November 5, 2019
Written Declaration dated November 12, 2019
Written Declaration dated November 26, 2019
Written Declaration dated December 10, 2019
Written Declaration dated February 4, 2020
Written Declaration dated February 18, 2020
Written Declaration dated March 17, 2020
Written Declaration dated April 14, 2020
Written Declaration dated June 23, 2020
Written Declaration dated August 11, 2020
Written Declaration dated September 8, 2020
Written Declaration dated October 6, 2020

October 6, 2020, Meeting

[45] On October 6, 2020, Council met as Committee of the Whole.

[46] During the meeting when Council was discussing the Consent Agenda, Councillor Hoogenhoud requested that items 8.4 to 8.10 be removed and discussed. When invited by the Mayor to speak to the items, Councillor Hoogenhoud asked questions about the potential closing of the Snowmobile Museum.

Reference: Council Meeting Audio Recording, October 6, 2020

[47] The Snowmobile Museum is collocated with the Habitat and Councillors were aware that the Charity wanted the exhibit from the Habitat to make space for a meeting room.

Reference: Confidential Documents reviewed in Closed Meetings

[48] In response to Councillor Hoogenhoud's comments Mayor Clement stated:

“...It is not the intention of this Council to shut the Snowmobile Museum...we have a negotiation with habitat board. We’re trying to transition the movement on the habitat of the polar bears and part of this negotiation is the ... solution needs to come about before anything gets transferred...well aware of the importance of the Snowmobile Club and the Snowmobile Museum and the final decisions haven’t been made and the final decisions will come back to this Council. But we need to let our ad hoc committee negotiate on behalf and they’ve made that perfectly clear to the board to that they need to find a proper solution for the museum moving forward...”

Reference: Council Meeting Audio Recording, October 6, 2020

[49] Mayor Clement’s comments clearly show the discussion was about the transfer of the Habitat and that the Snowmobile Museum was part of this consideration.

[50] Councillor Calaezzi then joined the conversation and explained that he and Councillor O’Connor had been appointed to negotiate the transition of the Habitat to the Charity. He reiterated that the snowmobile museum is tied to the Habitat and that there never was discussion about moving the museum out of its current location. He stated:

“...I don’t know where this information is coming from...We’re going through discussions, we’re negotiating back and forth with different groups and like I said, at this point in time there’s no intent to close the museum and kick anybody out...”

Reference: Council Meeting Audio Recording, October 6, 2020

[51] Councillor O’Connor indicated that he agreed with Calaezzi’s comments.

Reference: Council Meeting Audio Recording, October 6, 2020

[52] The discussion continued about the negotiations for the transfer of the Habitat to the Charity and the issues with the Snowmobile Museum. Mayor Clement then made the following comments:

“...the deal is far from being over. Let’s give everybody the benefit of the doubt. It’s the final decision to move to a separate board. Our separate foundation is run the habitat is ours and ours alone. If it makes good business sense, I hope that’s what we’ll do. And if it doesn’t make good business sense for the community, then we probably won’t. Let’s not jump to conclusions on anything. In their minds they a good business plan, a good business model, and if it meshes with the

community support and with the community wishes, then we'll move forward and if it doesn't, then we probably won't..."

Reference: Council Meeting Audio Recording, October 6, 2020

[53] It was at this point that Councillor Henderson joined the conversation in response to Mayor Clement:

"... You took the words out of my mouth. Right now, all these negotiations are happening. We've got people, Councillor Calaiezzi and Councillor O'Connor representing this right now and it sounds like a lot of gas being thrown on the fire and I don't deny the importance of the Snowmobile Museum. I think it's a vital part of our community, but I think we've got the people that are at the table do their job and then bring back the reports. But right now, this conversation is just being initiated so I think we just need to pull it back a little bit and stop making prepositions about what might actually be going on or what actually might happen or what ifs and what maybes and just give it a second for the people at the table to negotiate and figure this out..."

Reference: Council Meeting Audio Recording, October 6, 2020

[54] Also on October 6, 2020, Council, received in open session an administrative report regarding the operations of the Habit for the month of September.

Reference: Council Meeting Agenda, October 6, 2020
Council Meeting Minutes, October 6, 2020
Council Meeting Audio Recording, October 6, 2020

[55] Councillor Henderson participated in the discussion.

Reference: Council Meeting Audio Recording, October 6, 2020

[56] To be clear, Councillor Henderson did not declare a pecuniary interest in the administrative report. He did participate in the discussion that ensued after the report had been tabled for consideration by Council.

Reference: Council Meeting Minutes, October 6, 2020
Council Meeting Audio Recording, October 6, 2020

[57] The decision made by Council was to accept the report and Councillor Henderson voted on the decision.

Reference: Council Meeting Minutes, October 6, 2020
Council Meeting Audio Recording, October 6, 2020

- [58] The Departmental Monthly Report was submitted to Council for information purposes. The report updated Council on several topics including financial (pecuniary) matters related to the Habitat. More specifically, the report covered a revenue comparison of July to September 2019 to the same period in 2020 and special events/rentals. This portion of the report highlighted current and potential rate charges for renting facilities at the Habitat. Stating “... *summary of both current and potential rental items for review. Suggestions have been included for clarification, however, more clarification can be provided and Council may also see other opportunities not listed*”.

Reference: Council Meeting Agenda, October 6, 2020
Council Meeting Minutes, October 6, 2020
Council Meeting Audio Recording, October 6, 2020
Polar Bear Habitat Monthly Report of September 28, 2020

- [59] When Council considered the report, their discussion was around rental opportunities at the Habitat. The Habitat, as well as other municipal facilities, were rented out by the municipality to generate revenue to offset operating costs.

Reference: Council Meeting Audio Recording, October 6, 2020
Polar Bear Habitat Monthly Report of September 28, 2020

- [60] Councillor Henderson made the following comments,

“...Two questions. The first one having to do with the expiration of rental opportunities at the habitat. Just curious, does this- I guess I’m questioning the need for this, especially with the idea of a potential transition on the horizon but the second thing I guess I question about this is does this put added stress on our existing facility that already used for rental purposes and other venues in the community... is this really something that we need to be spending time exploring and I guess to add on top of that, do we actually have significant enough demand to be putting resources into this?... perhaps that we should be maintaining our focus on making sure those costs are covered.”

Reference: Council Meeting Audio Recording, October 6, 2020

- [61] Monika Malherbe, Director of Corporate Services, responded to Councillor Henderson’s first question. He then replied:

“...if you just asking for my personal opinion, I think that right now, our focus should be on supporting the facilities that we have typically slated for rental, unless there’s like an overwhelming demand for the various facility rental possibilities that have been listed in your report. My second questions has to do- we received an email about this fast track to success program. Is this something we can have a conversation about right now or is that slated for a future agenda?”

Reference: Council Meeting Audio Recording, October 6, 2020

- [62] CAO, Darren Ottaway, explained that this program was a kind of mystery shopper program where someone would attend the Habitat as a tourist and make recommendations. He stated *“...I think it’s relevant to the discussion that Council is currently having about the future of the habitat.”*

Reference: Council Meeting Audio Recording, October 6, 2020

- [63] Councillor Henderson then asked if this issue could be put on a future agenda for discussion.

Reference: Council Meeting Audio Recording, October 6, 2020

- [64] Councilor Henderson continued to comment on the Habitat:

“...the Town has in the past, partnered with the charity board and in conjunction with funding from NOHFC to do something which seems very similar with the HRNA report from last year... I’m removed from the conversations related to the habitat for pecuniary interest reasons, but in terms of this, I’m curious as to the context of this report or this endeavour in the grand scheme of things with the entire transition. And again, it kind of comes back to where we’re out looking to get our resources. Are we just doubling upon information? Does the Town have purposes to do something different with the habitat transition? I know that we have our experts at the table dealing with this, but I just don’t know if this piece is factoring into that negotiation question or if this is something entirely different. So I’m just looking for some context on this and where this came from... it my opinion something to get some further information on to how this fits into the puzzle, especially with the anticipation of a potential transition. Again I know that transition is still up in the air. Nothing’s confirmed. But I just for my own understanding of where it fits in.”

Reference: Council Meeting Audio Recording, October 6, 2020

[65] Councillor Henderson completed a "Declaration of Interest Municipal Conflict of Interest Act" form pertaining to item number 5.1 related to the Polar Bear Habitat which was to be considered in Closed Session.

[66] When interviewed about his comments/questions about the rental opportunities at the Habitat the following exchange took place between Councillor Henderson and the Investigator:

Sean Sparling:

Yeah, so it starts off with yourself okay to say thank you to our two questions the first one happened to do with the expiration of the rental opportunities of the habitat. I'm just curious is this, I'm guessing, that questions the need for a special potential transition on the horizon. So, you're talking specifically about the transition of the habitat on the horizon and these uh, rental opportunities. To me that's probably why I looked at this because rental opportunities equals pecuniary and so on right?

Shea Henderson:

Oh, oh for sure, and I understand that so just so you know in that report there was a, I don't know if you viewed that report or not?

Sean Sparling:

I'm not sure, I think we got them all um, probably did.

Shea Henderson:

So that, that report uh, was indicating potential rental opportunities if the- from the perspective of the- I think it was just informally collated by the interim manager at the time. Basically, if they were to start using the facility and rent it out to groups, what potential revenue the town could accrued from that process. Um. My, my question had to do with the context of this in relation to- again coming back to the fact that negotiations were still happening behind closed doors and in private, as they should be. And understanding what, what the context of this information was. Um, I, I felt right, that at that point in time seeking information um, was not conflicting. I feel like I have been very careful and diligent in seeking out advice up until that point, to the idea that I, I felt that just asking for information, uh, wasn't putting me in a conflict or in a pecuniary area. Uh I don't know if the perception is that rental opportunities referring to me renting?

Yeah, I know, ah, so, again just using kind of, my, I'm not, won't, will not say expertise, but my diligence in trying to kind of learn this process of conflict and pecuniary interest. Uh, you know, through seeking advice. I, I tried to make sure that I was aware of

what situations would put me in conflict. Similar to the ways like, you know when we vote on a budget. Right, uh, does that put me in conflict with any department that I might have had involvement within the past. Or, and I think you could ask the same of any councillor, right? At this point and time, I, I, I'm kinda sticking to my guns in the fact I was strictly seeking information. Um, I think I later said like I don't want this, this is nothing to do with the transition. The transition is, although it's related to it, and I understand that, and I did bring up the word transition several times. My intent was to be very explicit in saying, I don't want any conversation about the transition. I've removed myself from the transition because I had even in the transcript, I identified that I, because I do have conflict that I was asking for the context of this new report that was coming that seemed to be in isolation from the ongoing negotiations that were happening confidentially."

October 9, 2020, Special Closed Meeting

- [67] Special Closed Session meeting of Council was scheduled for 12:00 P.M. on October 9, 2020, for the specific purpose of receiving a confidential report related to the strategy. Negotiations for the transition of the Habitat to the Charity. Councillor Henderson attended the meeting, did not declare a pecuniary interest, and participated in the meeting.
- [68] Section 239 of the *Municipal Act*, allows Council's to hold meetings without the public present (closed meetings) for very specific purposes. Due to the confidential nature of these sessions, we only disclose those portions of the minutes that are required to demonstrate the nature of the discussion or that corroborates witness evidence. We will also document the nature of Councillor Henderson's participation.
- [69] Witnesses reported that upon arriving at the meeting, Councillor Henderson asked if anyone had any information indicating he was in a conflict of interest. No one answered his question and he participated in the meeting. Of import is that Dylan McCart, Councillor Henderson's spouse was no longer employed with the Town at the time this meeting occurred
- [70] When interviewed about his participation in this meeting, Councillor Henderson advised that the discussions at the meeting were not pecuniary and there were no decisions made by Council during the meeting. Councillor Henderson confirmed that during this meeting, there were discussions about the pending negotiations involving the Habitat and that he participated in the meeting. The only direction given was to create an update report about what was going on.

[71] The meeting minutes confirmed that Councillor Henderson asked the CAO if Councillor Henderson now had a conflict of interest, and that the CAO did not respond to the question.

[72] The minutes also confirmed that negotiations between the Town and the Charity were discussed. The following are relevant excerpts of this meeting found within the meeting minutes:

“Councillor Henderson advised that he heard as of this morning he no longer had a pecuniary interest and asked if the CAO could confirm that and Mr. Ottaway did not provide any information and/or advice to Councillor Henderson on the matter.”

“...as per their discussions at the October 6th closed session meeting, whereby it was mentioned that the Board [meaning the Charity] has been negotiating in bad faith, continue negotiating with the Board or move forward into another direction

Councillor Henderson inquired if he could receive a copy of the LOI and if the issue of moving the Snowmobile Museum was the roadblock to transitioning the PBH to the Board and Councillor Calaiezzi provided some incite on the negotiations.” sic

Councillor Henderson indicated to the members that they should hold off on deciding to cut off the ties with the Board as the municipality does not want to operate the facility and that someone else should run it.”

[73] The minutes indicated that Councillor Henderson left the Closed Meeting at 12:14 p.m. and returned at 12:41 P.M. without explanation. Further, the Closed Session minutes do not show Councillor Henderson declaring a pecuniary interest but do show that there was a discussion related to Councillor Henderson’s Spouse.

[74] Direction was given to the CAO during the Closed Session to prepare a report that directly affects the sustainability of the Habitat.

[75] When the Council meeting resumed in open session a resolution was passed. It was moved by Councillor Henderson and reads:

*“**BE IT RESOLVED THAT** the Chief Administrative Officer be and is hereby authorized to undertake the directions provided during the in Camera meeting of October 9th, 2020.” (sic)*

October 19, 2020, Council Meeting

[76] On October 19, 2020, Council met in closed session with Board Members who represented the Charity. Councillor Henderson was in attendance

Reference: Council Closed Meeting Minutes October 19, 2020

- [77] During the Closed Meeting, the Chair of the Board for the Charity presented their business plan for the transition of the Habitat. Council did request to see a more detailed financial to show how the Board would sustain the operation of the Habitat.
- [78] Councillor Henderson advised that he *“remained silent during this meeting since I was awaiting advice from the IC at this point.”*

October 20, 2020, Councillor Henderson Resigns as a Volunteer

- [79] On October 20, 2020, Council was again meeting, and the Habitat was to be considered. Councillor Henderson contacted the IC and emailed a request for advice. The IC advised Councillor Henderson that he did have an indirect pecuniary interest in the pecuniary interest of the Habitat because he was a volunteer.
- [80] Councillor Henderson resigned as a volunteer of the Habitat so that he could participate in the discussion on October 20, 2020.
- [81] When interviewed, Councillor Henderson stated:

“It was the 20th. Because. It was the 20th of October because, I had, I was not aware that my volunteerism would put me in conflict. Um and initially, when I was seeking advice, I had not indicated that. And that’s, my own mistake. Um and when I did advise that on a secondary piece of advice from, from the IC and that when I did indicate that, I do volunteer for the habitat um, that I was told that would put me in conflict and I can’t represent the body and represent Council at the same time. Uh, so I sent my resignation to the volunteer coordinator who is Heather Brower, who then CC’d me in an email to Jennifer Olaisola, who’s the interim manager.”

- [82] Councillor Henderson acknowledged on more than one occasion that he did not advise the IC before October 20, 2020, that he was a volunteer at the Habitat. Once the IC was informed about his volunteering, he did not try to hide that he did not previously disclose this fact to the IC when seeking advice.
- [83] When interviewing Councillor Henderson, the following exchange occurred with the Investigator related to Councillor Henderson’s volunteer efforts:

“Sean Sparling:

Your, like I said, I said to this before Shea, we’ve interviewed enough people and stuff like yeah one of the opening lines of the report is going to say Shea Henderson the prolific volunteer, right? And you are kind of the poster child of volunteerism for his community. Um, I, we’re gonna say stuff like-and one of his activities is the Polar Bear Habitat.

Shea Henderson:

Yeah, I guess, I just, I am still wrapping my head around it, and it's-I'm not going to lie I'm being incredibly stubborn about it. Um, but the idea that getting involved in Council means that you are automatically pretty much void of any kind of volunteerism. Um, and that's- and that- because- ultimately, like you know- like the curling club. I volunteered for the curling club, and they've recently come to Council asking for money. Well, my name is associated and by proxy my name and my very, very incredibly tiny business. Uh, and, so does that-if they are asking for money to support the new shingles on their roof, does that, does that put me in conflict? Because in the past I have done stuff to support them and help them raise money. It's, I, I, I've mentioned this before it's pretty disheartening, uh, to think that-that-

Sean Sparling:

I understand what you are saying and I'm going to be very fair about it in the report, um, it's again, like I'm not, again we're not the ones who are going to make the decisions on it but, I'm going to be very fair about it, this is what Shea's position is here's what the evidence is and, right?

Shea Henderson:

Yeah, and I appreciate it Sean, like I, I, I understand I know you are just doing the role you have. You, you are pursuing every, everything you have to pursue. Um and I'm sorry if I, if I come off as, as stubborn. Um but it does, it does go hand in hand with the interest I have in the community and the people that are here. Right? It's not some inauthentic, you know, I have no, there's not some malicious background agenda that I'm trying to pursue. Ah, thousands of hours would have been a silly waste of my time if that was the case.."

Soup! There It Is - Councillor Henderson's Catering Business

- [84] Councillor Henderson did not report to the IC that he operated a catering business. Nor did he inform the IC that he catered as part of his volunteer work with the Habitat. Councillor Henderson did advise that he mainly volunteered with caring for the bears.
- [85] Councillor Henderson reported that he started selling soup in jars at the Farmers Market and that his business formally began in 2015. He reported catering events for profit and as a volunteer. He advised the Investigator that after the election he primarily volunteered his services as a caterer to assist in fundraising events for community groups including the Habitat.

"Sean Sparling:

No, no. And I'll be upfront again is that there's nothing in here saying that somehow you're lining your pockets, or Dylan's pockets with anything that's going on here. Or that you personally benefited-there's not- I don't

have anything to say to that, so it's not gonna, that's not gonna reflect in the report. So that's probably a good transition. Let's move on to your catering business and how that, ah, impacts with the Polar Bear Habitat there.

Shea Henderson:

Yeah, and, I, I'm not going to lie, like, I knew that, like uh, in the past I've done, uh, work for the habitat for the Municipality, uh and I've been paid, um, and, I knew going into Council that-while my assumptions later-okay I can no longer be paid for these, these roles. Uh, but I continued to donate my time. Um, and I guess that was my error. Uh, uh, I, although my name or, and or a logo associated with my, my business, excuse me, might have been on marketing material. Um, it was never by any request that I recall. Uh, nor, like, I mean that's, [laughs] I, I, I'm that person that likes to hide behind the scenes and get things done and I don't like praise if I can, you know that can sound a little, uh, you know cliché, but I truly don't. I don't like being the center of attention as much as I like being involved in this community. Um, to give you background on my, my- the nature of the business, I, I realized by the act I don't think size or scale matters. But my business started out as a farmer's market booth selling soup in a jar. Uh, just so you understand that background. And then, just slowly started get involve- actually the build into larger events happened by doing charity stuff for the curling club and that was the first leap. And, and then, yeah, I've done private functions for people before. Um, obviously not recently because of COVID but ah, you know, like I said I've done work for the municipality. I've done work for businesses. Um, and then, uh, but since my role on Council. I've been very diligent about making sure that I, I'm not paid, uh, for the roles that I take on, uh, with, with donating my catering services. Again, and I understand that, oh if, you know if I was standing on the podium saying hey, I catered this dish now start lining up your bookings and start booking me for your next catering event, yeah, I'd be concerned about you know a conflict or pecuniary interest there, but. Uh, catering wasn't the only nature of my volunteerism. Hm, I did get involved with a number of different organizations so like um, Live at the Lakeside, uh, it started out as, I don't know, have you come across that in your reports?"

V. ANALYSIS

[86] We considered:

- a. Whether Councillor Henderson had a pecuniary interest in the Habitat and specifically whether that pecuniary interest existed when he participated in meetings on October 6, 9, and 19th, 2020.
- b. Whether at all times, Councillor Henderson had a direct, indirect and deemed pecuniary interest.
- c. Whether the acceptance of a staff report containing financial information is a pecuniary matter before Council.

- d. Whether Councillor Henderson influenced or attempted to influence the voting of Council before, during or after a meeting;
- e. Whether Councillor Henderson's participation in the open meeting on October 6, was an attempt to influence the transition of the Habitat to the Charity.
- f. Whether Councillor Henderson properly declared his prohibited pecuniary interests; and
- g. Whether to make an Application to Court for breach of the *MCIA*.

Pecuniary Interest

- [87] The *MCIA* prohibits Councillors from acting, even from influencing matters where they have a pecuniary interest "*before, during or after*" the meeting².
- [88] The primary issue for analysis is whether Councillor Henderson had a prohibited pecuniary interest in the matters before Council on October 6, 9 and 19 related to the Habitat. On these dates the matters before Council related to the on-going negotiations between Council and the Charity for the transition of the operation of the Habitat from the Town to the Charity.
- [89] "Pecuniary Interest" is not defined in the *MCIA*, however, the Courts have interpreted it to mean a financial interest, or an interest related to or involving money. It does not matter whether the financial interest is positive or negative and when considering the existence of a "Pecuniary Interest", it also does not matter the quantum of the interest.

"Pecuniary Interest" is not defined in the [*Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50], but it has been held to be a financial, monetary or economic interest; and is not to be narrowly defined³.

A pecuniary Interest [as used in s. 5(1) of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50] is a particular kind of interest. In *Edmonton (City) v. Purves* (1982), [18 M.P.L.R. 221](#)... (Q.B.), at p. 232 [M.P.L.R.] Moshansky J. turns to the Shorter Oxford English Dictionary definition of "pecuniary" as "of, belonging to, or having relation to money."

- [90] A Member may have a **Direct Pecuniary Interest** where the matter being considered by Council affects the Member's own finances. A Member may have an **Indirect Pecuniary Interest** where they are a shareholder of a private corporation or have a controlling interest in a public corporation (i.e., director, significant shareholder) or is a "member of a body" that has a pecuniary interest in the matter being considered by Council or 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. A Member may have a **Deemed Pecuniary Interest** where a matter being considered affects the finances of a Member's parent, spouse or child [as defined by the *MCIA*].

² *Municipal Conflict of Interest Act*, R.S.O. 1990 C.M.50 s.5(1)(c).

³ *Mondoux v. Tuchenhagen* (2011), 284 O.A.C. 324, [2001] O.J. No. 4801, 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, 107 O.R. (3d) 675 (Ont. Div. Ct) at para. 31, Lederer J. (Gordon J. concurring).

[91] At the times in question, Councillor Henderson had a direct, indirect, and deemed pecuniary interest in any matter considered by Council that impacted the financial interests of the Habitat. The impact could be positive or negative and does not matter the size of the financial impact.

[92] To be specific, Councillor Henderson had the following pecuniary interest:

- A **direct** pecuniary interest because of his catering business;
- An **indirect** pecuniary interest as a volunteer at the Habitat; and
- A **deemed** pecuniary interest because of his spouse being employed by the Town and working at the Habitat.

Councillor Obligations Related to Pecuniary Interest

[93] Section 5 of the *MCIA* requires that when a member of Council has a pecuniary interest with a matter that Council is considering, they must disclose not only that they have a pecuniary interest in the matter, but they must also explain the general nature of the interest. Additionally, they are prohibited from taking part in the discussion or any vote on the matter and are prohibited from influencing or attempting to influence the vote.

When present at meeting at which matter considered

5 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

- (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
- (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
- (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question. R.S.O. 1990, c. M.50, s. 5 (1).

Where member to leave closed meeting

(2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration. R.S.O. 1990, c. M.50, s. 5 (2).

[94] Section 5.1 of the *MCIA* requires a member to file a written statement of conflict when he has a prohibited pecuniary interest.

[95] Councillor Henderson was therefore obligated under the *MCIA* to, at all times when there was a matter before Council that affected the finances of the Habitat, declare his interest in writing, submit it to the Clerk and not participate in the discussion. Further, Councillor

Henderson was required to refrain from influencing or attempting to influence any decision before during or after a meeting.

- [96] Additionally, because of his prohibited pecuniary interests, Councillor Henderson was also required to leave any closed meeting where the pecuniary interests of the Habitat were discussed.
- [97] Between February 2019 and October 6, 2020, Councillor Henderson submitted written declarations of pecuniary interest related to his Spouse's employment and did not participate in the meetings.
- [98] Councillor Henderson at no time declared that he had an indirect pecuniary interest due to his volunteer work at the Habitat. Nor did Councillor Henderson declare his direct pecuniary interest because of his catering business. This would be a technical breach of section 5.1 of the Act.

When did Councillor Henderson's Pecuniary Interest Crystalize?

- [99] Case law shows us that there is a point in time when a pecuniary interest becomes absolute. This means that a matter Council is considering may not be in its entirety a conflict of interest as defined by the *MCIA*. Case Law is also clear that you cannot have a pecuniary interest for something that might or might not happen at a future date.
- [100] Justice Michael Penny in *Lorello v. Meffe* surveyed numerous *MCIA* decisions about future or contingent interests in examining whether a contingent interest constitutes a prohibited pecuniary interest pursuant to the *MCIA* and found:

These authorities seem to establish that, in order to constitute a pecuniary interest, there must be something more than infrequent past business dealings or the possibility of future business. To have a conflict under s. 5 of the MCIA, there must be a pecuniary interest existing at the time of the vote. There must be an actual conflict or a reasonable assumption that the conflict will occur".⁴

- [101] Additionally, in *Mondoux v. Tuchenhagen*, at paragraph 32,

[32] We do not agree with counsel for Robert Tuchenhagen that this interest crystallized only when he viewed the property and decided to make an offer. This presumes that any discussion at meetings of City Council or any resolution or by-law passed by City Council involving the sale or potential sale which took place as Robert Tuchenhagen was deciding whether to make an offer could not affect that private determination. This is not correct. Any decision of the members of Council could affect the price or whether the property would be sold at all. "The question that must be asked and answered is 'Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?'"

⁴ *Lorello v. Meffe*, 2010 CarswellOnt 11195, 2010 ONSC 1976, 99 M.P.L.R. (4th) 107 (OntSCI) at Para 59.

*(emphasis added) (see Greene v. Borins (1985), [1985 CanLII 2137 \(ON SC\)](#), 50 O.R. (2d) 513, [1985] O.J. No. 2510, 1985 CarswellOnt 666 (Div. Ct.), at para. 39). **As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest.** The e-mail he sent on July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest.⁵ [emphasis added]*

- [102] Councillor Henderson's Spouse was working at the Habitat (employed by the Town) prior to Councillor Henderson's election to Council in 2018. Upon being sworn in as a member of Council, Councillor Henderson had a pecuniary interest in all matters that affected the financial interest of his spouse. This would include those financial considerations that would affect his Spouse directly like wages, benefits, professional development, etc., as well as those financial considerations that would affect his Spouse's employer, the Habitat.
- [103] Additionally, Councillor Henderson was volunteering at the Habitat and providing catering services to events held at the habitat prior to his election to office. Councillor Henderson had a direct and indirect pecuniary interest in all matters that affected the financial interest of the Habitat immediately upon being sworn in.
- [104] On the morning of October 9, 2020, Councillor Henderson no longer had a pecuniary deemed pecuniary interest as his spouse was no longer employed by the Town and more specifically the Habitat.
- [105] Similarly, Councillor Henderson no longer had an indirect pecuniary interest after his resignation as a volunteer with the Habitat on or about 6:30 P.M. October 20, 2020.
- [106] Councillor Henderson continued to have a direct pecuniary interest due to his catering business.

Transitioning the Habitat to the Charity

- [107] We have already established that the Town owned and operated the Habitat. And that the Habitat was not a separate body with a separate board of directors.
- [108] Council became concerned about the future of the Habitat and the increasing costs associated with the maintenance of the infrastructure and operating the facility. Over the years there had been a significant cost to the taxpayers for the operation of the Habitat

⁵ *Mondoux v. Tuchenhagen* (2011), 284 O.A.C. 324, [2001] O.J. No. 4801, 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, 107 O.R. (3d) 675 (Ont. Div. Ct) at para. 32, Lederer J. (Gordon J. concurring).

that Council believed was not sustainable. Council contracted a third party to conduct a study and provide Council with options.

- [109] Council decided to discontinue operating the Habitat and to wind down its operation.
- [110] Thereafter, Council began negotiations with the Charity to transition the Habitat to the Charity.
- [111] The negotiations were on-going until November 27, 2020, when the Charity wrote to Council terminating the negotiation immediately.
- [112] It is evident that all discussions about the transition of the Habitat are of a financial interest to the Habitat.
- [113] On October 6, 2020, Councillor Henderson participated in the discussion related to the Snowmobile Museum which was a consideration of the negotiating committee dealing with the Habitat.
- [114] At the same meeting, Councillor Henderson participated in the discussion about rental opportunities/proposed rate options included in the staff report about the Habitat.
- [115] Both matters are pecuniary in nature. No decision (vote) was taken about the Snowmobile Museum. Council did accept the report by resolution and Councillor Henderson moved the resolution.
- [116] Additionally, on October 9, 2020, Councillor Henderson did not declare a pecuniary interest and attended a closed session meeting whereat the Charity presented their business plan for the Habitat after transition from the Town.
- [117] On October 20, 2020, Councillor Henderson participated in the Closed Meeting after he had resigned his position as a volunteer of the Habitat.

Influence Before During and After Meeting

- [118] Section 5(1)(c) of the *MCIA* prohibits a member of Council on his own behalf or through another from “attempt[ing] in any way whether, before, during or after the meeting to influence the [voting] of Council.
- [119] While the *MCIA* prohibits “influencing” a vote of Council when a member has a pecuniary interest, it does not provide an express definition of the same. The key principles of the *MCIA* provide that it is to be interpreted broadly with a view to transparent and accountable decision-making. Influence may be exercised by word, body language, laughter or facial expression. It may also be exercised through threats or extortion or

through social or political power. By leaving the term undefined, the *MCIA* contemplates influence in all its various subtle and direct forms. All are prohibited.

- [120] On October 6, 2020, Councillor Henderson participated in discussions related to the transition of the Habitat. No decision was made at this meeting. However, Council had made a decision prior about the transition of the Habitat that had not been amended or changed and continued to be negotiated and reported to Council. Councillor Henderson's evidence is that he was attempting to support the direction of Council by reminding them of the decision that had been made and the committee that had been struck to carry out the negotiations.

Contraventions of the *MCIA*

The evidence before us demonstrates that Councillor Henderson contravened the *MCIA* on October 6, 19 and 20, 2020, when he participated in Council meetings notwithstanding his direct, indirect and deemed pecuniary interests. Breaches of the *MCIA* are therefore found to have occurred.

VI. SHOULD WE APPLY TO A JUDGE IN THIS CASE?

- [121] Upon completion of an inquiry regarding whether a member has contravened the *Municipal Conflict of Interest Act*, the *Municipal Act, 2001* provides the Integrity Commissioner with discretion about whether to apply to a Judge.⁶ The Integrity Commissioner must publish written reasons for the decision whether or not to apply.⁷
- [122] The section does not set out clear parameters detailing when it is appropriate to apply to a court and we could not find any judicial analysis of this section. It is our opinion that this discretion is not unfettered and must be exercised in a reasonable manner consistent with the Integrity Commissioner's statutory duty to investigate, enforce and provide advice about the *Municipal Conflict of Interest Act (MCIA)*.⁸
- [123] Notably, the Integrity Commissioner is not given the authority in either piece of legislation to decide upon, recommend or negotiate a penalty with respect to a Councillor found to have breached the *MCIA* after an inquiry. The final decision about whether there has been a breach of the *MCIA*, and the penalty is the exclusive jurisdiction of a Judge of the Ontario Superior Court of Justice.⁹
- [124] This fact is a significant and important factor in how the decision to apply to a judge should be made. That is, because the Integrity Commissioner is given broad powers of investigation but is not vested with the authority to make a final decision, the determination of whether to apply to a judge should usually be contingent on the outcome of the investigation and the conclusions of the Integrity Commissioner. Absent extraordinary circumstances, the conclusion that the *MCIA* has been breached should

⁶ *Municipal Act, 2001*, S.O. 2001, c.25 as am. s. 223.4.1(15)

⁷ *Ibid*, s. 223.4.1 (17)

⁸ *Ibid*, s. 223.3(1)

⁹ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, s.8.

ordinarily result in a decision to apply to a judge. If a decision is made that there is no conflict, a court application should not be pursued.

[125] This is an appropriate conclusion to reach in light of the direction taken by the legislature in Bill 68 to require the expenditure of municipal funds on investigations of alleged conflicts of interests, as well as a broader range of potential penalties available to be imposed by our courts. In our view, this signals that our legislature believed that there were too many conflicts that were not being pursued due to the fact that costs had to be borne by individual complainants, or that automatic removal from office upon the finding of a breach of the *MCIA* resulted in fewer conflicts being found.

[126] We have reached this conclusion in part by having regard to the “*Principles*” section of the *MCIA* and in part by considering the purpose and intent of the *MCIA* as found by the courts. The *MCIA* has introduced principles which state:

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:

1. The importance of integrity, independence, and accountability in local government decision-making.
2. The importance of certainty in reconciling the public duties and pecuniary interests of members.
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.

[127] The *MCIA* is designed to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. There is no need to find corruption on the part of the councillor or any actual loss on the part of the council or board. As articulated by the courts: “*So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.*”¹⁰

[128] Recently, Integrity Commissioner Giorno examined this question in a reported decision not to proceed with an application to Court after he found there was no breach of the *MCIA*:

3. SHOULD I MAKE AN APPLICATION TO A JUDGE?

¹⁰ *Moll v. Fisher* (1979), 8 M.P.L.R. 266 (Ont. Div. Ct.).

51. 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.

52. If I commenced a Court application then I would bear the onus of proving that Deputy Mayor Meadow breached the *MCIA*.⁷ I have no evidence of a breach.

53. In my view, the Respondent's disclosure was not subject to the *MCIA*. I will not commence a Court application in which I argue the opposite.

54. I also note the costs of a Court application would be borne by the Township.

55. I do not consider it appropriate for me to apply to a judge for a determination as to whether Deputy Mayor Bob Meadows has contravened the *MCIA*.¹¹

[129] We agree that the foregoing is an appropriate methodology to follow and an example of a situation where an Integrity Commissioner would reasonably decide not to apply to a Judge; where the Integrity Commissioner concludes that on a balance of probabilities there is insufficient evidence of a breach of the *MCIA*. In our view, it would be inappropriate to expend further municipal resources to pursue a judicial determination after a statutory investigation has concluded there is no conflict.

[130] The converse also follows, namely, that where a breach of the *MCIA* is found to exist, the Integrity Commissioner *should* apply to a Judge *unless* there are articulable reasons why that is not appropriate.

[131] Articulating circumstances where it is appropriate to exercise discretion refusing to apply to a judge despite a finding of conflict is a difficult task, but one we think should only be exercised on narrow and exceptional grounds. The independent investigatory role of the Integrity Commissioner exists to minimize the chances that court applications will become unduly politicized and to ensure that conflicts that are alleged to exist after an investigation are actually pursued in the courts. In this case, we are not aware of any exceptional grounds upon which we are prepared to exercise the discretion not to bring an application before the courts for a determination.

[132] When determining to apply to a Judge, it is relevant to look at the penalty section of the *MCIA*; specifically, section 9:

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:

1. Reprimand the member or former member.
2. Suspend the remuneration paid to the member for a period of up to 90 days.

¹¹ *Anderson, D. v. Meadows*, 2020 ONMIC 2 (Giorno)

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. 2017, c. 10, Sched. 3, s. 7.

Same

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

- (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.

[133] Councillor Henderson resigned as a member of Council on June 16, 2021. As such, he will have no remuneration to suspend. His seat is already vacated. He has moved from the Town and as such is not eligible to run in the next election. There is no established personal financial gain that the Court would likely order disgorged.

[134] We do note that Councillor Henderson did ask for advice about conflicts from the IC. He did not fully disclose all relevant facts when seeking advice and as such it is not clear whether the breaches were or were not inadvertent or by reason of an error in judgment made in good faith.

[135] In that a reprimand is the only reasonably likely penalty that a Court would order in this case because all of the other penalties are inapplicable, we find that it would not be an appropriate use of taxpayers' funds to proceed with a Court application in this case.

- a. We will not be applying to a Judge with respect to Councillor Henderson's aforementioned breaches of the *Municipal Conflict of Interest Act* for the foregoing reasons.

DATED: August 10, 2021