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INTEGRITY COMMISSIONER REPORT ON MCIA APPLICATION 2024-02

THE CORPORATION OF THE TOWN OF COCHRANE

Aird & Berlis LLP

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**INTEGRITY COMMISSIONER REPORT
MCIA APPLICATION 2023-02
COUNCILLOR RODNEY HOOGENHOUD**

A. INTRODUCTION

1. Aird & Berlis LLP is the appointed interim Integrity Commissioner for The Corporation of the Town of Cochrane (the “**Town**”).
2. A formal application made pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001*¹ was filed directly with the Town’s former Integrity Commissioner on February 6, 2024 (the “**Application**”). The Application was forwarded to our office on March 19, 2024.
3. The Application alleges that Councillor Rodney Hoogenhoud (the “**Councillor**”) contravened section 5 of the *Municipal Conflict of Interest Act*² by failing to declare a pecuniary interest in, and voting on, a matter related to the 2024 Non Union Annual Inflationary Wage Adjustment (the “**Wage Adjustment**”) at a meeting of Council held on January 9, 2024.
4. The Application asserts that the Councillor has a pecuniary interest in the Wage Adjustment because the Councillor’s spouse is a member of the non-unionized staff at the Town.
5. The Application was accompanied by a complaint made pursuant to the Town’s *Code of Ethics for Town Councilors Policy*, alleging a breach of Section 7(4)(f) – Conflict of Interest.³ The allegation was essentially the same as in the current Application. The complaint was summarily dismissed on March 21, 2024.⁴
6. Subsection 223.4.1(15) of the *Municipal Act, 2001* provides that upon completion of an inquiry, the Integrity Commissioner may, if he or she considers it appropriate, apply to a judge under section 8 of the MCIA for a determination as to whether a member has contravened the statute and the possible imposition of penalties.
7. Subsubsection 223.4.1(17) *Municipal Act, 2001* provides that the Integrity Commissioner shall publish written reasons for the decision. This report contains our decision regarding our inquiry into the Application and is issued pursuant to subsection 223.4.1(17) of the *Municipal Act, 2001*.

¹ *Municipal Act, 2001*, S.O. 2001, c. 25.

² *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 (“**MCIA**”).

³ Section 7(4)(f) of the *Code of Ethics for Town Councilors Policy* provides:

(f) Conflict of Interest

Every Municipal Council Member shall have regard to the provisions contained in the Municipal Conflict of Interest Act, R.S.O. 1990, the Municipal Act and any other governing legislation, regulations, and laws relating to the avoidance of conflict of interest.

⁴ The complaint was dismissed because the provisions of the MCIA cannot be indirectly enforced via a code of conduct. Written notice of the summary dismissal was provided to both the complainant and to the Councillor.

8. It is our view that the requirement of subsection 223.4.1(17) is satisfied by including this report in the agenda materials for an open meeting of Council.

B. APPOINTMENT AND AUTHORITY

9. Aird & Berlis LLP was appointed as interim Integrity Commissioner for the Town pursuant to subsection 223.3(1) of the *Municipal Act, 2001* on February 27, 2024 by Resolution No. 112-2024. Council assigned to us all of the functions set out in subsection 223.3(1) of the *Municipal Act, 2001*. As Integrity Commissioner we have authority to consider the application of section 5 of the MCIA to members of council and local boards and to receive and consider applications pursuant to 223.4.1 of the *Municipal Act, 2001*.

10. We have reviewed the Application in accordance with our authority as Integrity Commissioner and as set out in section 223.4.1 of the *Municipal Act, 2001*.

C. PRELIMINARY MATTERS

(a) Standing to File Application

11. Pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001*, only an “elector” or a “person demonstrably acting in the public interest” may file an application to the Integrity Commissioner for an inquiry to be carried out concerning an alleged contravention of the MCIA. We are satisfied that the applicant in this matter is an elector of the Town.

(b) Time Limit to File Application

12. Subsection 223.4.1(4) of the *Municipal Act, 2001* requires that an application to the Integrity Commissioner be made within six (6) weeks after the applicant becomes aware of the alleged contravention. This provision replicates the time limit set out in subsection 8(2) of the MCIA. The strict time limit is meant to protect elected officials and ensure that applications are brought forward on a timely basis.⁵

13. The Application applies to a matter dealt with by Council on January 9, 2024. The Application was filed on February 6, 2024 and thus within the six (6) week limitation period specified by subsection 223.4.1(4) of the *Municipal Act, 2001*.

D. MCIA PROVISIONS AT ISSUE

14. The Application alleges that the Councillor contravened section 5 of the MCIA which provides as follows:

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,

⁵ *Hervey v. Morris*, 2013 ONSC 956, 9 M.P.L.R. (5th) 96 (Ont. S.C.J.).

- (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.

15. The Councillor is alleged to have failed to declare a pecuniary interest and to have voted on a matter related to the Wage Adjustment at the meeting on January 9, 2024.

E. REVIEW OF MATERIALS

16. In order to undertake our inquiry into the Application, we have reviewed the following:

- the Application and materials referred to therein, including attachments;
- the Councillor's response to the Application;
- the agenda for the meeting of Council on January 9, 2024;
- the report to Council entitled "CSD – 2024 Non Union Annual Inflationary Wage Adjustment" (the "**Report**"); and
- the video recording and minutes of the Council meeting of same date.

17. We have also reviewed, considered and had recourse to such applicable jurisprudence and secondary source materials that we believe to be pertinent to the issues under consideration.

F. BACKGROUND

(a) Councillor

18. The Councillor was elected to his current office in the 2022 Municipal Election. The Member was previously elected to Council in 2018. This is his second term as a member of Council.

(b) Wage Adjustment

19. The Report advised Council that Council Resolution 332-2014 directed that non-union staff wages were to be automatically increased in accordance with the Consumers Price Index (CPI) for Ontario but that due to the higher than normal increase in 2022, non-union wages had been frozen at 0% for 2023. The Report noted that since the CPI rates had normalized in 2023, staff recommended that the Wage Adjustment for all non-unionized workers at the Town be increased by 3.35% commencing on January 1, 2024.

20. It is important to note that the Report contained a recommendation for Council's consideration and determination. The Report was not an information-only report. The Report recommended an action on the part of Council as the decision-making body for the Town.

(c) Councillor's Spouse

21. The Councillor's spouse is a member of the Town's non-unionized administrative staff. The Councillor admitted that his spouse recently accepted a management position at the Town. As such, the Wage Adjustment to be considered by Council does have a financial impact on the Councillor's spouse.

(d) Allegation

22. The Application alleges that the Councillor contravened his obligations under section 5 of the MCIA by failing to declare a pecuniary interest [clause 5(1)(a)] and by voting [clause 5(1)(b)] on the directions provided to municipal staff respecting the Wage Adjustment.

23. The allegation arises because the pecuniary interest of a member's spouse is deemed to be the member's own pecuniary interest pursuant to section 3 of the MCIA:

Interest of certain persons deemed that of member

3 For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member.

24. The minutes of the meeting of January 9, 2024 note that Council passed the following Resolution:

12.2 CSD - 2024 Non Union Annual Inflationary Wage Adjustment

Report from the Director of Corporate Services was received and the following resolution was presented.

Moved By: DANIEL BRUNET

Seconded By: MARCK RECOSKIE **07-2024**

BE IT RESOLVED THAT the Council of the Corporation of the Town of Cochrane receive the report titled "CSD - 2024 Non Union Annual Inflationary Wage Adjustment"; and

THAT an increase of 3.35% be applied to non-union positions effective January 1, 2024.

DEFERRED

(f) Review and Consideration

25. Subsection 223.4.1(7) of the *Municipal Act, 2001* provides that in investigating an application that a member has contravened the MCIA, the Integrity Commissioner "may conduct such inquiry as he or she considers necessary." We believe that a proper inquiry must ensure a fair process or procedure.

26. As such, the Councillor was provided an opportunity to file submissions with respect to the allegations, which he did on April 4, 2024. We have considered the Councillor's responding submissions in which he does not dispute that he did not declare a pecuniary interest in Item 12.2 on the agenda respecting the Wage Adjustment.

27. The essence of the Councillor's submissions is captured in the following three paragraphs of his response, which provide as follows:

If Council would have moved to vote on an increase, decrease or status quo in regards to the non union inflationary wage adjustment, I would have declared a conflict of interest as such time as it would be considered pecuniary but at this point and in my opinion Council was seeking additional information prior to making a financial impacting decision.

Throughout my term of Council I have always advised the Clerk and Council either as the meeting commenced or during the discussion of a particular item on the agenda that I would declare a conflict of interest to the matter and would either leave the conversation and exit the room or abstain from the conversation and decision. During the discussion surrounding 12.2 on January 9th, 2024 at no time did the Council consider or motion to have an increase in non union inflationary wages although identified that further conversation was needed as Council moves ahead.

If the matter was only my spouse receiving the change of wages then I would have declared a conflict of interest. At our Council meeting where the minutes reflecting January 9, 2024's meeting, I would have advised the Clerk that I would like to reconsider my participation in the motion to defer item 12.2.

28. The Councillor's position is that he would have declared a pecuniary interest in the Wage Adjustment and Report if Council had decided to vote on the matter. However, the Councillor's position appears to be that Council never got to the point to substantively consider the question because further information was required for Council to make a decision.

G. ANALYSIS

(a) Pecuniary Interests

29. Despite its central importance to the statute, the MCIA does not define the term "pecuniary interest." However, it is well-accepted that a "pecuniary interest" pertains to any financial interest that is related to or involves money.⁶ The jurisprudence has interpreted "pecuniary interest" to include a financial, economic or monetary benefit that will be received or could be received, either in cash or in an increase in the value of some asset, but can also entail the avoidance of a financial or economic loss.

30. The subject matter at issue in agenda Item 12.2 relates to the Wage Adjustment. The Councillor's spouse would be impacted by Council's consideration of the Wage Adjustment as Council's decision would financially affect her. By virtue of section 3 of the MCIA, the pecuniary interest of the Councillor's spouse is deemed to be his own pecuniary interest.⁷

⁶ *Mondoux v. Tuchenhagen* (2011), 88 M.P.L.R. (4th) 234 at para. 31 (Ont. Div. Ct.); *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 at para. 6 (Ont. Div. Ct.); *Cauchi v. Marai*, 2019 ONSC 497; *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683 at para. 9.

⁷ A member's non-disclosure and participation in a meeting involving a matter related to the potential wage and salary increase affecting their municipal-employed spouse was found to be a clear contravention of the MCIA: *Adamiak v Callaghan* (2014), 35 M.P.L.R. (5th) 152, 2014 ONSC 6656. The case law is clear that a spousal pecuniary interest is likely something from which the member will derive a personal financial benefit: see *London District Catholic School Board, Application*, 2023 ONSC 1693, at para. 45.

31. The potential financial interest was obviously known to the Councillor.
32. The Councillor sworn an oath of office pursuant to section 232 of the *Municipal Act, 2001* prior to taking his seat this term wherein he solemnly declared and promised as follows:
- I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.
33. The statutory requirement in section 5 of the MCIA is clear that if a member is present at a meeting at which they have a pecuniary the member is required “prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof.” (emphasis added)
34. The Mayor asked for declarations of pecuniary interest at commencement of the meeting on January 9, 2024 and none were made. No declarations were subsequently made.
35. The Councillor participated in the short discussion of the Wage Adjustment and voted to defer the matter.
36. The Councillor did not raise any statutory exceptions that might be applicable under section 4 of the MCIA.

H. FINDINGS

37. We have carefully and fully considered the Application and the responding submissions provided by the Councillor.
38. The Councillor contravened his statutory obligations under section 5 of the MCIA. The Councillor ought to have declared his deemed pecuniary interest at the start of the meeting when the Mayor asked if any members had declarations to make. This would have provided express notice to the public that the Councillor had a pecuniary interest in agenda Item 12.2 and the Wage Adjustment. The Councillor’s failure to declared was a breach of clause 5(1)(a) of the MCIA.
39. The Councillor ought not to have participated at all in the discussion on the matter at the meeting and he should not have voted on the deferral. In taking both of these actions, the Councillor acted in contravention of clause 5(1)(b) of the MCIA.

I. CONCLUSIONS

40. Subsection 223.4.1 of the *Municipal Act, 2001* provides that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination of whether the member or members have contravened section 5, 5.1, 5.2 or 5.3 of the statute.
41. Subsection 223.4.1(15) of the *Municipal Act, 2001* provides as follows:

Completion

223.4.1 (15) Upon completion of the inquiry, the Commissioner may, if he or she considers it appropriate, apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether the member has contravened section 5, 5.1, 5.2 or 5.3 of that Act.

42. Unlike an investigation report related to an alleged contravention of a code of conduct where the Integrity Commissioner reports its opinion on the matter and council may need to make a decision on the imposition of any penalties or remedial measures/corrective actions that may be recommended, the decision-making power under section 223.4.1 of the *Municipal Act, 2001* resides solely with the Integrity Commissioner. Council is advised of the Integrity Commissioner's decision and it receives the report for information – Council is not asked, nor is it empowered, to make a decision on whether a matter will be brought before a judge.

43. We have concluded that the Councillor contravened his obligations of disclosure and recusal from participation and voting as set out in section 5 of the MCIA. We note that the Councillor is not a first-time elected member.

44. We have also, however, taken into account that the Councillor (and perhaps the rest of Council) may not have received comprehensive training on the MCIA during this term of Council. The Councillor courteously advised us that he was aware that training would be provided to Council on the MCIA and that he would “participate to continue my education as a Councillor for the Town of Cochrane.” We consider these matters to be mitigating factors.

45. In addition, although the question of whether a member may have contravened the MCIA by inadvertence or by an honest error in judgment is not one for the Integrity Commissioner to make, we do believe that a judge might consider that the Councillor's belief that he could have some limited participation in the matter and vote on the deferral to be a *bona fide* error in judgment.⁸

46. Finally, in all respects, the Councillor cooperated fully with our inquiry and responded to us in a manner that we considered to be honest and forthright.

47. We have also considered whether the Town should incur significant legal costs to seek a sanction that only a judge can impose.

48. In our view, it is also appropriate to consider, among other matters, the following factors:

- the seriousness of the contravention of the MCIA;
- whether there have been any enduring benefit as a result of the contravention;
- whether it is appropriate to seek any or all of the following sanctions: removal from office; disqualification from holding office; reimbursement for profit gained; suspension of remuneration; and reprimand.
- whether there is a reasonable prospect of securing a penalty that only a judge alone can impose, including an assessment of any applicable defences or relevant considerations under subsection 9(2) of the MCIA.

49. Given that Council did not consider and debate the substantive issue of the Wage Adjustment for managerial staff, the contravention of the statute by the Councillor would likely not be one that a judge would view as being deserving of an escalated penalty under subsection 9(1) of the MCIA.

⁸ See s. 9(2) of the MCIA.

50. In our assessment of the above factors, the public interest is not served by the Integrity Commissioner making an application to court pursuant to subsection 223.4.1(15) of the *Municipal Act, 2001*.

51. In view of the foregoing, we will not be filing an application to a judge of the Ontario Superior Court of Justice under section 8 of the MCIA for a determination of whether the Councillor has contravened the MCIA and seeking the imposition of a penalty. As noted above, Council has no role in this determination and cannot direct us to make an application nor can Council itself impose a penalty.

52. As required by subsection 223.4.1(16) of the *Municipal Act, 2001*, we have provided notice to the elector who filed the Application that we will not be making an application to a judge. We have also provided notice to the Councillor.

53. We recommend that a copy of our written reasons in this Report be posted by the Town's on its website.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the Town of Cochrane

Dated this 15th day of April, 2024

JM/sk

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