

February 28, 2021

Mayor Britton & Members of Council
Town of Iroquois Falls
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By Email: jbelhumeur@iroquoisfalls.com

MCIA Complaint Regarding Councillor Cybolsky

Your Worship & Members of Council,

On April 13, 2020, our office received a request for inquiry from Mr. Roger Hardy (the "Applicant") under section 223.4.1 of the *Municipal Act* alleging that Councillor Cybolsky did contravene sections 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* (the "MCIA") and under section 223.4 the Town of Iroquois Falls Code of Conduct ("Code of Conduct") when he submitted a notice of motion requesting permission from Council to allow him to record and photograph Council meetings when a reporter from the Enterprise was not in attendance.

We confirm that the Applicant is eligible to make such a request for inquiry.

We further confirm that the application was first filed without using the proper forms. The Applicant was advised of this and then he submitted a revised application which was supported by a sworn affidavit [dated April 14, 2020] setting out the reasons the Applicant believes his application complies with section 223.4.1(4) of the *Municipal Act* which requires that an application be made within six weeks after the applicant **became aware** of the alleged contravention. 2017, c. 10, Sched. 1, s. 21.

In the application the Applicant alleged that:

1. He attended the Council meeting on February 24, 2020.
2. At the meeting he witnessed a *"Notice of Motion presented by Councillor Darcy Cybolsky, a Councillor for the Town of Iroquois Falls, to sitting Councillors."*
3. The motion requested that Councillor Cybolsky be permitted to *"document Council meetings for his employer, The Enterprise."*
4. The motion put forward by Councillor Cybolsky *"suggests an employment issue at The Enterprise, where at times there is no one who can attend a Council meeting to "cover" the proceedings. He [Councillor Cybolsky] wishes to represent his employer as a reporter."*

5. He believed that *“Councillor Cybolsky recognizes that Council meeting activities hold a point of interest with readers of The Enterprise and certainly, along with other items, this adds to the sales of the newspaper which in turn creates job security for Councillor Cybolsky as an employee of The Enterprise.”*

In the documentation before us, the Applicant is clear that he became aware of the alleged contravention on February 24, 2020. The Applicant reported that upon learning of the motion, a letter was sent to Council to attempt to resolve the issue with them *“rather than make an application with the integrity commissioner’s office.”*

The Applicant contacted the *“interim clerk, for the Town of Iroquois Falls to ask when Councillor Cybolsky’s Notice of Motion would be entertained. [He] was advised that the motion would be discussed at the March 30, 2020 Council Meeting. After learning this, the Applicant stated that he “then, by email dated March 10, 2020, (within the six weeks) requested that [his letter] be added to the March 30, 2020 Council meeting agenda knowing that Councillor Cybolsky’s motion would be discussed.”* The Applicant also informed that he was not aware of his letter being on a Council meeting agenda and when the pandemic happened, he received an automated response from the Clerk [April 3, 2020] and decided to submit an Application to the Integrity Commissioner.

LEGISLATIVE AUTHORITY

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

Sections 5, 5.1 and 5.2 of the *MCIA* provide as follows:

- 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).

...

Written statement re disclosure

5.1 At a meeting at which a member discloses an interest under section 5, or as soon as possible afterwards, the member shall file a written statement of the interest and its general nature with the clerk of the municipality or the secretary of the committee or local board, as the case may be. 2017, c. 10, Sched. 3, s. 4.

Influence

5.2 (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 that is being considered by an officer or employee of the municipality or local board, or by a person or body to which the municipality or local board has delegated a power or duty, the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter. 2017, c. 10, Sched. 3, s. 4.

When an application is submitted alleging that a member of council has contravened sections 5, 5.1, or 5.2 of the *MCIA*, we **may** then conduct an inquiry. Upon completion of the inquiry, we may apply to a judge under section 8 of the *MCIA* for a determination as to whether the member has contravened section 5, 5.1, or 5.2 of the *MCIA*. We must publish reasons as to whether we intend to apply to a judge under section 8 of the *MCIA*. These are those reasons.

INQUIRY PROCESS

After receiving the Application, we followed the inquiry process as set out in the Integrity Commissioner Inquiry Protocol. We did a preliminary review of the complaint which resulted in the decision to conduct an inquiry into the matters.

Sean Sparling, a professional investigator with Investigative Solutions Network (ISN), was assigned as an agent of the Integrity Commissioner to carry out an investigation into the Applicant's allegation. The inquiry followed the process outlined in section 5 of the Integrity Commissioner Inquiry Protocol which included reviewing the available evidence, interviewing the Applicant, witnesses and Councillor Cybolsky.

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 Township's Code of Conduct. As required, assessments of credibility have been made. These assessments are based on:

- whether or not the individual had first-hand 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.)

FACTS

On January 31, 2020, Councillor Cybolsky submitted a Notice of Motion which was included on the February 24, 2020, Council Agenda. The notice submitted by Councillor Cybolsky stated:

“Request to document for the Enterprise – Councillor Cybolsky. I, Councillor Darcy Cybolsky, formally request permission from Council to document Council meetings for The Enterprise. On occasion, our regular reporter cannot attend a meeting or does not take a photo of a delegate or presenter. In these instances my ability to document provides a reporter who cannot attend with the content required to cover the meeting or the The Enterprise with a photo to accompany the article.”

The Procedure Bylaw for the Town requires that a member of Council bring forward a matter as a Notice of Motion at one meeting and that the matter is then deliberated at the next meeting. Councillor Cybolsky submitted the Notice of Motion in accordance with this practice. Later he withdrew the request. Council did not deliberate the matter.

The Applicant reported that he attempted to correspond with the Town to get clarity on the matter before he submitted his request to the Integrity Commissioner. In the Application, the Applicant stated that he first knew of the alleged contravention of the *MCIA* on February 24, 2020.

Six (6) weeks from February 24, 2020, is April 6, 2020.

The Application was received by our office on April 13, 2020, outside of the statutory application period.

For a member of Council to contravene the *MCIA* there must be a matter before Council that is pecuniary in nature for that member.

In accordance with the Town’s Procedure Bylaw, a Notice of Motion is not a matter debated/considered at Council on the date it is presented. It only becomes a matter to be considered at a subsequent meeting.

Councillor Cybolsky reported that he did not discuss the motion with Council, nor did he intend to vote on the matter. Further that he planned to declare a conflict when Council debated the request.

Councillor Cybolsky has declared pecuniary interest in matters before Council.

ANALYSIS

The Municipal Conflict of Interest Act

The *Municipal Conflict of Interest Act (MCIA)* prohibits Councillors from acting, even from influencing matters where they have a pecuniary interest “before, during or after” the meeting².

The Primary issue for analysis is whether Councillor Cybolsky as a member of Council had a “**pecuniary interest**” when he put forward a notice of motion requesting, he be granted permission of Council to document Council meetings when a Reporter normally assigned to do this by The Enterprise was unavailable.

“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.”

In essence, we considered whether a financial interest existed at the time Councillor Cybolsky submitted the notice of motion and whether it is “Direct” (personal to the Councillor), “Deemed” or “Indirect” pursuant to the *MCIA*.

Pecuniary Interest

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 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.

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).

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 *MClA*].

The Applicant's assertion is that Councillor Cybolsky would have a pecuniary interest because *"Councillor Cybolsky recognizes that Council meeting activities hold a point of interest with readers of The Enterprise and certainly, along with other items, this adds to the sales of the newspaper which in turn creates job security for Councillor Cybolsky as an employee of the Enterprise."* Councillor Cybolsky acknowledged that he believed he had a pecuniary interest and intended to declare the interest at the meeting whereat the motion was debated.

With the evidence before us, we cannot confirm that Councillor Cybolsky or the Enterprise have a pecuniary interest in the request Councillor Cybolsky put forward in his notice of motion. We rely on the decision of Justice James [*Winfield v. Hoyle* 2019 ONSC 4772, COURT FILE NO.: CV-17-073] which provides that the onus is on the Applicant to show there is a pecuniary interest.

"The Act should not be narrowly construed. Accordingly, although the vote in question [resolution 137-17] was whether the municipality should support CNL's proposal and therefore does not directly engage financial issues, the broader issue is whether CNL stands to gain financially if the regulator approves the project. If so, the applicant submits that the respondent, as an employee of CNL, ought not to have participated in the discussion or the vote."⁴

"On the evidence presented I am unable to conclude on the balance of probabilities that CNL has a pecuniary interest in the NSDF. A pecuniary interest in its favour cannot be assumed"⁵

"In my view, the applicant has failed to establish that CNL has a pecuniary interest in the NSDF."⁶

We further considered if the act of putting forward the notice of motion on a matter that Councillor Cybolsky believed he had a pecuniary interest, in itself, is a contravention of the *MClA*. To be clear, we considered if the mere act of putting forward the notice of motion was a contravention of the *MClA*.

The *MClA* requires that a member having a pecuniary interest in a matter not influence the decision of Council before, during or after the meeting when the matter is considered. There is

⁴ Paragraph 19 *Winfield v. Hoyle* 2019 ONSC 4772, COURT FILE NO.: CV-17-073 – August 13, 2019 [Decision of Justice James]

⁵ Paragraph 28 *Winfield v. Hoyle* 2019 ONSC 4772, COURT FILE NO.: CV-17-073 – August 13, 2019 [Decision of Justice James]

⁶ Paragraph 30 *Winfield v. Hoyle* 2019 ONSC 4772, COURT FILE NO.: CV-17-073 – August 13, 2019 [Decision of Justice James]

no definition of what the act of influencing would entail. However, the *MCIA* is to be interpreted broadly with a view to accountable and transparent decision-making. The *MCIA*, does not specifically prohibit a member of Council from putting forward a matter that they have a pecuniary interest in. It does require them to declare the interest and not influence the decision.

When does a Member's Pecuniary Interest Crystalize?

Case law shows us that there is a point in time when a pecuniary interest becomes absolute. Case Law is also clear that you cannot have a prohibited pecuniary interest for something that might or might not happen at a future date.

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.⁷

In this situation before us, Council received information about a matter that would be voted on at a future meeting. There was no deliberation of the motion or the notice of motion at the February 24, 2020, Council meeting. The motion was withdrawn by Councillor Cybolsky and was never deliberated by Council. To be clear, there was no vote, nor decision made by Council on this issue.

Code of Conduct

The Town of Iroquois Falls Code of Conduct requires Councillors to adhere to the *MCIA*. Therefore, a contravention of the *MCIA* is also a contravention of the Code of Conduct. The Code of Conduct does not require the matter to be reported within the statutory six (6) week time limit. Additionally, the Code of Conduct requires that a Councillor not use their position to benefit themselves, a friend, associate, etc. or to disadvantage someone else.

⁷ *Lorello v. Meffe*, 2010 CarswellOnt 11195, 2010 ONSC 1976, 99 M.P.L.R. (4th) 107 (OntSCI) at Para 59.

DECISION

The Applicant in this matter filed the request for inquiry more than six (6) weeks from when he became aware of the alleged contravention. When a matter is filed outside of the statutory filing period, the IC loses jurisdiction to consider the matter under the *MCI*A.

We have therefore considered the matter as an alleged contravention of the Code of Conduct only.

In the Application, the Applicant alleged that Councillor Cybolsky had a pecuniary interest because he is employed by The Enterprise and wanted to document Council meetings which would add to the sales of the newspaper and therefore, provide job security for Councillor Cybolsky (and presumably income for his employer). The Applicant did not provide evidence that Councillor Cybolsky would receive a bonus or that his employment with The Enterprise would be affected if he documented Council meetings in the absence of the regular Reporter. Nor did the Applicant provide evidence that covering/not covering Council meetings in the newspaper would increase or reduce the volume of sales for The Enterprise. To be clear, the Applicant failed to prove that Councillor Cybolsky had a pecuniary interest.

We cannot ***assume*** that Councillor Cybolsky had a pecuniary interest. There must be sufficient factual evidence to show a financial interest.

For a member of Council to contravene the *MCI*A there must be a pecuniary interest in a decision of Council. A Notice of Motion is not a matter debated/considered at Council. It only becomes a matter to be considered at a subsequent meeting. This matter was never considered, no decision of Council was ever made on the issue and so the breach of the *MCI*A could not have occurred regardless of whether or not Councillor Cybolsky or his employer had a pecuniary interest in the matter.

Had Council considered the matter and made a decision, the results of this inquiry may have been different, but in the circumstances, no breach is found.

Based on our review, the request for inquiry is dismissed.

Regards,



Peggy Young-Lovelace
Director/Independent Consultant