

EXPERTISE FOR MUNICIPALITIES (E4M)
NON-PROFIT ASSOCIATION
1894 LASALLE BLVD. SUDBURY, ON, P3A 2A4

INTEGRITY COMMISSIONER
FOR TOWN OF IROQUOIS FALLS



INQUIRY REPORT/DECISION

ALLEGATIONS: CONTRAVENTION OF THE
TOWN OF IROQUOIS FALLS CODE OF
CONDUCT & *MUNICIPAL CONFLICT
OF INTEREST ACT*

BY: COUNCILLOR TERRY BOUCHER

I. REQUEST/APPLICATION FOR INQUIRY

- [1] Expertise for Municipalities (E4m), as Integrity Commissioner, received a request for inquiry (“Request”) with respect to the Town of Iroquois Falls’ Code of Conduct – Bylaw 3507-18 (“Code of Conduct”) and an Application for Inquiry with respect to the *Municipal Conflict of Interest Act* (“MCIA”) from a member of Council (“Applicant”) about the alleged actions/behaviour of Councillor Boucher.
- [2] The Applicant alleged that Councillor Boucher contravened both the *MCIA* and the Code of Conduct when she emailed the Treasurer / Interim Clerk-Administrator (hereinafter referred to as Interim Clerk-Administrator or ICA) asking a question about a matter in which Councillor Boucher has a pecuniary interest.
- [3] To be clear, the allegations submitted by the Applicant are the same in their Application and their Request. However, the allegations have first been considered with respect to the *Municipal Conflict of Interest Act* (the “MCIA”) and subsequently, with respect to the Code of Conduct. A contravention of the *MCIA* is also a contravention of the Code of Conduct and should therefore be determined first.
- [4] Both matters are considered herein.

II. FINDINGS/CONCLUSION

- [5] We find that Councillor Boucher did contravene the *MCIA*. We will not be making an application to Court with respect to our finding.
- [6] If the Applicant disagrees with our finding, they can make an application to the Court at their own expense to seek redress.
- [7] Additionally, Councillor Boucher contravened:
- a. The Council-Staff Relations policy and thereby contravened section 6.5.1 of the Code of Conduct.
 - b. Section 9.8.2 of the Code of Conduct.
 - c. Section 14.13.2 of the Code of Conduct.

Recommendations

- [8] Finding a breach of the Code of Conduct, section 223.4(5) of the *Municipal Act*, 2001 permits Council to levy a penalty on the Respondent of either a reprimand, or a suspension of the remuneration paid to the Respondent in respect of their services as a member of Council for a period of up to 90 days for each breach.

[9] In this case, it is recommended that Council

- a. Reprimand Councillor Boucher, for contravening the *MCIA*; and
- b. Suspend her remuneration for thirty (30) days for Contravening the Code of Conduct.

III. INQUIRY PROCESS

[10] Upon receipt of the Request and the Application, we completed an initial review of the statutory declaration and the accompanying material submitted by the Applicant and upon finding the Application properly considered by us, we conducted a preliminary review of the allegations to determine if there were sufficient grounds to conduct a full inquiry in accordance with the Integrity Commissioner Inquiry Protocol.

[11] The matters were assigned to R.J. (Jamie) Appleton (the “Investigator”), an investigator with Investigative Solutions Network (“ISN”) as an agent of the Integrity Commissioner to crystalize the complaint and to interview the parties/witnesses.

[12] The Investigator interviewed the Applicant, Councillor Boucher and the Treasurer / Deputy Clerk-Administrator who was the Treasurer / Interim Clerk Administrator at the time the allegations occurred as the Clerk-Administrator position was vacant.

[13] The following bylaws, policies and other material related to the allegations were considered:

a) Town of Iroquois Falls Code of Conduct

Adherence to Council Policies and Procedures

Section 6.5.1 Every member shall observe and comply with every provision of this Code of Conduct, as well as all other policies and procedures adopted or established by Council.

Conduct Respecting Others

Section 8.7.1 Every Member has the duty and responsibility to treat members of the public, one another and staff appropriately and without abuse, bullying or intimidation, and to ensure that the municipal work environment is free from discrimination and harassment. The Member shall be familiar with, and comply with, the Municipality's Workplace Anti-Violence, Harassment and Sexual Harassment Policy.

Conduct Respecting Staff and Officers

Section 9.8.2 Members shall acknowledge and respect the fact that staff carry out directions of Council, through senior staff, including but not limited to the treasurer, clerk, director of public works, and administer the policies of the Municipality. No member shall perform, direct or attempt to undermine the duties of any staff person or Officer except in accordance with the Municipality's procedural by-law.

No Improper Use of Influence

Section 14.13.2

No Member shall use his or her office or position to influence or attempt to influence the decision of any other person, for the Member's private advantage, the private advantage of the Member's parent, child, spouse, staff member, friend or associate, business or otherwise or the disadvantage of others. No Member shall attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of their constituents as part of their official duties. No Member shall hold out the prospect or promise of future advantage through the Member's supposed influence within Council in return for any action or inaction.

- b) Municipal Conflict of Interest Act RSO 1990 Generally and Specifically, sections 3 and 5.2(1) (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. R.S.O. 1990, c. M.50, s. 3; 1999, c. 6, s. 41 (2); 2005, c. 5, s. 45 (3); 2021, c. 4, Sched. 11, s. 23 (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.

- c) Emails between Councillor Boucher and Clerk-Administrators (Interim and Former)
d) Conflict of Interest Declaration – Nov. 30, 2020
e) Regular Council Meeting Minutes – Nov. 30, 2020

Credibility and Standard of Proof

- [14] 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

[15] All those interviewed by the Investigator were found to be credible.

FINDINGS OF FACT

[16] The circumstances that give rise to the request for inquiry are related to an email sent by Councillor Boucher to a Municipal employee wherein she asked if her son had received a response to an inquiry he made about the possibility of purchasing a piece of property owned by the Town.

[17] Robert Boucher wrote to the ICA (emailed to all of Council as well) to inquire as to whether he would be permitted to purchase a piece of property owned by the Town. This request was to be brought before Council for a decision. Robert Boucher has a financial interest in the matter he is requesting that Council consider. His mother Terry Boucher is a Councillor.

[18] Councillor Boucher has been a Councillor in Iroquois Falls for over a decade. She has received training on her obligations under the Code of Conduct, the *MCIA*, and the Council/Staff Relations Policy. She is aware of her obligation to declare a pecuniary interest and has done so on several occasions.

[19] On **Tues. Nov.10**, 2020, the Interim Clerk-Administrator received an email from Robert Boucher asking to be on the next Council agenda to find out if the Town would be willing to sell him some municipal land. The email described the location and the amount of land.

Reference: Email - time noted as November 10, 2020, 3:38 a.m.

[20] Of interest, Councillor Boucher, received the same email a minute later.

Reference: Email - time and date noted as November 10, 2020, 3:39 a.m.

[21] Two days later, on **Thurs. Nov.12**, 2020, Councillor Boucher sent an email to the ICA. It stated, "*Hi (ICA's first name), Just wondering if he [referring to her son Robert] has received a response, Thanks, Terry.*"

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.)

- [22] On **Fri. Nov.13**, 2020 at 9:05 a.m., the ICA received another email from Councillor Boucher asking if she had a timeline when the CAO position would be posted as Council directed back in October.
- [23] The ICA responded to Councillor Boucher that same day at 5:31 p.m. that the CAO position had been posted.
- [24] That evening she received a *“thank you”* for your email from Councillor Boucher.
- [25] On **Sat. Nov.14**, 2020, a second email arrived from Robert Boucher interested in the land (copied to all of Council and the inquiriesandcomplaints@iroquoisfalls.com email address) saying, *“I am just confirming that you received my email as I have not heard from you.”*
- [26] On **Mon. Nov.16**, 2020, the ICA answered with, *“Thank you for your interest. I will need to explore this further with my department head team. Once all the components have been addressed, I will prepare a report to Council for consideration.”*
- [27] On **Mon. Nov.16**, 2020, a third email came back (copied to all of Council) asking if she had a timeline as to when she would have an answer.
- [28] On **Thurs. Nov.19**, 2020, the Interim Clerk-Administrator responded with, *“Your email will be presented as correspondence on the November 30th Regular Council meeting.”*
- [29] On **Mon. Nov.30**, 2020, the correspondence was presented as promised. Councillor Boucher declared a conflict and left the meeting.

Reference: Nov. 30, 2020, meeting minutes
2020 Conflict of Interest Declarations

- [30] The minutes of the Nov 30, 2020, Regular Council meeting indicate that Councillor Boucher declared a pecuniary interest with item “9. D) Robert Boucher – Potential Purchase of Land; her son is requesting to purchase the property.”

Reference: Nov 30, 2020, Regular Council meeting minutes

- [31] On **Fri. Dec. 4**, 2020, a response went back to Robert Boucher from the Treasurer / Deputy Clerk-Administrator (she had resigned from being the Interim Clerk-Administrator at this point) with the results of Council’s discussion and direction to staff to get more information. Emails continued back and forth on the topic until Jan. 6, 2021.
- [32] Councillor Boucher did not respond specifically to any of the emails sent by her son.

Reference: Interview with Councillor Boucher and ICA

- [33] Councillor Boucher did not ask her son to stop copying her on his emails related to his request to purchase property.

Reference: Interview of Councillor Boucher

- [34] Councillor Boucher on many occasions emailed individuals who have held the position of Clerk-Administrator. Generally, these emails ask for information, ask for the individual to respond to inquiries made by residents (who allegedly had reached out to Councillor Boucher for assistance) and gave an opinion on actions that had been taken.
- [35] The Applicant reported that Councillor Boucher's communications with the ICA have been overbearing and influenced the ICA's actions.

Reference: Interviews with Requestor/Applicant and ICA

IV. ANALYSIS

- [36] We considered:
- a. Whether Councillor Boucher had a direct, indirect or deemed pecuniary interest when she emailed the ICA requesting to know if her son had been responded to;
 - b. Whether Councillor Boucher complied with the *MCIA* [related to the email];
 - c. Whether to make an Application to Court for breach of the *MCIA*.
 - d. Whether Councillor Boucher contravened the Code of Conduct.

Municipal Conflict of Interest Act

- [37] The email sent by Councillor Boucher to the ICA related to her son's request to purchase property was dated prior to the matter coming before Council. The ICA advised Robert Boucher that she would need to consult with the department heads and then prepare a report for Council and that the matter would be considered on November 30, 2020.
- [38] The *MCIA* prohibits Councillors from influencing matters where they have a pecuniary interest "*before, during or after*" the meeting².
- [39] "*Pecuniary interest*" is not defined in the *MCIA*; however, the Courts have interpreted it to mean a financial, monetary or economic interest. A pecuniary interest is held to be a "deemed" interest of the member (Councillor) when the parent, spouse, or child of the member (Councillor) has a pecuniary (financial) interest, and the member is aware of the interest. In this circumstance, Robert Boucher has a pecuniary interest. Councillor Boucher was aware of her son's request. She therefore has a pecuniary interest in the matter and must comply with the *MCIA*.

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

[40] Councillor Boucher did declare the interest at the November 30, 2020, Council meeting. Of consideration is whether or not Councillor Boucher influenced the matter before the meeting.

[41] The *MCIA* in section 5.2 states:

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.³ [Emphasis added]

[42] The *MCIA* does not provide a definition of the word “*influence*” nor has the issue of influencing been interpreted in sufficient detail by the Courts as to create a test to apply when analyzing alleged breaches. However, in *Moll v. Fisher* (1979), Robbins J. with respect to the *MCIA* stated:

*“The obvious purpose of the Act is 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. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest.”*⁴

.....

He goes on to say:

“Legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose.”

[43] Robert Boucher’s request is a matter that was being considered by the ICA (an officer or employee of the Municipality).

[44] Councillor Boucher's email of November 12, 2020, to the ICA requesting to know if her son had received a response was done to ensure the ICA acted and is clearly an attempt to influence the matter. Councillor Boucher should have known that she must not have anything to do with any kind of comment, question or otherwise, with respect to her son’s inquiry to purchase a piece of municipally owned property as set out in his email.

[45] Councillor Boucher contravened the *MCIA*.

³ *Municipal Conflict of Interest Act*, R.S.O. 1990 C.M.50 s.5.2(1).

⁴ *Moll and Fisher* (1979), [1979 CanLII 2020 \(ON SC\)](#), 23 O.R. (2d) 609, 8 M.P.L.R. 266, 96 D.L.R. (3d) 506 (Ont. Div. Ct.), at page 612 (of O.R., 269 of M.P.L.R.)

Should We Apply to a Judge in this Case?

- [46] 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.⁵ The Integrity Commissioner must publish written reasons for the decision whether or not to apply.⁶
- [47] 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)*.⁷
- [48] 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.⁸
- [49] 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 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.
- [50] We will not be applying to a Judge with respect to the allegation that Councillor Boucher contravened the *MCIA*. Our reasons are as follows:
- a. Councillor Boucher did not receive a personal financial benefit;
 - b. Councillor Boucher declared the pecuniary interest and left the meeting when the matter was considered by Council;
 - c. Councillor Boucher only communicated with the ICA once about the matter;
 - d. Councilor Boucher did not intentionally contravene the *MCIA* in fact her behaviour is consistent with her practice of continually emailing the most senior Manager on many issues; and
 - e. We do not believe it is in the best interest of the Town to pursue this matter in Court considering the most likely outcome would be a reprimand. We base this on Justice Gareau's decision in *Elliot Lake v. Pearce* when he determined that while Councillor Pearce contravened the *MCIA*, because Councillor Pearce did not receive a financial benefit personally, the most appropriate penalty is a reprimand.⁹ And this decision was upheld by the Divisional Court, more specifically, Justices Swinton, Lederer and Doyle, in their decision *City of Elliot Lake (Integrity*

⁵ *Municipal Act, 2001*, S.O. 2001, c.25 as am. s. 223.4.1(15)

⁶ *Ibid*, s. 223.4.1 (17)

⁷ *Ibid*, s. 223.3(1)

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

⁹ *Town of Elliot Lake v. Pearce*, 2021 ONSC 1851

Commissioner) v. Ed Pearce in which they agreed that a reprimand was the appropriate penalty.¹⁰

Code of Conduct

- [51] Section 9.8.2 of the Code of Conduct states that, “No Member shall perform, direct or attempt to undermine the duties of any staff person or Officer except in accordance with the Municipality’s procedural by-law.”
- [52] The role of Council in section 3.4 e) of Procedural Bylaw 3545-19 states that members will, “Ensure the accountability and transparency of the operations of the Municipality, including the activities of the senior management of the Municipality.” It does not include “directing the duties” as a single Council member.
- [53] Council as a body directs the duties of the most senior manager in this case, the Clerk-Administrator or Interim Clerk-Administrator.
- [54] The Applicant alleged that Councillor Boucher attempted to influence or pressure the Interim Clerk-Administrator through email when she posed a question related to her son’s inquiry. Councillor Boucher denied that she attempted to influence the ICA with this email.
- [55] Section 3. of the Council – Staff Relations Policy, Bylaw 3508-18 states clearly that “Members of Council must understand that they have no individual capacity to direct Staff to perform or not perform functions or duties.” The policy goes on to say, “The Clerk-Administrator is responsible for Staff and Officers – Members of Council who need to engage with Staff and Officers must do so through the Clerk-Administrator. This would include both in person, verbal, written and electronic messages.”
- [56] Councillor Boucher was free to communicate with the Clerk-Administrator to seek clarification or information about matters before Council or municipal operations generally but not to direct the duties of the ICA unless duly authorized by resolution of Council. Councillor Boucher was not given express authority by Council to manage the work performance of the ICA.
- [57] When individual members of Council question whether an officer or employee has completed a task, they are in essence attempting to prioritize the individual’s work. Councillor Boucher sent an email two (2) days after her son’s email was sent to the ICA. The Town does not have a level of service bylaw or other policy that requires officers and employees to respond to email requests within a specified time.
- [58] Additionally, Robert Boucher’s request was not of an urgent or priority nature and did not require immediate action.

Dated: November 30, 2021

¹⁰ City of Elliott Lake v. Pearce, 2021 ONSC 7859