

## CITY OF WELLAND

IN THE MATTER OF A COMPLAINT against Councillor Lucas Spinosa, dated May 9, 2019, under section 223.4 and 223.4.1 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended (the "**Act**"), the *Municipal Conflict of Interest Act*, a R.S.O. 1990, c. M.50 (the "**MCIA**"), and Policy Number HUM-001-0031 of the Corporation of the City of Welland, being a Policy to establish the Code of Conduct for Members of Council.

### OVERVIEW

1. On February 5, 2013, the City of Welland (the "**City**") approved Policy Number HUM-001-0031, establishing a Code of Conduct for Members of Council (the "**Code**"). The purpose of the Code is to ensure that the Members of Council share a common basis for acceptable conduct. The Code is not intended to replace personal ethics.
2. On or about October 4, 2016, I was appointed as the City's Integrity Commissioner. Pursuant to section 223.3(1) of the Act, I have exercised my powers of delegation and thereby had the assistance of my associate, Matt Hodgson, in drafting this report.
3. Effective March 1, 2019, under section 223.4.1 of the Act, an Integrity Commissioner can investigate a complaint from an elector or a person demonstrably acting in the public interest concerning an alleged contravention of MCIA rules that apply to Members of Councils or Local Boards.
4. Lucas Spinosa ("**L.S.**") was elected to Welland City Council as the representative of Ward 3 in December of 2018. He is also the owner, since 2015, of The Black Sheep Lounge ("**The Black Sheep**"), a café located on 64 Niagara Street in Welland. His LinkedIn profile states that he attended Niagara College for Media and Design from 2012 to 2013.
5. I received one complaint, on May 9, 2019, alleging that, because The Black Sheep has either hosted, sponsored, or catered past events for the Welland Public Library (the "**Library**"), L.S. breached the MCIA and the Code in respect of his vote in council, on February 19, 2019, against a motion to reduce funding for the Library.
6. In accordance with section 223.4(5) of the Act, Article XVI of the Code authorizes Council to impose either of two penalties on a Member of Council following a report by the Integrity Commissioner that, in her or his opinion, there has been a violation of the Code:

- i. A reprimand; or
- ii. Suspension of the remuneration paid to the Member of Council in respect of his or her services as a Member of Council or local board, as the case may be, for a period of up to 90 days

7. Under the Code, the Integrity Commissioner may also recommend that Council or a local board take the following actions:

- i. Removal from membership on a Committee or local board;
- ii. Removal as Chair of a Committee or local board;
- iii. Repayment or reimbursement of moneys received;
- iv. Return of property or reimbursement of its value; and
- v. A request for an apology to Council, the complainant or both.

8. Under section 223.4(15) of the Act, upon completion of my inquiry, if I consider it appropriate, I 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 that Act. Under section 9(1) of the MCIA, a determination by a judge that the Member has contravened that Act could result in significant penalty, including the removal of the Member from his or her seat on council, and disqualification for a period of up to seven years.

9. The question at the heart of this inquiry is: Did Councillor Spinosa contravene the MCIA and the Code when he voted against the removal of Library funding at the February 19, 2019 meeting of Council?

10. For the reasons set out below, I have concluded that L.S. breached sections 5 and 5.1 of the MCIA and the Code.

### **THE COMPLAINT**

11. The complaint against L.S. was received on May 9, 2019. It consists of four allegations relating to The Black Sheep's involvement with Library events and a matter voted on in Council respecting the removal of Library funding. The specific incidents are listed as follows:

- i. Several events organized by the Library and advertised in the Library's winter and spring program guides, have been held, or were scheduled to be held, at The Black Sheep, including meetings of a book club on January 9, February 13, March 13, April 10, May 8, and June 12 of 2019. The Library provides participants with a complimentary beverage at book club events.
- ii. On February 16, 2019, the Black Sheep provided catering services to an event held by the Library at the Wellness Complex, a venue owned by the City;
- iii. On February 19, 2019, at a meeting of council, L.S. voted against a motion to remove some \$36,458.00 of funding from the Library;
- iv. On March 9, 2019, the Black Sheep advertised at, and provided coffee for an event held by MPP Jeff Burch at City Hall.

12. The focus of the complaint, and my subsequent investigation, was on whether The Black Sheep's sponsorship, hosting, or catering of events held by the Library, required L.S. to disclose a pecuniary interest and abstain from discussion or voting on Library matters. And, in particular, whether L.S.' vote on February 19, 2019, in respect of the removal of Library funding constitutes either a violation of the MCIA and/or the Code.

#### **THE RESPONSE**

13. On May 31, 2019, I provided L.S. with notice of the complaint against him, which set out the specific allegations noted above. I further requested that L.S. provide me with a written response to the complaint within 14 days of receiving the notice, which would be provided to the Complainant, for reply.

14. On August 28, 2019, I received a written response to the complaint from L.S. The response provides that, in addition to events held for the Library, The Black Sheep has, since 2015, also catered events for the Welland Historical Museum and Civic Square. The response further states that, upon being elected, out of concern that his business dealings may create a conflict of interest, L.S. informed "staff, elected officials and other professionals" of his business' participation in events held at city venues and was advised that if a conflict of interest was declared during relevant agenda items, that it would be business as usual." L.S. claims to have declared such conflicts of interest on multiple occasions.

15. In L.S.' view, he did not use his position as an elected official to benefit himself as he has been working with City venues for years prior to "even the prospect of running for office." Moreover, L.S. contends that he has been serving Welland as a volunteer and community advocate for some time, without material gain, and was being unduly targeted by the complaint against him.

## DISCUSSION AND FINDINGS

### *Preliminary Jurisdictional Issue – Timing and Content of Complaint*

16. Under section 223.4.1(4) of the Act, an application to the Integrity Commissioner to conduct an inquiry in respect of an alleged violation of the MCI Act *may only be made within six weeks after the applicant became aware of the alleged contravention*. Once the applicant believes that the MCI Act has been contravened, the six-week limitation period starts to run, even if the applicant later acquires facts to support that belief.<sup>1</sup>

17. Furthermore, the content of an application to the Integrity Commissioner under section 223.4.1 must be set out in prescribed form. Section 223.4.1(6) provides as follows:

#### ***Content of application***

*(6) An application shall set out the reasons for believing that the member has contravened section 5, 5.1 or 5.2 of the Municipal Conflict of Interest Act and include a statutory declaration attesting to the fact that the applicant became aware of the contravention not more than six weeks before the date of the application or, in the case where an applicant became aware of the alleged contravention during the period of time described in paragraph 1 of subsection (5), a statutory declaration attesting to the fact that the applicant became aware of the alleged contravention during that period of time.*

18. In a similar vein, the Code also places restrictions on the timing of complaints. Article XVIII of the Code provides that: *Complaints must be submitted within six weeks of the matter becoming known to the individual and no more than six months after the alleged violation occurring.*

19. In respect of the timing of this complaint, the date when the Complainant became aware of the alleged contravention of the MCI Act was not evident from the content of the formal complaint,

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<sup>1</sup> *Hervey v. Morris*, 2013 ONSC 956 at para 60-61.

as received. I therefore inquired when the Complainant first became aware that L.S. failed to disclose an alleged pecuniary interest at the vote in Council on February 19, 2019. I was initially advised that the Complainant was made aware of the Council Member catering an event for the Library, held on February 15 and 16, in April, and was made aware of winter book clubs being held at The Back Sheep also in April, and of spring book clubs being held there in May. However, the formal complaint references an unspecified date in March where the Complainant was made aware of a Library event that was catered by The Black Sheep. The relevant portion of the formal complaint reads as follows:

*I was made aware in March by a citizen of an event that the Councillor provided catering services to. The resident attended on February 16. The event was held by the Welland Library at the city owned Wellness Complex. Services were paid to the Councillor for this event*

20. In my view, the factual basis for the Complainant to believe a contravention of the MCI Act may have occurred were made clear as of that unspecified date in March 2019. The relevant portion of the complaint alludes to the fact that services were paid to L.S. for the catering of the event which occurred before the vote in council on February 19<sup>th</sup>. Thus, the Complainant has clearly implied that, as a result of L.S. receiving payment for catering services, L.S. allegedly had a pecuniary interest in municipal affairs relating to the Library.

21. When asked to further specify the date in March when the Complainant was informed of the Library event held at the Wellness Complex for which services were paid to the councillor, I was advised that, according to the Complainant's calendar, March 24, 2019, "may have been the date."

22. I then requested that the Complainant include, as part of their complaint, a statutory declaration attesting to the fact that the Complainant became aware of the contravention not more than six weeks before the date of the complaint, so as to comply with the prescribed content for an application under section 223.4.1(6) of the Act. On October 31, 2019, I received the Complainant's statutory declaration, which provided that he became aware of the Member's alleged contravention of the MCI Act on March 31, 2019.

23. In light of the apparent inconsistency in respect of the date in March when the Complainant was advised of the event that L.S. catered, I requested that the Complainant explain why that date had changed from March 24<sup>th</sup> to March 31<sup>st</sup>. The Complainant advised me that,

because it was a verbal discussion with the citizen, it was challenging to be certain of its timing. The Complainant further advised that, before completing the declaration, and upon further reflection and review of their weekend schedule in March, "in great detail," March 31, 2019 was in fact the date they became aware of the Member's alleged contravention of the MCIA.

24. Pursuant to section 223.4.1(4) of the Act, a complaint or application in respect of an alleged violation of the MCIA must be received *within six weeks after the applicant became aware of the alleged contravention*. Given that the Complainant attests to first having knowledge of the alleged contravention on March 31<sup>st</sup>, the complaint against L.S. must have been received by May 12, 2019, in order for me to be conferred jurisdiction to conduct an inquiry under the Act. As noted, I received the formal complaint against L.S. on May 9, 2019. I accept that the Complainant, having sworn under oath to the date they became aware of the alleged contravention, has satisfied the timing condition. Accordingly, I have conducted my inquiry into whether L.S. contravened the MCIA on that basis.

#### *The MCIA*

##### Purpose of the MCIA

25. The purpose of the MCIA 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 pecuniary interest. As stated by the Divisional Court for Ontario in the seminal case of *Re Moll and Fischer*,<sup>2</sup>

*"This enactment, like all conflict of interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgement of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less."*

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<sup>2</sup> (1979) 23 O.R. (2d) 609 (Div Ct)

26. The MCI A sets out four fundamental principles bearing on the responsibilities of members of municipal councils and local boards to avoid conflicts of interest.<sup>3</sup> These are provided as follows:

- I. *The importance of integrity, independence and accountability in local government decision-making.*
- II. *The importance of certainty in reconciling the public duties and pecuniary interests of members.*
- III. *Members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny.*
- IV. *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*

27. At its heart, the MCI A is not about acting dishonestly or for personal gain; rather it “concerns transparency and the certainty that decisions are made by people who will not be influenced by any personal pecuniary interest in the matter at hand.”<sup>4</sup> In short, the MCI A seeks to ensure the integrity of municipal governance.

#### Statutory Duties of a Member

28. Sections 5, 5.1 and 5.2 of the MCI A set out the duties of a member of council where one has a pecuniary interest, either direct or indirect, in any matter. The relevant sections provide 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,*

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<sup>3</sup> See MCI A, s 1.1.

<sup>4</sup> *Tuchenhagen v. Mondoux*, [2011] O.J. No. 4801 at para 25 (Div Ct), aff'd 2012 ONCA 567 [Tuchenhagen].

- (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.

**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.

**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.

29. Put concisely, when a member believes that he or she has a pecuniary interest under the MCI A, and is unable to find an appropriate exemption to redress the matter,<sup>5</sup> he or she must disclose the interest, file a written statement, and refrain from participating in any discussion of, or vote on any question in respect of the matter.

*Did L.S. Breach the MCI A?*

30. To decide whether L.S. contravened the MCI A when, on February 19, 2019, he voted at a meeting of council against a motion to remove funding from the Library, I must first determine whether L.S. had a pecuniary interest in that matter.

31. Although a “pecuniary interest” is not a defined term in the MCI A, Ontario courts have restricted its meaning to a financial, monetary, or economic interest.<sup>6</sup> The question that must be

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<sup>5</sup> Section 4 of the MICA provides various exceptions to the application of sections 5 and 5.2.

<sup>6</sup> See e.g. *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683 at para 9 and cases cited therein [*Ferri*]



asked is "Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?"<sup>7</sup>

32. The specific matter at issue at the February 19, 2019 meeting of Council was a motion to remove an additional operating grant from the Library Seaway Mall location in the amount of \$36,458.00. I find that L.S. had a direct pecuniary interest in that matter and should have disclosed his interest and refrained from casting his vote in Council. In my view, the pecuniary interest of the Member is definable and real with the potential to affect his interests.<sup>8</sup>

33. Records obtained in the course of my investigation reveal that The Black Sheep has received payment for catering or hosting Library events several times between April 2018 and February 2019.<sup>9</sup> One of those payments was made to the café on February 15, 2019 for catering the event held at the Wellness Complex on February 15<sup>th</sup> and 16<sup>th</sup>.

34. The records also indicate that payments issued to The Black Sheep are derived from the Library's operating budget, referenced to both "programming" and "city promotion", as provided in the Welland Public Library Operating Budget.

35. As further revealed through my inquiry with City staff, the Library's Operating Budget consists of one budget for all three of its locations, with funds allocated to respective locations on an as-needed basis, so as to balance revenues with expenditures. Moreover, and of significance, is the fact that the "additional operating grant for the Library Seaway Mall location" is not appropriated specifically to that location, nor for any particular purpose, but rather is subsumed into the Library's overall operational budget.

36. As payments to The Black Sheep are considered part of the Library's general operating costs, and because L.S. cast his vote on the issue of the removal of funds from the Library's general operating budget, he voted on a matter before Council in which he had a clear pecuniary interest; the vote concerned the amount of funding available to the Library, the extent of which creates the potential for gain or loss to his business.

37. On its face, The Black Sheep receives an economic benefit, or the opportunity to benefit financially, when it hosts, caters, or sponsors various Library events. Thus, the decision to either

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<sup>7</sup> *Tuchenhagen, supra* at para 32 citing to *Greene v. Borins* (1985), 50 O.R. (2d) 513 [*Greene*].

<sup>8</sup> *Rivett v Baird et al*, 2018 ONSC 352 at para 51.

<sup>9</sup> The records received indicate 7 payments related to distinct events were issued to The Black Sheep from the Library over this time period.

hold or reduce Library funding may diminish, or improve, opportunities for the Member's business to receive economic benefit from its involvement with Library events.

38. Even if L.S. had voted in favor of the removal of Library funding, his vote on the matter would still have contravened the MCI A. The aim of the statute is to prohibit *any vote* by one who has a pecuniary interest in the matter to be considered and voted upon. It is only by strict observance of this prohibition that public confidence will be maintained.<sup>10</sup>

39. Nor is there a need to find corruption on the part of a Member or actual loss on the part of the Council or board. "As long as a member fails to honour the standard of conduct prescribed by the statute, regardless of his good faith or the propriety of his motive, he is in contravention of the statute."<sup>11</sup>

40. Exceptions to the terms of section 5 of the MCI A are set out in section 4 and I have considered the provisions of section 4(k) in my inquiry. Although the Court of Appeal for Ontario has held that "a pecuniary interest sufficient to trigger the provisions of the MCI A is not to be narrowly confined," the Court of Appeal has also found,

*that "pecuniary interest" must not be construed so broadly that it captures almost any financial or economic interest such that it risks needlessly disqualifying municipal councillors, and others captured under the ambit of the MCI A, from participating in local matters of importance to their constituents. Section 4(k) of the MCI A operates to respond to this concern and ameliorate the potentially harsh effects of a broad definition of pecuniary interest by ensuring that pecuniary interests that are truly remote or insignificant are not caught under s. 5.<sup>12</sup>*

41. Thus, even if an interest is found to exist, section 4(k) of the MCI A provides that section 5 does not apply to a pecuniary interest in any matter that a member may have if that interest is so *remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.*

42. The test to be applied under section 4(k) asks, "would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to

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<sup>10</sup> See e.g. *Greene v. Borins*, *supra*, p 269-70.

<sup>11</sup> *Moll v. Fisher*, *supra*.

<sup>12</sup> *Ferri*, *supra* at para 10

influence that councillor's action and decision on the question?"<sup>13</sup> The test requires consideration of *all* the circumstances, including whether good faith and motive are relevant to the question of whether a pecuniary interest is likely to influence the councillor.<sup>14</sup>

43. Although I have no reason to doubt the sincerity of L.S.' belief that he "will never be influenced by a personal or business endeavor" while conducting the affairs of Council, it bears repeating that the underlying purpose of the MCIA is to ensure public trust and certainty in the actions and decisions of those we elect to govern. Its purpose is not to parse the intentional state of councillors to ensure that when they conduct municipal business, their motives are pure. Even though L.S. may have acted in good faith in omitting to declare his interest, the "reasonable elector" may view the situation differently. Thus, in my view, the Councillor's motivation, though a relevant consideration, must be balanced against other relevant factors.

44. First, it is worth re-iterating that The Black Sheep receives payment for its services from the Library's operating budget; the question voted on in Council was whether to remove funding from that budget. Thus, it is difficult to view the Member's interest as being "truly remote."

45. Other relevant considerations include the fact that The Black Sheep was either hosting or catering events for the Library in close proximity to the February 19<sup>th</sup> vote in Council. As noted, the Councillor's business catered a Library event at the Wellness Centre on February 15<sup>th</sup> and 16<sup>th</sup>. Payment was issued to The Black Sheep for this event on February 15<sup>th</sup> – four days prior to the vote in Council. The café also hosted a Library Book club on January 9<sup>th</sup>, and had others scheduled in coming months. Therefore, the member ought to have been aware, at a minimum, of the potential for a conflict to exist.

46. Furthermore, L.S. had declared conflicts of interest on previous matters before Council where he believed he had a pecuniary interest in the matter as a result of his café. He had done so on two occasions prior to the February 19, 2019 vote,<sup>15</sup> and was aware of his obligation to disclose an interest under the MCIA.

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<sup>13</sup> *Ibid* at para 16

<sup>14</sup> *Ibid* at para 17.

<sup>15</sup> See Minutes of Council, January 15, 2019, and February 5, 2019, available online at <https://www.welland.ca/Council/AgendasMinutes.asp>

47. Moreover, the Councillor's vote had material consequence. Had L.S. abstained from voting, the motion would have passed and the additional operating grant for the Library would have been removed.

48. In my view, a reasonable elector apprised of all these circumstances would have been more likely than not to regard the interest of the Councillor to influence his decision to vote on the question of the removal of library funding. Put simply, L.S. failed to satisfy his statutory duties in this case and must be held accountable for his omission.

49. It is an express principle of the MCIA that "members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny."<sup>16</sup> This expectation requires members to be familiar with their obligations under the legislation, and consider, with respect to every vote, the possibility of contravening the MCIA when a pecuniary interest in a matter, however slight, is not declared.

50. I also find that none of the other exceptions listed under section 4 of the MCIA apply so as to exempt L.S from the requirements of section 5. In particular, his pecuniary interest is not one in common with electors generally. Rather, the pecuniary interest of L.S. is direct, proximate, and particular to him as owner of The Black Sheep.

51. Accordingly, I find that on February 19, 2019, L.S. contravened sections 5 and 5.1 of the MCIA when, during a meeting of Council, he failed to disclose his pecuniary interest in the matter and cast his vote in respect of the removal of funding from the Library.

*Did L.S. Breach the Code?*

52. The Code itself does not contain a specific article or section establishing the duties of members in relation to conflicts of interest. However, one of its key underlying principles is that: *Members shall perform their functions with integrity, accountability, and transparency, avoiding the improper use of the influence of their office, and conflicts of interest, both real and apparent;*

53. Furthermore, Article I of the Code, entitled *Statutory Provisions Regarding Conduct*, provides that the Code operates along with, and as a supplement to, the existing statutes governing the conduct of members, including, the MCIA. The Code also imports defined terms

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<sup>16</sup> MCIA, s 1.1. (emphasis added).

from the MCIA,<sup>17</sup> and makes additional reference to compliance with its terms as constituting a standard of conduct.<sup>18</sup> In my view, this implies that, with respect to standards of conduct that govern members with conflicts of interest, the MCIA is incorporated by reference into the Code. Thus, a member who has failed to disclose a pecuniary interest in a matter, and thereby violated the MCIA, will, in this particular respect, also violate the Code. Accordingly, by virtue of my finding that L.S. has contravened the MCIA, I find that he has similarly breached the Code.

54. The complaint also alleges that L.S. was in breach of Articles VIII and XII of the Code, which provide as follows:

***VIII. Use of Municipal Property, Services and Other Resources***

*No Member shall use for personal purposes, or permit the use of, City property, facilities, equipment, supplies, services, staff or other resources (for example, City-owned materials, websites, Council transportation delivery services and Members of Council expense budgets) for activities other than the business of the City.*

***XII. Business Relations***

*No Member shall act as a paid agent before Council, its committees, or any agency, board or commission of the City, except in compliance with the terms of the Municipal Conflict of Interest Act.*

55. Article VIII of the Code prohibits the use of municipal property for a member's personal purpose, or for activities other than those relating to the business of the City. While it is true that L.S. has received payment for catering events held on municipal property and, thus, it may be said that he used City property for a personal purpose, his purpose was merely incidental. The predominant purpose of the event, and the primary use to which the property was put – a Library event – clearly relates to municipal affairs. Accordingly, I find that L.S. did not breach Article VIII of the Code. The fault of the member in this case lies not in receiving payment for his service, but for not disclosing his pecuniary interest when the matter respecting the Library came before Council in February 2019.

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<sup>17</sup> See, The Code, Article II: *The terms "child", "parent", and "spouse" have the same meanings as in the Municipal Conflict of Interest Act,*

<sup>18</sup> *Ibid*, Article XII

56. I also find that L.S. did not breach Article XII of the Code. L.S. has not acted as a “paid agent” before Council, its committees, or any agency, board or commission of the City. A “paid agent” is a person who charges or receives a fee to formally represent a person or business in a matter before council or committee. Councillor L.S. is the proprietor of a business who has received payment for services related to Library events, but his conduct cannot be characterized as that of paid agent, acting as a representative of his business, or himself, in a specific matter brought before council or committee. Thus, L.S. did not breach Article XII of the Code.

### **CONCLUSIONS AND RECOMMENDATIONS**

57. I conclude that L.S. has violated both the MCIA and the Code in failing to disclose his pecuniary interest and voting on the matter concerning the removal of Library funding at a meeting of Council in February 2019.

58. Given this finding, I must now decide whether to make an application to a judge for a ruling on the question of whether L.S. has contravened the MCIA.

59. Section 8(1) of the MCIA provides that an elector, an Integrity Commissioner or a person demonstrably acting in the public interest may apply to a judge for a determination of the question of whether a Member has contravened section 5, 5.1 or 5.2 of the MCIA. Moreover, by virtue of section 8(4) of the statute, a Commissioner may make such application more than six weeks after becoming aware of the alleged contravention, if the Commissioner has conducted an inquiry under section 223.4.1 of the Act.

60. Pursuant to section 223.4.1(16) of the Act, I have advised the applicant that, for the following reasons, I will not be making an application to a judge.

61. Assuming for the moment that both the MCIA and the Act regard a Commissioner as being equally as capable as a judge of making a correct determination of whether the Member was in breach of the MCIA, in my view, the important distinction between the two is in the powers afforded to each to sanction the Member.

62. A Commissioner makes only a recommendation to Council and it can only be for a reprimand or, at most, a docking of the Member’s pay for 90 days. On the other hand, under section 9(1) of the MCIA, if a 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:

- a) Reprimand the member or former member.
- b) Suspend the remuneration paid to the member for a period of up to 90 days.
- c) Declare the member's seat vacant.
- d) 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.
- e) 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.

63. The determination as to whether or not I should be applying to a judge is, to me, a function of the severity of the breach and the adequacy of the remedies available to me to address it. Applying this test to the case before me, I must consider whether Councillor Spinosa's breach is such that a recommendation of a reprimand, or a suspension of his pay, will be sufficient to maintain the public trust in him as a member of Council, or whether the breach is so egregious that his seat ought to be vacated and he be required to make restitution to the municipality.

64. In making this determination, I am guided by the matters a judge may consider in exercising her or his discretion as to the appropriate sanction, under section 9(2) of the MCIA:

- a) Did the member take reasonable measures to prevent the contravention;
- b) Did the member disclose the pecuniary interest and all relevant facts known to him or her to an Integrity Commissioner in a request for advice from the Commissioner and act in accordance with the advice; or
- c) Did the Member commit the contravention through inadvertence or by reason of an error in judgment made in good faith?

65. Not being aware of any measures taken by the Member to prevent the contravention and, although the Member and I have discussed his interest and many of the relevant facts known to him, not having provided advice to Councillor Spinosa, I am left to consider whether he committed the contravention through "inadvertence" or by reason of an "error in judgment made in good faith".

66. Inadvertence applies where the breach can be linked to an oversight of fact or law that was not recklessly committed or the result of wilfully blind conduct. It can also include inattention and carelessness.<sup>19</sup> Applying this test, I do not view the Member's decision to vote on the matter to have occurred through his inadvertence or carelessness. Given the Member's history of declaring conflicts in matters involving his business, at the time of the February 19<sup>th</sup> meeting of Council, L.S. knew of his statutory obligations to disclose a pecuniary interest yet omitted to do so.

67. Rather, I believe his conduct in voting on the matter occurred through an error in judgment made in good faith. As the Ontario Superior Court of Justice said in *Davidson v. Christopher*, in order to obtain the benefit of this saving provision, the Councillor must show that he proceeded with "good faith as to that error of judgment. He or she must be honest, forthright and open, acting in complete good faith. The courts do not require perfection of conduct. However, good intentions and a complete lack of deceit and collusion are required".<sup>20</sup>

68. In my view, Councillor Spinosa's conduct, while not perfect, was with all good intentions and a complete lack of deceit and collusion.

69. I am also aware of the Councillor's recent willingness to declare conflicts of interest in matters concerning the Library and the use of The Black Sheep as a host venue for city events,<sup>21</sup> and believe this to demonstrate contrition on his behalf.

70. Coming to the conclusion as I have that Councillor Spinosa committed the breach through an error in judgment made in good faith, I do not believe that any of the more significant sanctions available to a judge are needed and, accordingly, I will not be making an application to a judge.

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<sup>19</sup> *Adamiak v. Callaghan*, 2014 ONSC 6656 at para 67.

<sup>20</sup> *Davidson v. Christopher*, 2017 ONSC 4047 at para 31.

<sup>21</sup> See See Minutes of Council, September 3<sup>rd</sup>, and 17<sup>th</sup> 2019, available online at <https://www.welland.ca/Council/AgendasMinutes.asp>

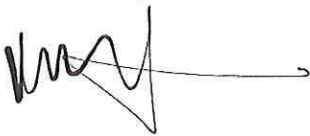


71. I recommend that, as a reprimand, Council direct Councillor Spinosa to issue an apology for his conduct to his colleagues on Council and to the citizens of Welland.

All of which is respectfully submitted, this 18<sup>th</sup> day of November 2019.

A handwritten signature in black ink, appearing to read 'Harold G. Elston', followed by a long horizontal line extending to the right.

Harold G. Elston

A handwritten signature in black ink, appearing to read 'Matthew J. Hodgson', followed by a long horizontal line extending to the right.

Matthew J. Hodgson