



Date: May 9, 2018

Town of Deep River Integrity Commissioner Files 2017-02, 2017-03, 2017-04

Subject: Complaint by Larry DuMolin against Councillor Jason McAulay, Mayor Joan Lougheed and other Councillors

Lorne Sossin, Acting Integrity Commissioner

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1. Delegation

On February 28, 2018, Deep River's Integrity Commissioner, Guy Giorno, delegated his powers and duties in relation to the investigation of, and any potential action taken in relation to this complaint to myself under subsection 223.3(3) of the *Municipal Act, 2001*. My understanding is that an earlier delegated Acting Integrity Commissioner also had a conflict in this matter. As a consequence, there has been a gap in time between the original complaints and this Report, which explains why it falls outside the expected timelines for an investigation and Report under the Town of Deep River Council Code of Conduct (the "Code of Conduct").

2. The Complaints

The Complainant, Larry DuMoulin, has raised complaints about several members of Deep River Town Council involving several sections of the Code of Conduct and in relation to several different incidents. All, however, flow in one way or another from discussions and votes with respect to fire services and a fire services agreement between Deep River and CNL (the "Mutual Aid" agreement).

The Complainant asserts that all Council discussions and decisions relating to fire services, collective agreements and labour issues involving firefighters, and the Mutual Aid agreement engage an alleged conflict of interest for Councillor McAuley, which in turn created duties which were not discharged by Councillor McAuley, Mayor Lougheed and the other members of Council.

This general Complaint includes five distinct complaint documents submitted over several months. The various allegations are summarized below.



(a) Complaints against Councillor McAuley

The Complaints against Councillor Jason McAuley was filed by Larry DuMoulin (the Complainant) on August 21, 2017, August 25, 2017 and September 29, 2017.

The complaint against Councillor McAuley is based on alleged conflicts that resulted in repeated alleged violations of the Ontario *Municipal Conflict of Interest Act* (MCIA) based on indirect pecuniary interests. That pecuniary interest is alleged to flow from two sources. First, Councillor McAuley is an employee of the Canadian Nuclear Laboratories (CNL). Second, Councillor McAuley is a part-time volunteer firefighter employed by the Town of Laurentian Hills.

The context for the alleged violation of the Code was a series of discussions and decisions involving the Town of Deep River's firefighting arrangements with the Canadian Nuclear Laboratories. The Complainant asserts that Councillor McAuley's failure to recuse himself from discussion and votes in open and closed session of Deep River Town Council is contrary to the MCIA and the Code of Conduct. The Complainant also expressed the concern that Councillor McAuley would intentionally arrive late to Council sessions dealing with matters involving the fire services agreement with CNL so that he would not be present when Councillors are asked to declare conflicts at the opening of the session.

The Complainant specified a number of specific Council sessions in the summer of 2017 at which Councillor McAuley moved and voted on various motions in relation to fire services without declaring a conflict of interest. While the complaints involve a time period in the summer of 2017, subsequent correspondence with the complainant confirms that the issue remains ongoing through the Winter and Spring of 2018.

(b) Complaints against Mayor Lougheed

The Complaint against Mayor Joan Lougheed was first filed on August 21, 2017, and a subsequent complaint was received on October 10, 2017. The complaint against Mayor Lougheed involved several different allegations.

First, Mayor Lougheed is alleged to have failed to discharge her duties under s.4.1(a) of the Code as a Presiding Officer for her inaction in relation to Councillor McAuley's alleged conflict of interest. Section 4.1 sets out certain duties which operate on the "Presiding Officer" of a meeting of Council and provides:

4.1 • Meetings & Quorum

- (a) The professional and personal conduct of Members must be above reproach and avoid even the appearance of impropriety. The Presiding Officer should never allow Members or delegations at a Council, Committee, or Board meeting to publicly criticize identifiable Members, employees or other individuals. It is the responsibility of the Presiding Officer to ensure that both parliamentary procedure and rules of etiquette are observed by all persons in attendance at all times.

Second, Mayor Loughheed is alleged to have made a series of false and inappropriate statements about fire service operational requirements in media statements, contrary to s.5.1(a) of the Code. Section 5.1(a) provides:

5.1 Interpersonal Behaviour

- (a) Treat Every Person with Dignity, Understanding and Respect:

Members shall refrain from abusive conduct, personal charges, verbal attacks, discrimination or gossip upon the character or motives of municipal employees, Councillors, Committee Members, Volunteers, or the public. Members shall abide by the Town of Deep River's Workplace Violence and Harassment Policies and Programs, as well as the Ontario Human Rights Code, and shall take these policies and legislation and their contents into account at all times when considering etiquette. All dealings with any person are to exhibit a high degree of professionalism and are to be based on honesty, dignity, understanding, respect, impartiality and fairness.

(c) Complaints against other Councillors

With respect to the Deep River Code of Conduct specifically, the Complainant alleges that a number of other Councillors (Reeve Doncaster, Councillor Aikens, Councillor Desrochers, Councillor McLaren, and Councillor Myers) and the Mayor violated the Code for failing to report the violation of the Code by Councillor McAuley. Section 10.2 provides:

10.2 - Duty to Report Violation

(a) No Member may directly or indirectly, induce, encourage, or aid a Member to violate any provision of this Code of Conduct.

(b) All Members have the duty to report a violation of this Council Code of Conduct.

Summary

These complaints were detailed, indicating specific sessions of Council and specific dates for communications. Below, I turn to the analysis of these complaints in relation to the scope and nature of the Code of Conduct and the Integrity Commissioner's role.

(3) Analysis

As this is one of the first reports under the Town of Deep River's Code of Conduct, it is important to highlight some aspects of the role and jurisdiction of the Integrity Commissioner under the Code.

While much of the outcome of this investigation turns on an interpretation of the Code of Conduct and its context, the facts and circumstances giving rise to the complaints always has significance and I have attempted to gain a clear understanding of what has motivated this complaint and how the facts and circumstances interact with the provisions of the Code.

The investigation of this complaint involved:

- Review of the complaints and related documents;
- Review of Deep River's Code of Conduct for members of Council, minutes of Council meetings and other documents;
- Review of audio and video clips involving statements by Councillor McAuley and Mayor Lougheed;
- Review of media coverage of the Deep River fire training and fire services policy decisions;
- Telephone conversation with the complainant; and
- Telephone conversation with Councillor McAuley.

The facts in this Complaint do not appear to be in dispute. In other words, the Complaint alleges that Councillor McAuley did not declare conflicts of interest in

relation to a series of discussions and decisions in open and closed sessions relating to fire services management in Deep River. Councillor McAuley does not dispute this fact. He believes he was under no obligation to declare conflicts in these circumstances. Neither Councillor McAuley's employment relationship with CNL, or his role as a part-time, volunteer firefighter with the Town of Laurentian Hills, are disputed. The question, in other words, is not what has occurred but rather when whether these facts and circumstances amount to a violation of the Code of Conduct.

Similarly, Mayor Lougheed is alleged by the Complainant to have made certain statements about fire service operations in the media and elsewhere, and there does not appear to be a dispute as to whether these statements were made. Rather, the question that remains to be determined is whether the facts and circumstances as set out by the Complainant constitute a violation of the Code of Conduct.

Below, I explain the conclusions I have reached in relation to each of the complaints based on the facts as alleged and the particular violations of the Code of Conduct as claimed by the Complainant.

a) The Complaints against Councillor McAuley

The Complainant's central concern with Councillor McAuley is that he participated in debates and votes in open and closed sessions of Council, notwithstanding an indirect pecuniary interest within the meaning of the MCIA. Section 5 of the MCIA addresses this situation:

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).

In this sense, the Complaint, the allegations against Councillor McAuley involve both the MCIA and the Code of Conduct. The jurisdiction of the Integrity Commissioner, however, relates only to the interpretation and enforcement of the Code of Conduct.

Under s.8 of the MCIA, the question of whether a member violated the Act can only be determined by a judge. Pursuant to legislation passed in 2017 (and which will come into force in 2019), the range of individuals who can forward a potential violation to a judge will expand to include, among others, an Integrity Commissioner. That provisions, however, is not in force at this time.

Section 13 of the MCIA prohibits others from imposing remedies on a person for violating the MCIA.

Other procedures prohibited

13 Proceedings to declare a seat vacant or to disqualify a member or former member for conflict of interest, or to require a member or former member to make restitution where a contravention has resulted in personal financial gain, shall be had and taken only under this Act. R.S.O. 1990, c. M.50, s. 13.

In light of my understanding of this statutory scheme, it would not be appropriate for me to opine on whether the matrix of issues in this complaint amounts to a direct or indirect pecuniary interest, and therefore conflict, under the MCIA.

That said, the question remains whether there is a basis in the allegations for a potential violation of the Code of Conduct. It is to this question that I now turn.

The Complainant asserts that Councillor McAuley violated s.3.4 and 4.1(a) of the Code of Conduct by his failure to declare pecuniary conflicts in relation to a series of Council discussions and decisions, in open and closed session, relating to fire services management.

Section 3.4 sets out the legislation operating alongside the Code and provides,

3.4 • Legislation

This Council Code of Conduct operates along with and as a supplement to the existing statutes governing the conduct of Members. The following provincial legislation governs the conduct of Members of Council:

- The Municipal Act
- The Municipal Conflict of Interest Act (MCIA)

- The Municipal Elections Act (MEA)
- The Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)
- The Ontario Human Rights Code (OHRC)
- The Criminal Code of Canada (CCC)
- The Occupational Health and Safety Act (OHSA) - including Bill 168
- The Accessibility for Ontarians with Disabilities Act (AODA)

Other legislation applicable to municipal services may also impact Council Members related to their decisions and responsibilities.

Setting out the legislation that the Code operates "along with and as a supplement to" does not mean that violations of those statutes also constitute violations of the Code. Rather, each of those other Acts and schemes includes its own enforcement provisions, whether before a Court of other adjudicative body. In short, a violation of the MCIA does not in and of itself constitute a violation of the Code, and rather is for a judge to decide if an alleged violation is brought to Court.

The Code of Conduct and MCIA are related in some respects. Justice Hackland of the Ontario Superior Court offered the following observation in relation to the MCIA and the City of Toronto Code of Conduct in *Magder v. Ford*:

[W]hereas the MCIA usually deals with cases where the municipality has financial interests and, in contrast, the Code of Conduct is primarily aimed at councillor integrity, nevertheless, those criteria do not define the application of the two regimes. Both are aimed at ensuring integrity in the decision-making of municipal councillors.¹

In the context of the Deep River Code of Conduct, the relationship with the MCIA is implied in s.2, setting out the purpose of the Code. This section reads:

Section 2 Purpose

¹ *Magder v. Ford* 2012 ONSC 5615 at para. 27; reversed on other grounds at 2013 ONSC 263 (Div Ct.).

This policy is intended to provide for governance that is accountable and transparent to its citizens, with opportunity for meaningful accessible public participation, utilizing means such as technology, innovation and collaboration.

This Council Code of Conduct sets standards for the behaviour of Council Members, as well as Members of Committees and Boards of the municipality, in carrying out their functions under the commitment to standards of good government that reflect the public trust.

This Code of Conduct has been developed to assist Council and Members to:

- (a) Understand the standards of conduct that are expected of them and the law that applies in relation to these standards;
- (b) Fulfill their duty to act honestly and exercise reasonable care and diligence;
- (c) Act in a way that enhances public confidence in local government; and
- (d) Identify and resolve situations which might involve a conflict of interest or a potential misuse of position and authority.

This Code of Conduct reinforces the commitment to Accountability & Transparency and outlines each individual's responsibility, as a Member of the municipality, to uphold these principles and values and act in the public interest. (Emphasis added).

While resolving situations of a conflict is referred to as a purpose of the Code, the only section of the Code establishing duties in relation to conflicts is s.9 which sets out a series of prohibitions on councillors receiving gifts of various kinds. This omission of a provision indicating Councillors who may have a direct or indirect personal interest in the subject matter of Council discussions or decisions may be contrasted with a number of other municipal codes of conduct which include a provision prohibiting "Improper Use of Influence." Rule no. 7 of the Brampton, Ontario Code of Conduct, for example, provides that, "No Member of Council shall use the influence of her or his office for any purpose other than for the exercise of her or his official duties."

While such provisions do not mean Integrity Commissioners may make determinations with respect to the MCIA, they do authorize Integrity Commissioners to develop approaches to conflicts of interest as part of the interpretation of such Codes of Conduct.

Because the Integrity Commissioner's role does not extend to enforcing the MCIA, it would not be appropriate for me to indicate whether or not the facts and circumstances as alleged by the Complainant give rise to a pecuniary interest on the part of Councillor McAuley within the meaning of the MCIA. Further, the provisions of the Deep River Code of Conduct referred to by the Complainant do not establish specific duties on councillors in relation to conflicts (actual or perceived).

In light of this analysis, I conclude Councillor McAuley has not violated the Code of Conduct in relation to the allegations in the Complaint.

(b) Complaints against Mayor Lougheed

The Complainant alleges that Mayor Lougheed violated s.4.1 of the Code based on the fact that she was the Presiding Officer at the time that Councillor McAuley allegedly failed to disclose a conflict of interest under the MCIA.

Section 4.1 sets out certain duties which operate on the "Presiding Officer" of a meeting of Council and provides.

4.2 • Meetings & Quorum

- (b) The professional and personal conduct of Members must be above reproach and avoid even the appearance of impropriety. The Presiding Officer should never allow Members or delegations at a Council, Committee, or Board meeting to publicly criticize identifiable Members, employees or other individuals. It is the responsibility of the Presiding Officer to ensure that both parliamentary procedure and rules of etiquette are observed by all persons in attendance at all times.**

The "Presiding Office" is defined under the Code as the Mayor. This provision does not impose duties on Councillors bringing motions to declare conflicts, or to recuse themselves in the face of conflicts of interest. Rather, it establishes a duty on the Mayor to address issues of civility.

The reference to Members being “above reproach” and avoiding “even the appearance of impropriety” could be understood as extending to potential conflicts of interest in the abstract, but in the context of this provision, it appears to relate to the duty of the Mayor to constrain members from criticizing each other in ways that fail to adhere to parliamentary procedure and rules of etiquette. In other words, it addresses how Councillors interact with each other, and staff, in the context of Council, Committee or Board meetings.

The Complainant further submits that the Mayor, by making false statements about fire service requirements in the media and elsewhere, violated s.4.1(a). While I am not in a position to determine the accuracy of the Mayor’s statements with respect to fire service, neither parliamentary procedure nor the rules of etiquette are violated where a statement by the Mayor is found to be inaccurate.

The Complainant also alleged that Mayor Lougheed violated s.5.1(a) which sets out a requirement that councillors and the Mayor treat people with dignity, understanding and respect. This section provides,

5.1 Interpersonal Behaviour

(a) Treat Every Person with Dignity, Understanding and Respect:

Members shall refrain from abusive conduct, personal charges, verbal attacks, discrimination or gossip upon the character or motives of municipal employees, Councillors, Committee Members, Volunteers, or the public. Members shall abide by the Town of Deep River’s Workplace Violence and Harassment Policies and Programs, as well as the Ontario Human Rights Code, and shall take these policies and legislation and their contents into account at all times when considering etiquette. All dealings with any person are to exhibit a high degree of professionalism and are to be based on honesty, dignity, understanding, respect, impartiality and fairness.

In this context as well, the Code sets out a duty for Councillors and the Mayor to treat each other, and others engaged in Town governance, with respect. Neither the Mayor’s alleged inaccuracies in her statements about fire services, nor the inaction by the Mayor in the face of the alleged conflict involving Councillor McAuley, constitute discriminatory or disrespectful conduct that would violate s.5.1(a).

In light of this interpretation of s.4.1 and 5.1, I conclude that the conduct of Mayor Lougheed did not violate the Code of Conduct.

(c) Complaints against other Councillors

With respect to the Deep River Code of Conduct specifically, the Complainant alleges that a number of other Councillors (Reeve Doncaster, Councillor Aikens, Councillor Desrochers, Councillor McLaren, and Councillor Myers) and the Mayor violated 10.2 of the Code. Section 10.2 provides:

10.2- Duty to Report Violation

- (c) No Member may directly or indirectly, induce, encourage, or aid a Member to violate any provision of this Code of Conduct.
- (d) All Members have the duty to report a violation of this Council Code of Conduct.

The Complaint alleges that the other members of Council violated the Code by not reporting that Councillor McAuley participated in discussions and decisions on fire services in open and closed sessions of Council, notwithstanding that he was in a pecuniary conflict of interest within the meaning of the MCIA.

Again in this context, the Complaint conflates the enforcement of the Code with the enforcement of the MCIA. Section 10.2 of the Code establishes a duty to report violations of the Code, not violations of other legislation like the MCIA (or other statutes that operate alongside the Code such as the *Criminal Code* or *Human Rights Code*, etc).

To reiterate, it would fall to a judge to decide based on the evidence presented in a proceeding under the MCIA that a failure to declare a pecuniary conflict of interest constituted a violation of that Act.

Conclusion

For the reasons set out above, and based on my investigation, I find that Councillor McAuley, Mayor Loughheed and the other Councillors involved in allegations by the Complainant did not violate the Code of Conduct. I reiterate that this decision should not be taken as expressing a view on whether Councillor McAuley's conduct was consistent with the obligations on members of Council under the MCIA.



Lorne Sossin, Acting Integrity Commissioner, Town of Deep River