



**Cunningham Swan**  
CELEBRATING **125** YEARS

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August 20, 2019

Council Members – Township of Rideau Lakes  
c/o Mike Dwyer, Chief Administrative Officer  
Township of Rideau Lakes  
1439 County Road 8  
Delta, ON, K0E 1G0

Attention: Council Members

**RE: Integrity Commissioner's Findings – Preliminary Review  
Application for Inquiry - Municipal Conflict of Interest Act  
Councillor Marcia Maxwell  
Our File No: 14093-106**

### **Application for Inquiry**

An application for inquiry was submitted to the Integrity Commissioner on June 20, 2019 under the *Municipal Conflict of Interest Act* ("MCIA"). The application was processed on June 24, 2019 after the Integrity Commissioner requested and received the required statutory declaration under section 223.4.1(6) of the MCIA from the applicant. The Integrity Commissioner is satisfied that the applicant became aware of the contravention not more than six weeks before the date of the application.

The applicant alleges that Councillor Maxwell (the "Councillor" or "Member") breached section 5 of the MCIA when voting at the April 1, 2019 and May 6, 2019 meetings of Council on the following resolutions (the "Resolutions"):

April 1, 2019 meeting of Council:

#### **RECOMMENDATION #42-2019**

To pass a Resolution that;

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CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP

The Municipal Services Committee acknowledges the verbal and written Report regarding Establishing Terms for a Lake Association Network Committee and Lake Association Grant Program, as provided by Mike Dwyer, CAO;

AND FURTHER Recommends that Council approve by By-Law, the terms as set out in Attachment A of the Report as amended.

**RECOMMENDATION #43-2019**

To pass a Resolution that;

The Municipal Services Committee acknowledges the verbal and written Report regarding Establishing Terms for a Lake Association Network Committee and Lake Association Grant Program, as provided by Mike Dwyer, CAO;

AND FURTHER Recommends that Council approve by By-Law, the terms as set out in Attachment B of the Report as amended.

May 6, 2019 meeting of Council:

**RESOLUTION #43-2019**

To pass a Resolution that;

By-Law 2019-25, being a By-Law to establish Lake Association Programs, be taken as read a first and second time the short way, this 1st day of April, 2019.

To pass a Resolution that;

By-Law 2019-25 be taken as read a third time, as amended, and finally passed this 1st day of April, 2019.

The applicant alleges that the Councillor is a member and President of the Otter Lake Landowners' Association ("OLLA"). The applicant further alleges that the OLLA had a pecuniary interest in the Resolutions and as such, the Councillor had an indirect pecuniary interest in the Resolutions under section 2(a) of the MClA:

**Indirect pecuniary interest**

2 For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

- (a) the member or his or her nominee,

- (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,
- (ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or
- (iii) is a member of a body,

that has a pecuniary interest in the matter  
[emphasis added]

The applicant states that the OLLA may use the funds at its own discretion.

### **Summary of Findings – Preliminary Review**

We have found no evidence to support the application and as such, no inquiry will be commenced by the Integrity Commissioner.

During the preliminary review, we took the following steps:

1. A copy of the application was sent to the Councillor with a request for a response;
2. A copy of the Councillor’s response was sent to the applicant with a request for a response;
3. A copy of the applicant’s response was sent to the Councillor with a request for a response;
4. All materials were reviewed by the Integrity Commissioner;
5. Contacted and obtained information from two witnesses that were deemed to have pertinent information related to the allegation;
6. Reviewed By-law 2019-25 and its schedules, “A By-law to establish Lake Association Programs” (the “By-law”).

For the Member to have had an indirect pecuniary interest in the Resolutions, we must first find that the OLLA had a direct interest. In a case with similar facts, the Court in *Cooper et al. v. Wiancko et al.*<sup>1</sup>, found that grant monies provided by a resolution of Council to a local Chamber of Commerce association (the “Chamber”) were to benefit the collective goals of the Chamber and there was no evidence that any of the monies would be paid to members of the Chamber or to their respective businesses. On this basis, the Court found that the Chamber had a direct pecuniary interest in the grant funds. This analysis can be applied to our facts. Schedule “C” of By-law 2019-25 reveals that lake associations shall receive grants based on the following formula:

- Part 1 – Each registered lake association shall receive a base allocation of \$300 annually;
- Part 2 – Plus \$1 per hectare of lake area as determined by the Township’s GIS system;

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<sup>1</sup> *Cooper et al. v. Wiancko et al.*, 2018 ONSC 342.

Part 3 – Plus \$5 per registered member.

The OLLA has 138 registered members and received an annual grant of \$1,562.00 for 2019. Schedule “C” of the By-law sets the terms for lake associations on how they may spend the grant funds:

Use of Funds

- The lake associations shall have broad discretion in the use of funds provided under the grant program.
- Funds should be used for the following general purposes:
  - Outreach, education and community building
  - Enhance the safety or accessibility of the lake
  - Scientific study
  - Lake ecosystem and/or habitat restoration or conservation

Notwithstanding the above, no funds provided under the grant program shall be used for the following:

- Taking civil or quasi-judicial (eg. LPAT) action against the municipality or its Boards.
- The payment of salary or expenses to any officer, member or other person for their work associated to the governance of the association.
- The lobbying of any level of government or the contribution to political parties, campaigns or candidates.
- The procurement of lands, facilities or other material capital assets wherein the right to use said land, facility or asset, should use be permitted, is not made available to the public at large (i.e. a member exclusive benefit).
- As ‘matching funds’ for any other grant program that may be established by the municipality from time to time.

The grant funds provided to the OLLA are to be used for the betterment of the lake and not to benefit any one member specifically. The “objectives” of the association are “to maintain the health of Otter Lake by working with local and regional governments, existing road associations, and individual landowners with properties on Otter Lake.”<sup>2</sup> Regardless of whether it has discretion to spend these funds as it wishes, the OLLA must abide by the terms of the By-law or risk losing grant funding in the future. We have no evidence that the funds have been used for any improper purpose to date.

We find that the OLLA had a direct interest in the Resolutions. On this basis, we find that as a member and President of OLLA, the Councillor had an indirect pecuniary interest in the Resolutions. The question would then have been, is that interest excepted under section 4 of the MCIA?

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<sup>2</sup> [www.otterlake.org](http://www.otterlake.org)

Section 4 sets out eleven circumstances where a member may have a pecuniary interest, but that interest falls under an exception. The member may continue to participate in deliberations and voting based on that exception. Subsection 4(j) states that:

“Section 5 does not apply to a pecuniary interest in any matter that a member may have,

...

4.

...

(j) by reason of the member having a pecuniary interest which is an interest in common with electors generally;

The term “interest in common with electors generally” is defined at section 1 of the MCIA:

s. 1

....

“interest in common with electors generally” means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part;

[emphasis added]

The section 4(j) exception need not include a majority of electors. The case law is clear that the affected group of electors considered to be ‘in common’ may only be a subset of the municipality’s population. In *Biffis v Sainsbury*, 2018 ONSC 3531 the Court, in examining the section 4(j) exception, stated that if Council were considering road improvements on one street within the area but not the others, only the electors affected by the road improvement would be regarded in determining any pecuniary interest they might have with that of a member of council and not all electors in the entire area. The Court went on to state that:

“This definition must be read together with Section 4(j) in order to ascertain which electors the legislature intended to be regarded when considering the issue of disqualification. If the legislature had intended that the provisions were to include "all the electors" it would have said so. Rather, Section 4(j) specifically provides, "with electors generally", thereby qualifying which electors are to be regarded when considering an exemption from disqualification. The word "generally" used in Section 4(j) indicates to me that the electors to be regarded, when applying the section, are to be of a certain class or order. It is apparent to me that the authorities, together with the language and intended general purpose of the Municipal Conflict of Interest Act, establish that the class or order must be those electors in the area in question who are "affected" by the matter. It is those affected electors that are to be regarded when considering the issue of conflict of interest and not necessarily all the electors. It may very well be that in some cases it will not be all the electors in a given area that is the subject of the matter that will be affected by it. An example of this might be the situation where a municipal council is considering various improvements in a defined area consisting of several square blocks. If council were considering road improvements on one street within the area but not the others, surely it is only those electors affected by the road improvement who would be regarded in determining any pecuniary interest they might have with that of a member of council and not all electors in the entire area.”

[emphasis added]

Based on this analysis, the population residing on Otter Lake (seasonally or annually) may share interests in common as they pertain to the lake or their lake front properties. The terms of use set out in the By-law clearly indicate that the grant funds are to be used for the overall benefit of the lake itself and consequently property owners on the lake. The applicant has provided no evidence that the Member has received a benefit any different than that of other members of the OLLA or lake front property owners. In that sense, members of the OLLA and property owners on the lake share the interest in the grant funds in common. Councillor Maxwell's indirect pecuniary interest in the Resolutions, as President and a member of the association, is excepted under section 4(j) of the MCIA.

A further exception also applies in this case. Section 4(k) of the MCIA states as follows:

Section 5 does not apply to a pecuniary interest in any matter that a member may have,  
...  
4.  
...  
(k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

Section 4(k) of the MCIA was analyzed in *Whitely v. Schnurr*<sup>3</sup> where a Councillor voted in favour of a university's application to amend an official plan without first disclosing that he was a university employee. An application was brought under the MCIA for a declaration that the Councillor had failed to disclose a pecuniary interest. The Court held that no pecuniary interest existed since "the interest of the [councillor] in the subject matter of the official plan amendment approval was of such remoteness and insignificance in its nature that it could not reasonably be regarded as having been likely to influence the [councillor] in his vote on the subject matter."

In reaching its decision, the Court advocated the following test in determining whether a set of circumstances would meet the "remoteness" or "insignificance" threshold of section 4(k):

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 influence that councillor's action and decision on the question? In answering the question set out in such test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her."<sup>4</sup>

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<sup>3</sup> (1999) 4 M.P.L.R. (3d) 309 (Ont. Sup. Ct. of Justice)

<sup>4</sup> This test was also applied in the case of *Mel Lastman v. Ontario* (2000) 47 O.R. (3d) 177 (Ont. Sup. Ct. of Jus.)

In *Cooper*,<sup>5</sup> the Court found that the respondents had never received a direct monetary benefit from their membership in the Chamber and as such, their indirect pecuniary interest in the grant funds was excepted under section 4(k). A reasonable elector, apprised of all the circumstances, would not have found that there was any present or prospective financial benefit or detriment, financial or otherwise, that would have impacted their vote on the grant funds. Similarly, it is our opinion that Councillor Maxwell's indirect pecuniary interest is excepted under section 4(k). A reasonable elector, apprised of the facts, would not consider her indirect pecuniary interest in the grant funds as likely to influence her vote on the matter. We have no evidence that she has received a financial benefit or detriment from the funds that is any different than the other members of the OLLA or lake property owners. As such, it is our opinion that any interest she has is remote and not likely to have influenced her vote on the Resolutions. In addition, the amount of the grant funds provided to the OLLA (\$1,562.00) for the benefit of the lake and the lake property owners is insignificant in that it could not reasonably be considered as likely to have influenced the Councillor's vote.

## Conclusions

The Councillor has not contravened section 5 of the MCI. Her indirect pecuniary interest in the Resolutions is excepted under section 4(j) and (k) of the MCI.

The indirect pecuniary interest Councillor Maxwell has in the grant funds is no different than the other members of the OLLA and property owners on the lake in general who benefit from the work of the OLLA. Her interest is therefore excepted under section 4(j) of the MCI. Further, there is no evidence that the Councillor has received a direct benefit from the grant funds that is different from the membership of the OLLA or lake property owners, and the amount of the grant funds was not significant in nature. Any indirect pecuniary interest she has as a member of the OLLA is excepted under section 4(k) as sufficiently remote or insignificant in nature.

Each application for an inquiry under the MCI must be considered on its facts. There is no 'bright line' to demarcate where a conflict exists.<sup>6</sup> Members must be diligent and assess each situation on its facts to determine whether a conflict exists. In this case, we have found no evidence to warrant an inquiry, and thus make no recommendations for Council's consideration. Consequently, the Integrity Commissioner will not be applying to a judge in accordance with section 223.4.1(16) of the MCI, a conclusion which our office will communicate to the applicant.

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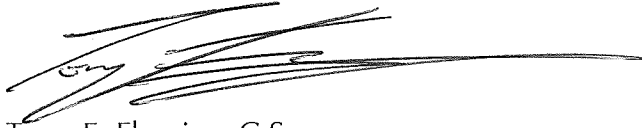
<sup>5</sup> *Cooper et al. v. Wiancko et al*, *ibid*, at para. 80.

<sup>6</sup> *Ibid*, at para. 61.

There is no requirement to make these findings public as no inquiry was conducted and this letter does not constitute a report as required at the conclusion of an inquiry.

Sincerely,

**Cunningham, Swan, Carty, Little & Bonham LLP**

A handwritten signature in black ink, appearing to read 'Tony E. Fleming', with a long horizontal flourish extending to the right.

Tony E. Fleming, C.S.  
LSO Certified Specialist in Municipal Law  
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TEF:als