

INTEGRITY COMMISSIONER INQUIRY REPORT

FOR THE TOWNSHIP OF NAIRN AND HYMAN

CODE OF CONDUCT COMPLAINT RE:

COUNCILLOR ROD MACDONALD



*Office of the Integrity
Commissioner*

Prepared By:

Sean Sparling
ISN Director of Investigations/
Agent of the Integrity
Commissioner

Peggy Young-Lovelace
E4m Consultant

I. EXECUTIVE SUMMARY

- [1] These reasons relate to inquiries under section 223.4(1) of the *Municipal Act, 2001*, (the "*Municipal Act*") about Councillor Rod MacDonald ("Councillor MacDonald"), an elected member of the Township Council ("Council") for the Township of Nairn and Hyman ("Township").
- [2] The Applicant alleged that Councillor MacDonald contravened the Township's Code of Conduct when he:
- By his actions on a number of occasions contravened the *Occupational Health and Safety Act* ("*OHSA*");
 - Routinely overstepped his role and became overly involved in municipal operations by requesting employee overtime and making disparaging comments about employee performance.
 - Routinely attempted to direct the work of municipal employees when he would constantly report a drainage issue and demand immediate action; and
 - Continually attempted to use his office to influence staff related to an alleged flooding problem adjacent to his personal property and further that his actions pose a conflict of interest.
- [3] Contraventions of the *OHSA* are not within the jurisdiction of the Integrity Commissioner and will not be adjudicated herein. However, failure to comply with legislation constitutes a contravention of the Township's Code of Conduct.
- [4] Councillor MacDonald admitted that he reported drainage issues on a routine basis to the office and more specifically, to the CAO/Clerk Treasurer. Councillor MacDonald advised the investigator that he was acting on behalf of a number of ratepayers and admitted becoming upset about the issue.
- [5] Councillor MacDonald admitted that he was not satisfied with the work performance of the Public Works Superintendent's ("PWS") and openly stated such. Councillor MacDonald requested an accounting of the overtime when it was reported at a Public Works meeting that a significant amount of time was owed to the PWS.
- [6] It was documented that Councillor MacDonald said to the CAO/Clerk Treasurer that **"he felt [the PWS] was not performing his duties to the Town, and that as a Councillor he represented the taxpayers and he would do whatever he had to do to get this culvert situation fixed. He then said he did not care if the Integrity Commissioner was called because of his actions."**
- [7] He denied that he has done anything improper and was not in a conflict. In fact, Councillor MacDonald expressed that he is only acting on behalf of the taxpayers and for the benefit of the Township.

FINDINGS

- [8] The Township's Code of Conduct requires that members of Council conduct themselves in accordance with the following rules, among others:

- a. Act within their role as defined in the Code of Conduct and the *Municipal Act*,
- b. Understand and give proper consideration to legal requirements,
- c. Behave in a manner that maintains and enhances the image of Council and does not reflect adversely on Council,
- d. Act in good faith and not for improper or ulterior motive,
- e. Prevent the misuse of their position to influence employees to gain an advantage for themselves or others,
- f. Demonstrate respect for employees' opinions and professional expertise,
- g. Respect the decisions of Council,
- h. Being aware of and conversant with the statutory obligations imposed on Council as a whole, as well as each individual member of Council.
- i. Members of Council will recognize their obligations to follow and respect the letter and spirit of the provisions of the Municipal Conflict of Interest Act...and will disclose other interests which may not necessarily be of a pecuniary interest

Contravention of the *Occupational Health and Safety Act*

- [9] Allegations that Councillor MacDonald contravened the *OHSA* were investigated separately from this inquiry. It was found that Councillor MacDonald did contravene the *OHSA* on multiple occasions.
- [10] Councillor MacDonald did contravene the Townships Code of Conduct by his contravention of the *OHSA*.

Routinely Overstepping Role/Micromanaging

- [11] Councillor MacDonald contravened the *Municipal Act*, and the Township's Code of Conduct by attempting to influence staff on a flooding issue adjacent to his property including threatening media exposure.
- [12] He also overstepped his role when he attempted to performance manage the PWS and made disparaging remarks about the competency of municipal employees. To be clear, a single member of Council does not have the authority, nor responsibility to manage staff. Governance oversight by Council is done in a properly held Council meeting with a quorum of members present.

Routinely Direct the Work of Municipal Employees

- [13] Councillor MacDonald spoke directly to staff about issues surrounding the flooding adjacent to his property. He admittedly attempted to have them address the issue. This was done without the authority of Council. In fact, Council had previously addressed this situation by corresponding with Huron Central who is directly responsible for the issue. Put differently, this was not a municipal issue, but was the responsibility of a third party, a fact which Councillor MacDonald did not accept or agree with.

Routinely Use His Office to Influence Municipal Employees for a Personal Benefit

- [14] There is no evidence that other ratepayers have chronically or otherwise complained about the drainage issue that Councillor MacDonald has continually brought forward to Council

and/or demanded that municipal employees respond immediately to address his concerns. The evidence before us supports that Councillor MacDonald routinely uses his position as Councillor to demand services from Council and/or municipal employees for his personal benefit.

[15] This pattern of behaviour is contrary to the Township's Code of Conduct.

Pecuniary Interest

[16] The *Municipal Conflict of Interest Act* ("MCIA") requires members of Council to declare a conflict where they have a pecuniary interest in a matter and for the Councillor not to influence the decision of Council before, during and after the matter is debated by Council. This includes attempting to influence municipal officers and employees.

[17] A pecuniary interest is a financial interest. It is clear, that Councillor MacDonald would have a financial interest should the watercourse flood his property. It is also clear, that Councillor MacDonald is exercising influence with respect to this matter when he continually brings the matter before Council or demands that the PWS immediately deal with the issue affecting his property.

[18] Fear of his property flooding is not a pecuniary interest.

[19] There is no evidence before us that Councillor MacDonald has a pecuniary interest in the culvert at this time.

II. LEGISLATIVE FRAMEWORK

[20] Under section 223.4(1)(a) of the *Municipal Act*, Council, a member of Council or a member of the public may make a request for an inquiry to the Integrity Commissioner about whether the member has contravened the Code of Conduct applicable to that member.

[21] When a matter is referred to us, we may then conduct an inquiry in accordance with the Municipality's Integrity Commissioner Inquiry Protocol and, upon completion of the inquiry, we may make recommendations to Council on the imposition of penalties.

III. THE REQUEST

[22] The requests before us were properly filed in accordance with the *Municipal Act* and the relevant policies and procedures for the Township of Nairn and Hyman.

IV. THE INQUIRY PROCESS

[23] The responsibilities of the Integrity Commissioner are set out in section 223.3(1) of the *Municipal Act*. On March 1, 2019, section 223.2 of the *Municipal Act* was amended, and municipalities were required to adopt a Code of Conduct. Further, municipalities were to appoint an Integrity Commissioner who is responsible for the application of the Code of Conduct. Complaints may be made by Council, a member of Council or a member of the

public to the Integrity Commissioner for an inquiry about whether a member has contravened the Code of Conduct that is applicable to that member.

[24] After receiving the complaints, we followed the inquiry process as set out in the Township's Code of Conduct. We did a preliminary review of each complaint to determine if they are within the jurisdiction of the Integrity Commissioner. Those matters not within the Integrity Commissioner's jurisdiction are referred to be considered by other appropriate parties. In this circumstance several of the allegations were referred to be investigated under the *OHS Act*. The matters considered by our office followed a process whereby the available evidence was reviewed, and the Applicant, witnesses, and Councillor MacDonald were all interviewed. Interviews were recorded and transcriptions prepared for each individual interviewed.

[25] The conclusions we arrived at with respect to these matters are based upon the standard of a balance of probabilities. Balance of probabilities is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct "more likely than not" [50.1%] took place, and that the behaviour is a breach of the Township's Code of Conduct. As required, assessments of credibility have been made. These assessments are based on:

- whether or not the individual had first-hand knowledge of the situation,
- whether or not the individual had an opportunity to observe the events
- whether or not the individual may have bias or other motive,
- the individual's ability to clearly describe events
- consistency within the story
- the attitude of the individual as they are participating
- any admission of dishonesty¹

V. THE FACTS

Contravention of the *Occupational Health and Safety Act*

[26] Several of the allegations received by our office were more properly considered as contraventions of the *OHS Act*.

[27] These allegations were referred to an independent third-party having expertise in such investigations.

[28] The findings of the investigator are that Councillor MacDonald did on several occasions contravene the *OHS Act*.

Routinely Overstepping Role/Micromanaging

[29] The PWS is responsible for all the infrastructure such as roads and buildings. He reports directly to the CAO/Clerk Treasurer not to Council nor Councillor MacDonald

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.)

- [30] Councillor MacDonald is not responsible for the performance management of the PWS nor does he have the authority of Council to direct the work of municipal employees. Councillor MacDonald was found to have repeatedly contacted the Township about the culvert issue an inordinate number of times. Further he made disparaging remarks to the CAO/Clerk Treasurer about the PWS's character and work performance. It got to the point where Councillor MacDonald was questioning the PWS's overtime and holiday schedule.
- [31] Councillor MacDonald frequently engaged with staff about the culvert. This in turn resulted in the PWS taking steps to keep the culvert clear of debris even though it is not his responsibility and puts the Township at risk. This did not satisfy Councillor MacDonald.
- [32] When there is flooding, there is only one house that it affected by it and that is Councillor MacDonald's home. There is a ditch that runs alongside Councillor MacDonald's property. And while Councillor MacDonald alleges that he is acting on the behalf of ratepayers, there have been no other formal complaints made about flooding in this particular area.
- [33] Councillor MacDonald has written two letters, one on April 3, 2020 and another on April 6, 2020, both complaining about the culvert and that the PWS was not doing his job.
- [34] Councillor MacDonald has gone to the CAO/Clerk Treasurer a number of times and asked about overtime hours related to the PWS.
- [35] On January 26, 2020, an employee was working at the rink. Snow at the community centre and office needed to be cleared out and this employee was doing the work. Councillor MacDonald was called and parked at the site and watched the employee for forty-five minutes.
- [36] The CAO/Clerk Treasurer has received numerous calls from Councillor MacDonald to complain about the PWS.

Routinely Direct the Work of Municipal Employees

- [37] Councillor MacDonald has brought the issue of the culvert up at Council and at the Public Works Committee meetings. Additionally, he has instructed the CAO/Clerk Treasurer in how to manage the PWS and demanded immediate action.
- [38] Councillor MacDonald stated in his interview that he has been fighting since 2014 to fix the drainage problems throughout the town, not just his property. Councillor MacDonald stated that he has taxpayers call him when the water level is high, and they have water in their basement. He claims the people deserve better service. He also stated that most time when he calls the CAO/Clerk Treasurer to complain, it is because a taxpayer has called him.
- [39] Council has not adopted a bylaw or resolution authorizing Councillor MacDonald to direct the work of employees.
- [40] The fact is that there is no one event where Councillor MacDonald demanded of staff, "*do this*". Instead, there is overwhelming evidence that Councillor MacDonald contacted staff

repeatedly to get work done on the culvert. He even resorted to coercion such as in the letter previously described.

- [41] Although Councillor MacDonald did not use specific words to direct staff, his actions and repeated communication certainly constituted an express effort to make them do what he wanted. His conduct also ensured that it happened, and this was clearly contrary to his role.

Routinely Use His Office to Influence Staff for a Personal Benefit

- [42] Councillor MacDonald continually brought forward a matter that has already been dealt with by council.
- [43] There is a culvert on MacDonald Street [where Councillor MacDonald lives] that acts as one of the Township's main drainage ditches and all the runoff from that part of town runs through it. The culvert is owned by and is the responsibility of Huron Central Railway and has nothing to do with the Township.
- [44] The evidence clearly established that Councillor MacDonald used his positional authority as a Councillor to influence municipal staff to take action when this culvert became blocked and allegedly posed a threat to Councillor MacDonald's house/property.
- [45] There is also the issue that the culvert in question does not belong to nor does the responsibility of any flooding rest with the Township. The Township has undertaken considerable work, at their own cost, on an asset that is owned by a third party which demonstrated the level of influence Councillor MacDonald exerted on them.

Pecuniary Interest

- [46] The *Municipal Conflict of Interest Act* ("MCIA") requires members of Council to declare a pecuniary interest in matters that they have a financial interest in and not influence the decision before, during and after the matter is debated by Council. This includes attempting to influence municipal officers and employees.
- [47] After March 1, 2019, declarations of pecuniary interest must be done in writing. Councillor MacDonald has made no such declarations even though the matter has been considered at the Public Works Committee and Council.
- [48] A pecuniary interest is not defined in the MCIA but has been held by the Courts to mean an economic or financial interest. It is not clear, that Councillor MacDonald would have a financial interest should the watercourse flood his property. There is no evidence before us to demonstrate that Councillor MacDonald has sought costs from the Township for property flooding. There is also no evidence that Councillor MacDonald's insurance company sought restitution from the Township for the same. There is only evidence of Councillor MacDonald exercising influence with when he continually brings it forth to Council or demands that the PWS immediately deal with the issue.

[49] Fear of property flooding on its own is not pecuniary in nature. Had there been evidence that Councillor MacDonald had damages due to flooding, the matter would have been considered more carefully.

While there is insufficient evidence to support an allegation of pecuniary interest, that does not mean that in the future Councillor MacDonald will have one. Nor does it mean that at this time Councillor MacDonald's actions should be condoned.

VI. THE OPINION

[50] It was very apparent that Councillor MacDonald has been fixated on a watercourse and more specifically a culvert that is not owned by or the responsibility of the Township.

[51] Councillor MacDonald contravened the *OHSA*.

[52] Councillor MacDonald attempted to micromanage the municipal operation contrary to his role as a municipal councillor.

[53] Councillor MacDonald used his position as a member of Council to direct the work of municipal employees for his personal benefit.

[54] The Township's Code of Conduct requires that members of Council among a number of other things:

- a. Act within their role as defined in the Code of Conduct and the *Municipal Act*,
- b. Understand and give proper consideration to legal requirements,
- c. Behave in a manner that maintains and enhances the image of Council and does not reflect adversely on Council,
- d. Act in good faith and not for improper or ulterior motive,
- e. Prevent the misuse of their position to influence employees to gain an advantage for themselves or others,
- f. Demonstrate respect for employees' opinions and professional expertise,
- g. Respect the decisions of Council,
- h. Being aware of and conversant with the statutory obligations imposed on Council as a whole, as well as each individual member of Council.
- i. Members of Council will recognize their obligations to follow and respect the letter and spirit of the provisions of the Municipal Conflict of Interest Act...and will disclose other interests which may not necessarily be of a pecuniary interest

[55] Furthermore, the *Municipal Act* section 224, clearly sets out Council's role. No where in either the Township's Code of Conduct or the *Municipal Act* does it provide exemption for any of these provisions for Councillor MacDonald. Yet Councillor MacDonald appears to disregard them at all times when it pertains to getting what he wants.

[56] Councillor MacDonald contravened the Township's Code of Conduct

VII. CONCLUSION

- [57] The conduct of Councillor MacDonald had been ongoing at a times quite persistent. It is our opinion that his behaviour will be ongoing, and we recommend that Council:
- a. With respect to the contravention of the *OHSA* our recommendation is that Council:
 - i. Suspend his remuneration for a period of ninety days (90)
 - b. With respect to the repeated complaining, micromanaging the operation and directing staff that Council remove him from any standing or ad-hoc committees of Council as a remedial action to minimize his opportunity to continue this behaviour and suspend his remuneration for a period of ninety (90) days.
 - c. With respect to use of his office for personal benefit we recommend that he be reprimanded and further that Council establish a committee that will review all future complaints from Councillor MacDonald and resolve which will be considered.
- [58] We further recommend that the Mayor and Council immediately stop Councillor MacDonald when he begins to nitpick, question, or openly attack staff at Council meetings. Should he fail to stop, the Mayor should have him removed from the meeting.
- [59] We also recommend the following:
- Council update their Code of Conduct to be complaint with changes to the *Municipal Act* that came into affect March 1, 2019.
 - Council adopt a Council-Staff Relations Policy as now required by the Municipal Act.
 - Council provide training on both to all members of Council, members of committees of Council and municipal employees.
 - Council adopt an Expected Behaviour Policy as well as a Feedback/Complaint Policy.
 - Council adopt a proper performance management system and related tools for the Township so that Council is clear on how employee performance is managed.