



Department of Justice

Legal Services Division

CONFIDENTIAL

Nova Scotia Department of Justice

Conflict of Interest Investigation – Chester Village Commission

Dated: March 21, 2016

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A. INTRODUCTION

Relevant Background

The Village of Chester Village Commission (the "Commission") is an elected body of up to 5 Commissioners, each serving a three year term. The Commission has a mandate to represent its electors with respect to the operation and funding of the Chester Volunteer Fire Department. It also owns, and is responsible for the operation of, the Chester Lido Pool and Public Washrooms, and the Jib Lot, a recreational green space on the Front Harbour. In addition, the Commission funds the operational costs of the village streetlights, and decorative hanging flower baskets and wreaths within the village itself.

Village electors include anyone normally resident within the electoral boundaries of the village for a period of at least six months, and elections are held yearly at an Annual General Meeting open to the public. Candidates for the position of Commissioner must be nominated and are elected on a rolling basis. The result of this is that only part of the Commission is up for re-election at any given time, allowing for turnover of new Commissioners while at the same time ensuring that some experienced Commissioners remain in their positions.

The Commission's income comes from two sources, an area rate collected from village residents, and a fee charged to neighbouring areas within the larger Municipality of the District of Chester for whom the Chester Volunteer Fire Department provides firefighting and emergency response services. A third, smaller source of income comes from the rental of a building housing the village's ambulance service.

The Commission meets monthly and meetings are open to the public.

Allegations of Conflict of Interest

In 2007, 2008, and 2010, the Commission undertook three significant projects. In 2007, the Commission advertised a Request for Proposals for the renovation of the Chester Fire Station (the "Fire Hall Renovation"). In 2008, the Commission put out an Invitation to Tender for the removal and replacement of roof shingles on the Chester Fire Station (the "Fire Hall Roof Replacement"). And in 2010, the Commission put out a tender for the construction of new public washrooms and pool facility for the Chester Lido Pool (the "Lido Pool Project"). Each of those projects was awarded to Wildo Builders Limited, a company owned and operated by Commissioner William ("Bill") Zinck, Jr. ("Commissioner Zinck").

Over time, concerns were raised with respect to potential violations of the provisions of the *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299 in relation to the awarding of these contracts. Piotr Luczak, a lawyer with Burke, MacDonald & Luczak, legal counsel for the Commission, raised those concerns with the office of the Attorney General of Nova Scotia in written correspondence spanning several months. The

Commission ultimately passed a resolution on August 13, 2014, instructing Burke, MacDonald & Luczak to request an inquiry to determine whether or not Commissioner Zinck had contravened the provisions of the Act.

Inquiry Overview

By Ministerial Appointment on January 20, 2015, I was appointed a Commissioner of Inquiry and tasked with carrying out the requested inquiry, publishing my findings once that inquiry was complete. This report is comprised of those findings. Submitted along with this report is a large volume of document disclosure, identified as Appendix "A" – Document Disclosure. In addition to Appendix "A" is a further volume of authorities containing copies of all of the legislation and case law relied upon as legal authority for my conclusions, as well as summaries of all of the interviews carried out in the fact finding part of my investigation.

B. PROCESS AND AUTHORITY FOR INQUIRY

Legal Authority

By appointment of the Honourable Lena Metlege Diab, then Minister of Justice, on January 20, 2015, I was appointed, pursuant to section 12 of the *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299 (the "Act"), to carry out an inquiry into the concerns raised by the Commission:

12(1) If the council or local board by resolution requests that inquiry be made into or concerning

- (a) Any matter mentioned in the resolution and relating to an alleged malfeasance, breach of trust or other misconduct on the part of a member, an officer or other official, an employee or agent of the municipality or local board, or any personal having a contract therewith, in relation to the duties or obligations of such person to the municipality or local board;
- (b) any allegation that a member has contravened the provisions of this Act; or
- (c) any matter connected with the good government of the municipality or local board or the conduct or any part of the public business thereof,

the Attorney General shall appoint a judge or some other suitable person to make the inquiry.

"Local board" is defined within the Act at section 2(d) to include a commission such as the Chester Village Commission.

Process

This inquiry has been investigative in nature. Documents were requested, initially through the office of Burke, MacDonald & Luczak, and later, through the Commission by way of its Clerk Treasurer, Iris Tolliver after being informed that Mr. Luczak's representation of the Commission with respect to this inquiry had come to an end.

Ms. Tolliver provided a number of documents which were compiled into a large, tabbed volume which was provided to Derek Wells, of Wells, Lamey, Mailman & Bryson, lawyer for Commissioner Zinck, in electronic format by email of June 26, 2015, and hard copy sent by courier on June 29, 2015. A copy of the same volume of documents was on hand for the interview of each individual listed above, and documents contained therein may be referenced in their interview statements. There are two exceptions to this, the first being Phil Elwood, who was interviewed by telephone as he is currently resident in British Columbia and the second being Joanne Grant who did not make herself available for an interview.

A second, small number of documents was provided by Ms. Tolliver in August, 2015. These documents are clearly identified in the index to Appendix "A". No additional documents have been provided.

In the course of my investigation, I interviewed the following individuals:

1. Iris Tolliver, Clerk Treasurer, Village of Chester Commission Clerk Treasurer – June 25, 2015 and August 17, 2015;
2. Ray Cambria, Village Commissioner, 2003 -- 2007 - June 30, 2015 ;
3. Dave Foley, Village Commissioner, 2006 - 2007 – June 30, 2015;
4. Brenda Mulrooney, Commissioner and Vice Chair of the Village Commission, 2009 – 2010 – June 30, 2015;
5. Phil Ellwood, Village Commissioner, 2008 – 2009, 2009 – 2010, June 30, 2015;
6. William Zinck Sr., Village Commissioner, 2006-2007, 2007-2008, July 2, 2015;
7. William Zinck Jr., Vice Chair, Village Commission, 2007-2008, 2008-2009, Commission Chair, 2009 – 2010, 2010 – 2011, July 2, 2015;
8. Michael Heisler, Village Commissioner, 2007 – 2008, 2008 – 2009, 2009- 2010, 2010 – 2011, July 2, 2015;
9. Tony Howlett, Commission Chair, 2006 -- 2007, 2007 – 2008, 2008 – 2009, June 30, 2015;
10. Ronald Zinck, Proprietor Ronald Zinck Trucking, August 17, 2015; and
11. Tom Mulrooney, July 3, 2015.

Each of these interviews was recorded by court reporter and each individual was sworn in before giving evidence. The years of service referenced for each past or present Commissioner are in relation to the impugned projects and are not intended to be reflective of that Commissioner's full length of service, either past or continuing. Summaries were prepared of each Commissioner's interview evidence; copies may be found in the Book of Authorities submitted with this report.

C. FIRE HALL RENOVATION PROJECT

By 2007, the Commission had made the decision that the Fire Hall Renovation was required in order to accommodate a new fire truck purchased for the Chester Volunteer Fire Department. The earliest reference to Commission discussion of the Fire Hall Renovation in the materials provided to me is found in the Commission meeting minutes for September 13, 2006. The last reference to Commission discussion of the Fire Hall Renovation Project in the materials provided to me is found in the Commission meeting minutes for October 10, 2007.

Below is a table outlining each set of Commission meeting minutes that contain references to Commission discussion surrounding the Fire Hall Renovation Project (the "Fire Hall Minutes"). All tab references refer to Appendix "A":

Tab No.	Date
3A	September 13, 2006
3B	October 11, 2006
3C	November 8, 2006
3D	December 13, 2006
3E	March 14, 2007
3F	April 11, 2007
3G	June 13, 2007
3H	July 11, 2007
3I	September 12, 2007
3J	October 10, 2007

A review of the Fire Hall Minutes, together with the interview evidence gathered from the Commissioners of the time, helped to inform my understanding of how the Commission worked through the initial development of the Fire Hall Renovation Project, from the original Request for Proposals, to acceptance of proposal and creation of a contract for the work required. I find that Commissioner Zinck took on a leadership role in identifying the scope of work required, seeking out and retaining the services of an engineer to draft the necessary building plans, and coordinating with the appropriate government offices to obtain the necessary building permits. This work was done between September 2006 and May 2007 and Commissioner Zinck provided the Commission with regular progress updates throughout.

To advertise the project, the Commission placed a Request for Proposals soliciting proposals for the required work from members of the general public in the Chester Clipper: one on May 8, 2007 and one on June 13, 2007. Copies of these ads may be found at Tab 24.

The Fire Hall Minutes show that the first time Commissioner Zinck advised the Commission that he had a conflict of interest with respect to the Fire Hall Renovation Project did not occur until the Commission meeting held on June 13, 2007 [Tab 3G] when the first round of Proposals was put before the Commission for consideration. The Minutes for that meeting reflect Commissioner Zinck and his father, Commissioner Bill Zinck, Sr. declaring a conflict of interest with respect to the Fire Hall Renovation Project, excusing themselves from any decision making and leaving the room. This was echoed in the interview evidence as well.

The Minutes from June 13, 2007 show that only one proposal was received. That proposal was deemed by the Commissioners to be too vague, and a decision was made to re-advertise the project, seeking a fresh round of proposals. The July 11, 2007 [Tab 3H] minutes show that once again, Commissioner Zinck and his father, Commissioner Bill Zinck, Sr. advised the Commission that they had a conflict of interest with respect to this project, excused themselves from any decision making and left the meeting room. Only one proposal was received by the Commission as a result of the second advertisement and it was accepted by the Commission.

The successful proposal came from Wildo Builders Limited, Commissioner Zinck's company and a copy of it may be found at Tab 20. It is my understanding that Wildo completed the required work on time and without issue.

D. FIRE HALL ROOF REPLACEMENT

The Fire Hall Roof Replacement Project was undertaken a year after the Fire Hall Renovation Project and was required to tie the newly renovated section of the Fire Hall roof to the older pre-existing roof.

Overall, it would appear that the Fire Hall Roof Replacement Project generated far less discussion at the Commission table than the Fire Hall Renovation Project. Based on the Minutes provided for my review, the Commission as a whole discussed the Fire Hall Roof Replacement starting in April 2008 [minutes at Tab 3L], an Invitation to Tender was advertised in The Clipper on May 6, 2008 [Tab 25] with a clarification ad placed shortly thereafter [Tab 3M], and tenders were opened by the Commission at its meeting on June 11, 2008. Everything happened very quickly. A table indexing all of the Commission meeting Minutes referring to Commission discussion of the Fire Hall Roof Replacement Project (the "Fire Hall Roof Minutes") appears below. All tab references refer to Appendix "A":

Tab No.	Document Description
3L	April 9, 2008
3M	May 14, 2008*
3N	June 11, 2008

I find that Commissioner Zinck once again assumed a leadership role with respect to this project, advising the Commission at its April 9, 2008 meeting that he would "...word how the tender should read, including a list of expectations." [Tab 3L].

The job description that Commissioner Zinck devised wasn't without some controversy however. Minutes for the Commission's May 14, 2008 meeting [Tab 3M] reflect questions raised by a member of the public around the requirement for hand nailing as opposed to air gunning the shingles into the roof, among other issues. My understanding, based on interview evidence gathered, is that the gentleman raising concerns around the job description was also a contractor within the Village. Despite this input, the Commission decided to keep Commissioner Zinck's stated list of project expectations, including the requirement that the new roof shingles be hand nailed. A copy of the Invitation to Tender containing the job description may be found at Tab 5.

Tenders were opened during the June 11, 2008 Commission meeting [Tab 3N]. Minutes for the meeting show that Commissioner Zinck advised the Commission of his conflict of interest in the matter and excused himself from any decision making process, leaving the Commission table and sitting in public seating. Two bids were received during this tender process, with Wildo Builders Ltd. submitting the winning bid by a difference of approximately \$3,600.00.

The Fire Hall Roof Replacement Project went ahead with the work completed without incident. After completion however, several issues arose with respect to the shingles. A review of Commission meeting Minutes and witness interview evidence shows that the Commission dealt with recurring problems of blown off shingles and roof leakages culminating in a replacement metal roof being installed in the winter of 2015. There is some dispute as to whether the shingle problems originated as a result of improper installation or manufacturer's defect. Ultimately, I find that this determination lies outside of the scope of this inquiry and the shingle issue, while certainly a matter of concern for the Commission, has no significant bearing on my findings with respect to the existence, or otherwise, of any breach of relevant and applicable legislation. However, for reference, the table below provides a listing of all Commission meeting minutes provided to me for review that contain a reference to discussion of the Fire Hall roof shingles. All tab references refer to Appendix "A":

Tab No.	Document Description
3BB	October 13, 2010
3EE	December 11, 2010
3NN	September 10, 2014
3OO	October 15, 2014

E. LIDO POOL FACILITY AND PUBLIC WASHROOMS PROJECT

The Lido Pool Facility and Public Washrooms Project (the "Lido Pool Project") was the most significant project undertaken by the Commission in the period subject to this inquiry. The project was very involved, requiring the negotiation of a land purchase, the involvement of multiple government departments, and accommodation of several different circumstances and physical factors. I find that Commissioner Zinck once again assumed a leadership role in the early developmental stages of the Lido Pool Project, coordinating building plans and presenting the Commission's plans and budget to interested Villager ratepayers at a special October 27, 2009 meeting held to vote on whether the Commission would assume a mortgage to complete the anticipated building project.

The Lido Pool Project however proceeded somewhat differently to the earlier projects in that Commissioner Zinck relinquished his leadership role much earlier in the project's development. Commission meeting minutes reflect discussion of the Lido Pool Project beginning at the September 9, 2009 meeting and continuing until the October 13, 2010 meeting (the "Lido Pool Minutes"). A listing of the Lido Pool Minutes and other relevant documents may be found in the table below. All tab references refer to Appendix "A":

Tab No.	Date
3S	September 9, 2009
3T	October 14, 2009
3U	October 27, 2009
3V	November 10, 2009
3W	March 10, 2010
3X	April 14, 2010
3Y	May 12, 2010
3Z	June 9, 2010
3AA	September 8, 2010
3BB	October 13, 2010
7	Tender
8	Demolition for Lido Pool
9	Quotation for Pool house and Wharf Structure Demolition (Land & Sea Contracting Ltd)
10	Quote on demolition of Pump House and wharf (Ronald Zinck's Trucking)

11	Village of Chester Tender Instruction Package and Response Form (no plans)
12	Tender Response Form -- Dominey Enterprise & Excavation
13	Tender Response Form -- Rikjak Projects Inc.
14	Tender Response From Wildo Builders Ltd.
15	Contract between Wildo Builders Ltd and the Village of Chester (Construction of Public Bathroom in Lido Pool Area)

I find that by the November 10, 2009 Commission meeting, Commissioner Brenda Mulrooney has assumed responsibility for managing the Lido Pool Project. I also find that Commissioner Mulrooney did so at the request of Commissioner Zinck for the stated purpose of keeping Commissioner Zinck at "arm's length" from the Lido Pool Project, presumably to avoid any issues arising, if and when his company chose to bid on the work.

It was Commissioner Zinck's evidence that he advised the Commission of his intention to bid on this project. There is no reference of him having done so in any of the minutes provided, however I accept that Commissioner Mulrooney was aware of this intention by at least early November 2009. Clerk/Treasurer Iris Tolliver gave evidence that she was also aware that Commissioner Zinck intended to bid on this work although she could not recall when she was informed. I also accept that Commissioner Zinck advised Ms. Tolliver of his intention. It is reasonable to infer that this intention was communicated to Ms. Tolliver around the same time as it was communicated to Commissioner Mulrooney.

A call for tenders was advertised on November 3, 2009 and then twice again on November 6, 2009 [Tab 26]. We do not have copies of the November 6, 2009 advertisements, however billing records suggest that two ads were run on that date. The tender package provided by the Commission may be found at Tab 11 and three companies, Dominey Enterprise & Excavation, Rikjak Projects Inc., and Wildo Builders Limited, all submitted tender responses dated for either November 17 or November 30, 2009. Unfortunately, the materials provided for my review did not include a copy of the final, or any, building design.

The tender opening for the Lido Pool Project was handled differently from those involved with the Fire Hall Renovation Project and the Fire Hall Roof Project. Although no meeting minutes were provided, based on interview evidence collected, I find that the Lido Pool Project tenders were opened at a private, ad hoc meeting where only Commissioners Brenda Mulrooney and Tom Mulrooney were present. Commissioner Zinck was not present for this meeting and there are no meeting minutes available to

suggest that he advised the Commission of any intention to bid for the Lido Pool Project work. All three tenders were provided for consideration with the bidding parties' information obscured such that the tenders were presented and considered "blind". This differed from the two previous tender openings this inquiry is concerned with, where tenders were opened at a public Commission meeting and all of the bidders' information was visible.

Wildo was the successful bidder and was awarded the Lido Pool Project work.

Although Commissioner Mulrooney became involved shortly before the tender opening, there was still a lot of work to do in order to get to the construction phase of the Lido Pool Project. It was Commissioner Mulrooney's evidence that demolition work, an architectural survey, and other complicating factors including, but not limited to, design issues and rights of way, had to be dealt with. Multiple government departments, provincial and federal, had to be consulted to address different concerns, and to arrange the purchase of the land upon which the new building was constructed. The required building permit was not obtained until after the May 12, 2010 Commission meeting [Tab 34], and the June 9, 2010 meeting minutes indicate that construction work had begun [Tab 32].

Once construction work began, the project advanced quickly as the Commission was very anxious to have the new Lido Pool facility open for the 2010 summer season. With respect to the construction of the building, I accept, based on the evidence before me, that there were disputes between Commissioner Zinck and Commissioner Mulrooney and that Commissioner Zinck made some minor changes to the building plans as construction progressed. Overall however, I accept that the building was built substantially to plan, on time, and no significant issues arose with the work carried out by Wildo on the building itself.

F. APPLICABLE LAW

Governing Legislation

The *Municipal Conflict of Interest Act*, R.S.N.S. 1989, c. 299 (the "Act") governs conflicts of interest in respect of a municipal government. The Commission falls under the section 2(d) definition of "local board" as follows:

2. In this Act,

...

(d) "local board" means any board, commission, committee, body or local authority of any kind established to exercise or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes of a municipality or parts thereof or of two or more municipalities or parts thereof, or to which a municipality or municipalities are required to provide funds, and includes a school board pursuant to the *School Boards Act*;

And the Act applies to determine potential conflicts of interest of individual members, defined as:

2(f) "member" means a member, in whatever capacity, of a council or a local board and, for the purposes of Sections 9 and 10, includes a former member;

Potential conflict situations are identified by the existence of a pecuniary interest, either direct or indirect, and the protocol to be followed by a Commissioner in a potential conflict situation is addressed by section 6 of the Act:

6 (1) Where a member, either on the members own behalf or while acting for, by, with or through another, has any direct or indirect pecuniary interest 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 shall

(a) as soon as practicable after the commencement of the meeting disclose the interest and the general nature thereof;

(b) withdraw from his place as member and

(i) in the case of a closed meeting, leave the room in which the meeting is held for the duration of the consideration of the matter, and

(ii) in the case of a meeting that is open to the public, either leave the room in which the meeting is held or remain in that part of the room set aside for the general public for the duration of the consideration of the matter;

(c) refrain from taking any part in the consideration or discussion of the matter and from voting on any question relating to the matter; and

(d) refrain from attempting in any way, whether before, during or after the meeting, to influence the decision of the council or local board with respect to the matter.

...

(3) A member shall comply with this Section in respect of any matter in which the member intends to obtain a pecuniary interest, either on the member own behalf or while acting for, by, with or through another.

The effect of section 6 is that Commissioners are prohibited from participating in the consideration, discussion, or voting by the Commission with respect to any matter in which the Commissioner has a direct or indirect pecuniary interest, or *intends* to obtain a pecuniary interest.

Prevailing Case Law

The importance of avoiding a conflict of interest - either the existence of a conflict, or the mere appearance of one - is rooted in the trust conferred upon a public official to act for the public purpose. This is a long-entrenched concept, rooted in democratic values and historically recognized as a principal worthy of the law's protection.

This concept was articulated quite well in the 1979 decision of the Ontario High Court of Justice, Divisional Court, in *Moll v. Fisher*, [1979] O.J. No. 4113 ("*Moll*"), a decision that has since been widely quoted and adopted in subsequent Canadian case law respecting municipal conflict of interest legislation. All emphasis added is my own:

The obvious purpose of the Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but *applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest*. There is no need to find corruption on his part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute. And I should say at once, that in so far as this case is concerned there is no suggestion that the appellants acted out of any improper motive or lack of good faith.

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 judgment 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 selfinterest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.

The concepts enunciated in *Moll* are not novel, nor are they particularly modern. The Court of Chancery

of Upper Canada wrestled with the same constructs in the 1854 decision in *The City of Toronto v. Bowes*, C.R. [3] A.C. 10 at 17 (“*Bowes*”), considering the impact of the city Mayor’s decision to contract to purchase a large number of discounted Toronto City debentures, to be issued under an anticipated future by-law of the City Council, resulting in a profit to the mayor personally. Considering the state of the law at that time, the Court stated, at paragraph 25 of that decision:

...The settled rule is, that he who is entrusted with the business of others cannot be allowed to make such business an object of interest to himself...This is not a rule of positive law. It does not depend on reasoning technical in its character or local in its application. It is founded upon principles of reason, or morality, and of public policy. It has its foundation in the very constitution of our nature, for it has been authoritatively declared that a man cannot serve two masters, and is recognized and enforced wherever a well regulated system of civil jurisprudence prevails. [Emphasis added]

The Supreme Court of Canada weighed in in its 1990 decision in *Old St. Boniface Residence Assn. Inc., v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (“*Old St. Boniface*”), defining what constitutes a municipal conflict of interest at paragraph 92:

...There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonable, well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest...

While not limited to situations involving a pecuniary interest, conflicts of interest questions often arise in that context. Similar language to that used by the Supreme Court in the *Old St. Boniface* decision can be found in the comments of Justice Warner of the Nova Scotia Supreme Court in His Lordship’s recent decision in *Callin v. Dauphinee*, 2014 NSSC 452 (“*Callin*”).

The Nova Scotia Act is concerned with conflicts arising out of a pecuniary interest. In considering the meaning of this, Justice Warner’s decision, at paragraph 55, is instructive:

The grammatical aspect of the statutory interpretation process leads me to conclude that a pecuniary interest not held in common with electors, that is not so remote or insignificant as to require disclosure and abstinence from participation arises when a reasonably well-informed person would conclude that it is *likely* to, as opposed to *might or could possibly*, influence the member’s exercise of his or her duty.

His Lordship quotes heavily from *Moll*, including the passage quoted above, and goes on, at paragraph 96, to articulate how the Nova Scotia Act should be interpreted and applied:

As stated in *Moll*, and most of the subsequent decisions, the purpose of the *Act* is to prohibit members of council from engaging in the decision-making process in respect of matters in which they have a personal economic interest. The issue is not the good faith of the member or the propriety of his conduct, but rather, whether a reasonably well-informed person would conclude that the member's pecuniary interest in a matter likely influenced the exercise of his public duty in respect of that matter.

Analysis

Members of municipal government are entitled to have interests outside of their role within government. Indeed, modern conflict of interest legislation appears to anticipate that they will, setting out a legislated code of acceptable behaviour when such a conflict arises. Failure to live up to that code constitutes a violation of the governing law.

Based on my reading of the above authorities, and the relevant sections of the Act, any analysis of conflict of interest in the context of municipal government in Nova Scotia must first include an assessment of whether or not the impugned member of government had a pecuniary interest, either direct or indirect, in the matters at hand. Secondly, that pecuniary interest must be unique and personal to the member. It must be something more than the general interest the member holds in common with other citizens of his or her community. If the answer to those questions is yes, then the third step of this analysis is that one must look to section 6 of the Act to determine whether the member discharged his or her obligations under the legislation. In the sections below, I will endeavour to undertake that three part analysis with respect to the subject matter of this particular inquiry.

I. "Pecuniary Interest"

The first aspect of the required analysis is concerned with determining whether a pecuniary interest exists. The current inquiry is concerned with the pecuniary interests of Commissioner Zinck, and whether those interests influenced the exercise of his public duty. Commissioner Zinck's evidence was that his livelihood was derived from the building trade, that he was a trained carpenter, and that he ran his own small business, Wildo Builders Limited, for a period of time as a means of earning his personal income.

The three impugned projects all involved work put out to public tender that was ultimately awarded to Wildo. The Act does not define the term "pecuniary interest". It does define the terms "indirect pecuniary

interest" [section 3], and "deemed pecuniary interest" [section 4], with neither definition applying to the current situation.

The ordinary meaning of the word "pecuniary", as defined by the Merriam-Webster online dictionary, is:

1. Consisting of or measured in money;
2. Of or relating to money.

This meaning is consistent with Justice Warner's conclusions in *Calkin, supra* and nothing in the Act or case law would support adopting a different definition.

Based on a review of the meaning of the term "pecuniary interest", I think it is clear that Commissioner Zinck had a pecuniary interest in each of the three projects at issue. He bid for, and was awarded, contracts to carry out work for each of the Fire Hall Renovation, Fire Hall Roof Replacement, and Lido Pool Projects. He, through his company, ensured that the contracted for work was done, and he, through his company, received financial compensation in return. I find that Commissioner Zinck had a direct pecuniary interest in the awarding of those contracts.

II. Pecuniary Interest Not Held in Common with Electors Generally

There are a number of saving provisions found in section 5(1) of the Act that determine a series of circumstances where the Act does not apply. For the purposes of this analysis, primary among those circumstances are sections 5(1)(j) and 5(1)(k):

5(1) This Act does not apply to any interest in any matter that a member may have

...

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

(k) by reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

Having regard to the above therefore, the question to be considered becomes whether Commissioner Zinck's pecuniary interest was one that was unique to him, not held in common with electors. Furthermore, was that interest so remote or insignificant in nature that it could not reasonably be regarded as likely to influence Commissioner Zinck? This is an objective standard - returning to Justice Warner's comments in *Calkin*, it becomes necessary to determine "...whether a reasonably well-informed person would conclude that the member's pecuniary interest in a matter likely influenced the exercise of his public duty in respect of that matter."

As was set out above, Commissioner Zinck is a contractor by trade. That is his business and it is how he supports himself. From 2007 to 2012, Commissioner Zinck operated Wildo Builders Ltd. ("Wildo"), a limited company engaged in providing contracting and building services for hire. Wildo was a commercial enterprise, owned and operated by Commissioner Zinck, and I find that he had a pecuniary interest that was personal, direct, and not held in common with the electors of Chester Village generally with respect to the contracts awarded for the Fire Hall Renovation Project, Fire Hall Roof Replacement and Lido Pool Project.

The Chester Village Commission has a policy of awarding work, where possible, to Chester Village based businesses. There were other Chester Village based bidders seeking the work associated with the Fire Hall Roof Replacement and the Lido Pool Project. It is my view that the existence of these other bidders does not change my assessment of whether or not Commissioner Zinck's interest was held in common with the village electors generally. For greater certainty on the matter, I am guided by the words of Justice Lederer in the majority decision of the Ontario Superior Court of Justice (Divisional Court), in *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, at paragraph 43:

In common usage, "generally" means: "in most cases" or "widely" (see: *Concise Oxford English Dictionary*, Eleventh Edition, Revised, Oxford University Press 2006). Understood in this way, "electors generally" cannot be taken to include only two electors, as suggested by counsel for Robert Tuchenhagen. To her, "electors generally" should be taken to mean only the electors interested in "viewing and potentially bidding on the property"...It is not the nature of the interest, but the breadth of those who share the interest which defines whether s.4(j) of the *MCI*A applies. In this case, Robert Tuchenhagen would share, with "electors generally", an interest in whether the municipality obtained the best price possible for its sale of 141 Hardisty Street North. The consideration of whether to make a bid was not an interest Robert Tuchenhagen held in common with "electors generally"...

Any assessment of Commissioner Zinck's interest must be considered in the context of the Village electors as a whole, not limited to a small subsection of Village electors who might bid on construction work. Villagers as a whole would generally benefit from having improved facilities. They would also have a common interest in whether the Commission obtained the best work for the best price, and whether that work was done well, to an acceptable standard, and within acceptable timeframes. Commissioner Zinck's interest in bidding for, and securing, the construction work required for the three projects at issue was, however, exclusive to him, and not an interest held in common with Village electors generally.

Commissioner Zinck personally benefited from securing the contracts to carry out the construction work required for the completion of each project. This was a benefit that was pecuniary in nature, direct, significant, and not remote. Having regard to the language of the Act and case law authorities, I find that

a reasonably well-informed person would conclude that Commissioner Zinck's personal pecuniary interest in the three projects would likely influence the exercise of his public duty in respect of each of those matters. It is not for this inquiry to opine on whether Commissioner Zinck was, in fact, influenced, but rather, whether a reasonable person, looking objectively at the circumstances, would come to that conclusion. I find that they would.

III. Did Commissioner Zinck Discharge his Duties Under Section 6 of the Act?

Fire Hall Renovation

Commissioner Zinck was heavily involved with the development of the Fire Hall Renovation project, identifying the required scope of work, organizing building plans and permits, and taking responsibility for the drafting of the Request for Proposals. He took on, by all accounts, a role akin to project manager.

Commission meeting minutes from the June 13, 2007, meeting [Tab 3G] show that both Commissioner Zinck and his father, Commissioner Bill Zinck, Sr., publicly declared a conflict with respect to the Fire Hall Renovation, excusing themselves from any decision making, and leaving the meeting room once the Commission's business turned to a consideration of bids received in response to the publicly advertised Request for Proposals.

Finding a deficiency in the sole bid submitted, the Commission decided to re-advertise the required work. Commissioner Zinck and his father repeated this process on July 11, 2007 [Tab 3H], when the second round of bids were considered. Minutes for that Commission meeting show that both Zinck Commissioners once again advised the Commission of their conflict of interest, leaving the room for any consideration of the bids received for the Fire Hall Renovation.

Had the Commission's only discussion of the Fire Hall Renovation taken place during the meetings held on June 13 and July 11, 2007, there would be no issue with how Commissioner Zinck comported himself. However, it is clear from a review of the Minutes leading up to the June 13 and July 11, 2007 meetings that Commissioner Zinck was not only involved in Commission discussions and activity to develop and consider the project as a whole, but took on a leadership role throughout that process [Tabs 3C, 3D, 3E and 3F]. Meeting minutes covering the period from September 13, 2006 [Tab 3A], to April 11, 2007 [Tab 3F] show that Commissioner Zinck was quite involved in the Commission's active discussions surrounding the Fire Hall Renovation project. The October 11, 2006 Minutes [Tab 3B] are the only set in this series that do not reflect Commissioner Zinck taking an active role with respect to discussion of the Fire Hall Renovation.

None of the meeting minutes referred to reflect any reference to Commissioner Zinck declaring a conflict or refraining from participation in discussion surrounding the Fire Hall Renovation before the bid openings held during the June 13 and July 11, 2007 meetings. By contrast, several of the minutes identified above reflect Commissioner Zinck taking active steps to move the project along and advising the Commission of his progress.

Section 6(1)c) of the Act clearly requires abstinence from "...consideration or discussion of the matter *and* from voting on any question relating to the matter;". The matter at issue in this case was the Fire Hall Renovation, the conflict arising out of Commissioner Zinck's pecuniary interest in the awarding of any

contract to carry out that work. The wording of this section is clear. Consideration and discussion of the matter at issue is not limited solely to voting on that issue. It is my view that the legislation is meant to take a broad view of the types of activities that a municipal government member must abstain from undertaking when that member has a pecuniary interest in the outcome. Consideration and discussion of a matter are clearly viewed by the legislation as being activities separate from actual voting on a matter in which the member has a pecuniary interest. In my view, Commissioner Zinck's decision to take on a leadership role in developing the Fire Hall Renovation, and to continue to engage in active discussion of the project at the Commission table, and active participation in moving it along outside of the Commission table put him in a position of conflict of interest.

Fire Hall Roof Replacement

The Fire Hall Roof Replacement project appears to have been carried out in a similar fashion to the Fire Hall Renovation. During the April 9, 2008 Commission meeting, the minutes [Tab 3L] reflect Commissioner Zinck bringing a motion to advertise a tender for the roof replacement and advising the Commission that he would word how the tender would read, "...including a list of expectations". Interview evidence gathered from various Commissioners from that time confirmed that Commissioner Zinck was responsible for determining the scope of work required for the Fire Hall Roof Project and that he determined the specific expectations that were communicated to prospective bidders.

As with the Fire Hall Renovation, I find that there was no declaration of any conflict of interest prior to the Commission meeting held on June 11, 2008 [Tab 3N] at which time bids were opened and considered by the Commission. At that meeting, the minutes clearly reflect that Commissioner Zinck declared a conflict of interest with respect to the Fire Hall Roof Project, removed himself from the Commission table, and sat in the public gallery.

Had the June 11, 2008 Commission Meeting represented the sum total of the Commission's discussions around the Fire Hall Roof Replacement, I would be satisfied that Commissioner Zinck had not acted in conflict. However, that is not the case. As set out above, section 6(1)c) of the Act clearly requires abstinence from "...consideration or discussion of the matter *and* from voting on any question relating to the matter;".

For Commissioner Zinck, both the documentary record and interview evidence illustrate clearly that Commissioner Zinck's involvement in both the Fire Hall Renovation and Fire Hall Roof Replacement projects was extensive. I find that Commissioner Zinck undertook a role akin to project manager up to the point at which bids were opened at the Commission table. My understanding is that it was quite ordinary for Commissioners to take on a leadership or responsibility role with respect to various projects if their

personal skill sets meant they were particularly well suited to handling those tasks. I was told, and I accept, that this was very much the case when it came to Commissioner Zinck and Commission projects involving construction work as Commissioner Zinck's professional background was one of a trained, lifelong contractor.

Because of the size of the Commission, and its relative lack of resources, this practice was viewed positively. Unfortunately, this practice, when it came to Commissioner Zinck's involvement in projects he bid on, did not accord with the requirements of the Act. It did not accord with the requirements of the Act because Commissioner Zinck had a pecuniary interest in the outcome of the Commission's decisions on each of those projects.

Section 6(3) extends the reach of the Act to "...any matter in which the member *intends* to obtain a pecuniary interest...". Section 6(1)(a) requires the member to advise the Commission *as soon as practicable* of the pecuniary interest. Read together, it is my view that a Commissioner becomes obligated to advise the Commission of a potential conflict of interest as soon as is practicable once a matter arises for Commission discussion or consideration if that Commissioner intends to seek or obtain a pecuniary interest in the matter.

In the case of this analysis, and having regard to all of the evidence under consideration, it is my view that it can be reasonably inferred that Commissioner Zinck would have known that he, through his company, would have had an interest in bidding for any construction work that the Commission undertook as long as it fit within the scope of what Wildo was capable of carrying out. In practical terms, I find that Commissioner Zinck should have advised the Commission that he intended to bid on the work for both the Fire Hall Renovation and Fire Hall Roof projects as soon as, or very soon after, those projects came up for initial discussion at the Commission table. He would then have been obligated to withdraw and refrain from taking part in any consideration or discussion of those projects.

Instead, Commissioner Zinck took on a very active leadership role in the development of both of those projects, including setting the scope of work, organizing building plans and permits, and involvement in the advertisement of the tender and proposal calls. The only stage at which Commissioner Zinck advised the Commission that he had a conflict of interest was at the point of voting on each matter which was, in my view, too late to meet the requirements of the Act.

I am not in a position to comment on whether or not Commissioner Zinck's involvement in the development phases of each of these projects actually put him in a better position than other parties when it came time to bid for the contracts. However, I find that his involvement in each of these projects did, at a minimum, create the perception that it could have. Ultimately, Commissioner Zinck was in the position of having a

conflict of interest in relation to Commission business surrounding the Fire Hall Renovation and Fire Hall Roof projects because he had a direct pecuniary interest in the outcome of the tender and proposal processes involved with each and did not meet the code of conduct required by section 6 of the Act.

Lido Pool Project

The Lido Pool Project was developed in a somewhat different fashion from the earlier two projects. This occurred for multiple reasons. The evidence supports a finding that it was a much more multi-faceted and complex project to organize, but also, I find that the Commission had, by 2009-2010, started to put in place better and more robust processes, policies and procedures.

It is clear, based on a review of the minutes [specifically those at Tabs 3S, 3T, and 3U] that Commissioner Zinck undertook his usual role in managing the project in its early days. The minutes referred to contain references to Commissioner Zinck updating the Commission on his progress in obtaining building plans and giving a presentation to the Village electorate setting out the scope of the intended project and itemizing how a planned rate increase would be used to fund the Lido Pool Project's construction. It is also clear that by the November 10, 2009 meeting [Tab 3V] that Commissioner Brenda Mulrooney had taken over that role. The was not disputed during the Commissioner interviews and I find that the shift occurred because Commissioner Zinck was conscious of appearing to be at "arm's length" with respect to the Lido Pool Project.

I also find that nowhere in the minutes covering the Commission's numerous discussions of the Lido Pool Project did Commissioner Zinck announce to the Commission that he had a conflict of interest with respect to this project. However, both Commissioner Brenda Mulrooney and Clerk Treasurer Iris Tolliver recalled knowing that Commissioner Zinck intended to bid on the Lido Pool Project. Commissioner Mulrooney's evidence was that she became aware of that fact around the time that she took over on the project. Ms. Tolliver could not recall when she became aware of Commissioner Zinck's intention, but did recall having been informed of it by Commissioner Zinck himself. I am not in a position to find that that intention had been announced to the Commission as a whole at any point as the minutes provided for my review do not reflect this.

It was widely expressed to me amongst the Commissioners that I interviewed that they were aware of what Commissioner Zinck did for a living. It was also widely expressed to me that it was expected amongst the Commissioners that Commissioner Zinck's company would likely be bidding for any construction work that came up as that was the business he was in. Commissioner Zinck, by virtue of his trade, was in somewhat of a unique position on counsel. Apart from his father, Commissioner Zinck, Sr., there were no other Commissioners involved in professional pursuits outside of the Commission that would lead to them

pursuing any business with the Commission. This widely held understanding does not, however, appear to have been occasioned by any formal announcement by Commissioner Zinck, nor does it absolve him of his obligations under the Act.

With the Fire Hall Renovation and Fire Hall Roof projects, Commissioner Zinck did not advise the Commission of his pecuniary interest and subsequent conflict of interest until the point at which bids were being opened and considered. I find that Commissioner Zinck did not have the same opportunity with respect to the Lido Pool Project because the tender opening for that particular project was not held at an open meeting. I accept that Commissioner Zinck was told that he could not attend the tender opening for the Lido Pool Project and that he was not present for that tender opening. I find that the tender opening was attended by Commissioners Brenda Mulrooney, Tom Mulrooney and Village Clerk/Treasurer Iris Tolliver.

As is set out above, there is no reference in any of the meeting minutes provided to me of Commissioner Zinck bringing to the attention of the Commission that he had a conflict of interest with respect to the Lido Pool Project and I find that in fact he did not. However, I find that, at a minimum, Commissioner Mulrooney and Clerk/Treasurer Tolliver were aware that Commissioner Zinck intended to bid for the Lido Pool Project work and I am prepared to find that they were so aware by early November 2009.

However, I find that Commissioner Zinck was heavily involved in the development of the Lido Pool Project up to October 27, 2009 [Tab 3U]. All tender responses were submitted to the Commission on either November 17 or November 30, 2009 [Tabs 12, 13 and 14]. The Commission's only contract documentation with respect to its relationship with Wildo is found at Tab 15 and was signed on May 19, 2010. The documentary record is not entirely clear as to when the successful tender was accepted as there are no meeting minutes in relation to that meeting. However, Commissioner Zinck remained involved in the Commission's discussions of the Lido Pool Project up to the November 10, 2009 meeting [Tab 3V] and while subsequent meeting minutes reflect Commissioner Mulrooney carrying out a leadership role with respect to this project, they do not reflect Commissioner Zinck removing himself from any discussion or consideration of the same. As a result of the foregoing, I find that although Commissioner Zinck clearly attempted to be more up front with respect to his interest in the Lido Pool Project, his conduct fell short of that required by section 6 of the Act.

Ronald Zinck Trucking

Throughout the course of this inquiry, it became clear that certain members of the Commission had developed significant concerns around the hiring of Ronald Zinck Trucking to do landscaping and hardscaping work around the new Lido Pool building. The work at issue is set out at Invoice 293577, found

at Tab 21, and was more particularly itemized by Mr. Zinck himself during our interview as involving the installation of a holding tank, rock walls, extra steps, cement caps, sidewalks, topsoil, sodding, benches, landscaping apart from flowers, gravel, and some cement work in the parking lot. In return for carrying out that work, Mr. Zinck billed the Commission \$36,075. The only documentation of Mr. Zinck's arrangement with the Commission, assuming there was one, is set out at Invoice 293577. I accept that the Commission did not plan or budget for this work but that a decision was made, primarily by Ms. Tolliver and Commissioner Zinck, to pay Mr. Zinck's invoice out of the Commission's HST rebate funds. The remaining dispute centres on how Mr. Zinck came to do the work and at whose behest it was carried out.

One of the challenges encountered when carrying out this inquiry relates to the amount of time that had passed before the Commission requested that this inquiry be brought. The Lido Pool Project was the most recent project at issue, but the work had been carried out five years prior to any active investigation. An additional complicating factor arose out of the way that the Commission has historically carried out its business affairs. The Commission is a small body, run by volunteer Commissioners. Over the years, the Clerk/Treasurer and the Commissioners have worked diligently to formalize and standardize its policies, practices and procedures, but in the past, much of the Commission's business appears to have been done somewhat informally.

There was a dearth of paperwork available for my review and where Commissioners' accounts of the facts differed widely, there were few, or no, documents to refer to in order to try to objectively sort through the varying accounts. No formal contracts appear to have been entered for any of the projects at issue. And no written correspondence, either letters or emails, were referred to by any of the Commissioners, or provided for my review.

Two very divergent versions of events arose with respect to the hiring of Ronald Zinck Trucking. Ronald Zinck Trucking is a business name used by Ronald Zinck, an uncle of Commissioner Zinck. It was the evidence of Commissioner Zinck, and Ronald Zinck, that Commissioner Mulrooney requested that Mr. Zinck do the work at issue, reporting to Commissioner Mulrooney or Ms. Tolliver. Commissioner Mulrooney and Ms. Tolliver on the other hand, were very definitive in their evidence that Commissioner Zinck arranged for Mr. Zinck to carry out the work at issue.

It does not appear to be disputed that Ronald Zinck Trucking was retained to carry out some demolition and excavation work to prepare for the construction of the new Lido Pool building. I accept that Ms. Tolliver solicited a bid from Mr. Zinck for that work, found it acceptable, and retained him for those purposes and there is a brief reference to the demolition work generally in the November 10, 2009 minutes, raised by Ms. Tolliver [Tab 3V].

Mr. Zinck's evidence on the excavation and demolition work was not consistent with this. During our interview, Mr. Zinck gave evidence that the demolition work was a part of Commissioner Zinck's general contract to construct the building. Billing records, and a document appearing to be a price quote, found at Tab 21, do not support Mr. Zinck's evidence on this point and I find that the demolition and excavation work was commissioned by Ms. Tolliver acting on behalf of the Commission.

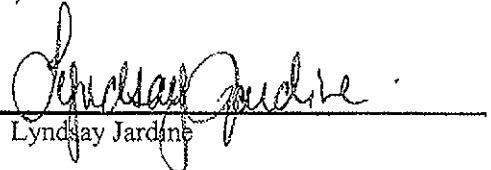
With respect to the landscaping and hardscaping work, Mr. Zinck gave evidence that he was retained by Commissioner Mulrooney, reporting to her, or to Ms. Tolliver. This was consistent with the evidence given by Commissioner Zinck.

During interviews with Commission Tom Mulrooney and Commissioner Mike Heisler, the evidence given was that both men understood that Commissioner Zinck had retained Ronald Zinck Trucking to do the work. Commissioner Tom Mulrooney's understanding of that was reported to have come from Commissioner Mulrooney and Ms. Tolliver. Commissioner Heisler's memory of the relevant events was negatively affected [REDACTED]

There was no contract, correspondence, or any other documents available to support either version of events. The evidence before me is, to put it simply, lacking. I can, however, accept that the Commission had not budgeted any funds to pay for the work carried out by Mr. Zinck, and was forced to resort to its HST rebate fund to cover the associated cost. Mr. Zinck understood Commissioner Mulrooney to be in charge of the Lido Pool Project. Commissioner Mulrooney, along with Ms. Tolliver and Commissioners Tom Mulrooney and Mike Heisler, gave evidence that they understood Mr. Zinck to have been on site as part of Commissioner Zinck's general contract. It is troubling to me that Mr. Zinck was an extended family member of Commissioner Zinck's. If the Commissioner did act unilaterally to retain him to carry out the work at issue, such a step would not have met the purchasing guidelines that the Commission had in place at the time, nor would it have been appropriate, either acting as a Commissioner or acting as the general contractor for the Lido Pool Project. The sum incurred was significant.

It is possible that the truth of Mr. Zinck's hiring lies somewhere in the middle of both versions of events. Ultimately, however, I do not find that the matter has any bearing on whether Commissioner Zinck was acting in a conflict of interest with the Commission with respect to the Lido Pool Project. I find that he was for the reasons outlined above.

All of which is respectfully submitted this 17th day of March, 2016.


Lyndsay Jardine