CITY OF OSHAWA INTEGRITY COMMISSIONER, GUY GIORNO

Citation: Gregory v. Kerr, 2021 ONMIC 2 (CanLII)
Date: March 24, 2021

REASONS FOR DECISION

TABLE OF CONTENTS

CONTEXT

1. Among their responsibilities, municipal Integrity Commissioners in Ontario conduct inquiries into applications alleging that council members or members of local boards have contravened the *Municipal Conflict of Interest Act*. At the end of such an inquiry, the Integrity Commissioner shall decide whether to apply to a judge under section 8 of the *Municipal Conflict of Interest Act* for a determination as to whether the member has contravened section 5, 5.1, or 5.2 of that Act, and shall publish reasons for the decision. Such decision is not subject to approval of the municipal council and does not take the form of a recommendation to council. There is, therefore, no municipal council resolution necessary to give effect to the decision.

2. Mr. Stephen Gregory (Applicant) has applied for an inquiry into whether Councillor Rick Kerr (Respondent) contravened the *Municipal Conflict of Interest Act* by participating in Downtown Oshawa BIA Board of Management decision making in relation to the Troubadour Series, a seven-week local concert program. The Application initially specified discussion at a September 9 committee meeting but, following notice to the parties, the inquiry eventually focused on discussion and voting at the August 27 meeting of the BIA Board of Management.

THE APPLICATION

3. Section 223.4.1 of the *Municipal Act* allows an elector or a person demonstrably acting in the public interest to apply in writing to the Integrity Commissioner for an inquiry concerning an alleged contravention of section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* (MCIA) by a member of council or a member of a local board.

4. The Applicant alleges that the Respondent contravened sections 5 and 5.1 of the MCIA by participating in decision making in relation to the Troubadour Series without ever disclosing a pecuniary interest. The September 9 Marketing Committee meeting was cited as “one case in particular” of a larger allegation. The Application was submitted December 16, 2020.

5. After considering the initial submissions of each party, I concluded that the seminal decision-making meeting occurred August 27, 2020. I clarified the scope of the inquiry to consider whether Councillor Kerr contravened section 5 of the MCIA by failing to disclose a pecuniary interest prior to consideration of the Troubadour Series at the August 27 meeting of the BIA Board of Management.

6. Upon receiving the Application, I assigned it File No. MCIA-2020-02, and conducted an inquiry.

DECISION

7. Subsection 223.4.1(15) of the *Municipal Act* states that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the MCIA for a determination whether the member has contravened section 5, 5.1, or 5.2 of that Act.

8. After considering the submissions of the parties, conducting my own independent investigation, and reviewing all the evidence, I have decided that I will not apply to a judge for a determination whether Councillor Kerr has contravened section 5 of the MCIA.

9. Subsection 223.4.1(17) of the *Municipal Act* requires me to publish written reasons for my decision. These are my reasons.

BACKGROUND

10. On August 27, 2020, the Oshawa Central District Business Improvement Area[1] (BIA) Board of Management voted unanimously to extend and to co-fund the Troubadour Series, a program of musical performances in downtown Oshawa scheduled over seven weeks, from September 4 to October 17.

11. Councillor Kerr was a member of the BIA Board of Management (as a representative of City Council) and he voted along with the rest of the BIA Board of Management to extend and to co-fund the Troubadour Series. He did not disclose any pecuniary interest.

12. In the Troubadour Series, local musicians were engaged to perform in the downtown area, as a means of stimulating business for local restaurants and bars by providing entertainment to residents.

13. Two volunteer organizers were responsible for engaging local businesses, scheduling and booking musicians, and marketing the Series.

14. One of the organizers, Mr. Jeff Davis, approached Councillor Kerr in early August in the hope of securing his support. Mr. Davis explains he had several reasons for doing so: Councillor Kerr represents Ward 4, which includes the downtown area; he has an interest in arts and culture; and he has always been supportive of local businesses during times of need. Notably, Mr. Davis acknowledged his own strained relationship with the BIA and felt that Councillor Kerr's involvement provided an enhanced prospect of success in securing BIA support, which could result in sponsorships, transparency in the use of

[1] On January 25, 2021, City Council voted to dissolve the BIA effective February 28, 2021. Until then the BIA was a board of management established under s. 204 of the *Municipal Act*. Boards of Management of business improvement areas are local boards of municipalities.

funding, and a new marketing channel. All of these factors were reasons that the organizers asked Councillor Kerr to help them do some good for local businesses that were "starving for event and promotional options during COVID."

15. In written submissions, the organizers describe Councillor Kerr as a "co-chair" of the project, but explain that his role was not managerial. Councillor Kerr was asked to be an ambassador for the Series and to bring it forward to the BIA and local businesses, but he was not expected to take care of organizational details.

16. Prior to Councillor Kerr's involvement with the Series, the organizers had already started to prepare a web-based sign-up sheet and database of interested musicians, which were reviewed as part of this inquiry. In an interview, Mr. Davis confirmed that he and another organizer completed 100 per cent of the bookings for the Series; Councillor Kerr had no role in securing or scheduling musicians.

17. The BIA co-funded portion of the Troubadour Series did not officially start until September 4, but the first performances were scheduled to take place on Friday, August 28, and Saturday, August 29. (The August 28-29 weekend[2] was effectively a launch or pilot weekend of performances.) Consequently, the organizers were contacting and booking musicians prior to late August (and, in particular, prior to the August 27 BIA Board of Management meeting), to have a line up in place for the August 28-29 weekend.

18. As it happens, one of the musicians scheduled to perform on the August 28-29 weekend was Councillor Kerr's son. Nine other musicians were also scheduled.

19. The August 28-29 performances were privately funded by personal donations from Mayor Dan Carter and Councillor Kerr. These performances were organized and booked prior to the decision by the BIA to co-fund the Series.

20. Each musician who played on the August 28-29 weekend received an honorarium of $50 per performance, plus any tips provided by members of the public. The private donations of Mayor Carter and Councillor Kerr covered the honoraria.

21. After the BIA and a local business became co-sponsors of the Troubadour Series,[3] the honorarium was increased to $100 per performance.

22. In a written submission, Mr. Davis explains the organizers' desire to "provide musicians with opportunities to play each location, dependant on availability and positive review of past performances." At the same time, the organizers hoped to have more musicians agree to perform as the series progressed, meaning that not all musicians

---

[2] All of the Troubadour Series performances were held on Fridays and Saturdays. In these reasons, I refer to each Friday-Saturday period as a "weekend" even though Sunday is excluded.

[3] As explained, BIA co-sponsorship was decided at the August 27 Board of Management meeting, but did not take effect in time for the August 28-30 weekend.

would necessarily have the chance to play all (or even multiple) venues. This explanation is confirmed by the sign-up sheet and organizing material provided during the inquiry.

23. Councillor Kerr's son performed at the following venues on the dates listed: Wendel Clark's Classic Grill & Bar (August 28), Brew Wizards Board Game Café (September 11), Top Corner Grill & BBQ (September 25), The Stag's Head Pub and Grill (October 2).

24. In total, Councillor Kerr's son performed four separate shows over the course of the Series. One of these performances was confirmed prior to the August 27 BIA Board of Management meeting (and took place immediately following, August 28). Three additional performances were booked and held after the BIA became a co-funder of the Series.

25. Mr. Davis says the invitations to perform three additional times reflected the fact that Councillor Kerr's son was an "accomplished musician and crowd favourite at each of the venues he performed at." (One of the three additional performances was scheduled as a substitution following another musician's cancellation.)

26. The Applicant alleges that Councillor Kerr "was directly involved in the organization, promotion, securing of funding, and artist selection for the Troubadour Series that hired and paid his son to be a performer" but that he was never on record as declaring a conflict of interest under s. 5 or 5.1 of the MICA. The inquiry found no evidence that Councillor Kerr played a role in selecting or booking performers.

27. As discussed below, the question to be determined is whether, at the time of the August 27 BIA Board of Management meeting, by virtue of his son's participation in the Troubadour Series, Councillor Kerr had an indirect pecuniary interest in the matter being considered and voted on at that meeting.

PROCESS FOLLOWED

28. In receiving and investigating applications under the MCIA, I follow a process that ensures fairness to both the Applicant and the Respondent. This is a full and fair process that at the same time is efficient and reasonable taking into account the circumstances of each case.

29. The Applicant and the Respondent had equal opportunities to make submissions over the course of the inquiry, including through multiple rounds of written submissions and oral interviews.

30. The Application was made on December 16, 2020. Councillor Kerr responded on January 7, along with supporting statements from witnesses. The Applicant replied on January 24, and Councillor Kerr sur-replied on January 27.

31. On January 31, I issued a Supplementary Notice to the parties informing them that, based on my review of the material submitted by the parties to that point, I was clarifying the scope of the inquiry to include whether the Respondent contravened section 5 of the MCIA by failing to disclose a pecuniary interest at the August 27, 2020, meeting of the BIA Board of Management.

32. Subsection 223.4.1(7) of the *Municipal Act* permits an Integrity Commissioner conduct the inquiry "as he or she considers necessary." If necessary, I have the ability to reformulate an application from a member of the public and to inquire into the reformulated application.[4]

33. I explained to the parties the rationale for clarifying the scope of the inquiry. Over the course of my review, it became clear that consideration of the August 27 meeting of the BIA would be necessary to determine whether the Respondent contravened the MCIA. When I issued the initial Notice of Inquiry, the August 27 meeting of the BIA was not known to me, and I was unaware that a decision related to the Troubadour Series was taken at that meeting. Both parties, however, subsequently discussed this meeting in their written submissions. I issued a Supplementary Notice of Inquiry to give each party additional opportunity to comment specifically on whether the Respondent had a pecuniary interest in the decision made at the August 27 meeting.

34. I also issued a delegation under subsection 223.3(3) of the *Municipal Act*, giving a lawyer who works with me the authority to conduct interviews. Those interviews occurred over the weeks of February 22 and March 5.

35. Councillor Kerr received an opportunity to comment on a draft of these reasons, and his comments are reflected.

---

[4] *Di Biase v. Vaughan (City)*, 2016 ONSC 5620 (Div. Ct.), at para. 39. An Integrity Commissioner "must be able to interpret and reformulate complaints submitted by members of the public who may lack specific knowledge of the Code… and who may, therefore, not be familiar with how to identify and formulate alleged breaches." While *Di Biase* involved a complaint made under a Code of Conduct, the same principle should apply to an application to an Integrity Commissioner alleging contravention of the MCIA. In assessing the reasonableness of the decision to reformulate the complaint, the Court also took into account that the parties did not object to the reformulation, and no prejudice was suffered as a result. Such was also the case here: the parties received notice of the reformulation, had already addressed the August 27 meeting in their initial submissions, and were then given an additional opportunity to comment on it.

ANALYSIS AND FINDINGS

36. I have considered the following issues:

(A) Did Councillor Kerr have a pecuniary interest in the August 27 vote of the BIA Board of Management to co-fund and extend the Troubadour Series?

(B) If so, was that pecuniary interest exempt from disclosure?

(C) Should I make an application to a judge?

Applicant's Position

37. The Applicant believes that, at the time of the August 27 meeting and by virtue of his son's participation in the Series, Councillor Kerr had a pecuniary interest in the matter being considered and voted on by the BIA Board of Management at that meeting.

38. The Application states that Councillor Kerr was "directly involved in the organization, promotion, securing of funding and artist selection for the Troubadour Series…" It further notes that Councillor Kerr is on record speaking about his son's involvement in the Series.

39. The Applicant, in reply to the Response, notes that Councillor Kerr's son had been booked to perform the August 28-30 weekend prior to the August 27 discussion of and decision by the BIA Board of Management to co-fund the series and ensure its continuation. He believes it is "highly implausible" that Councillor Kerr was unaware of this fact before the August 27 meeting. Councillor Kerr subsequently acknowledged that he knew this, as the Applicant suggests.

40. The conclusion that Applicant drew from this fact was that Councillor Kerr:

> would therefore have been aware that his involvement in the BIA board decision that would secure funds to extend the series to further dates could likely have a pecuniary benefit for his son who would continue to seek bookings, as he subsequently did and received.

41. I agreed that this was an important fact and, as explained above, I clarified the scope of the inquiry to focus on this particular question and gave both parties the opportunity to address it in written further written submissions and during their interviews.

42. Finally, the Applicant submits that Councillor Kerr should be held to an even higher standard of diligence in complying with the MCIA, since he was not just a member of the BIA Board of Management but also an elected official with six years of experience. In his view, Councillor Kerr has received enough training and education to be fully aware of his obligations under the MCIA when confronted with a potential conflict.

Respondent's Position

43. Councillor Kerr's primary argument is that, at the time of the August 27 meeting of the BIA Board of Management, there was never any guarantee of future performances in the Series for any participating musician, including his son. He argued that this fact was underscored by one of the goals of the Series, which was to provide opportunities for as many local musicians and local businesses as possible.

44. In the absence of any guarantee of future performances, Councillor Kerr submits that it was neither likely nor foreseeable that his son would be invited to perform again. As evidence of this, Councillor Kerr points to the fact that one of his son's performances was the result of a last minute cancellation by another performer and, in the COVID-19 environment, cancellations and rebookings were particularly unforeseeable.

45. In any event, Councillor Kerr maintains that he had no control over the scheduling or booking of musicians, including cancellations and rebookings, a fact that was confirmed by the Series organizers.

46. It is only with the "luxury of hindsight" that Councillor Kerr believes he can be seen to have had a pecuniary interest in the August 27 decision.

47. Councillor Kerr also rejects any suggestion that he had intent to further his own or his son's financial interest through the Series.

48. In hindsight, the Respondent states that, knowing then what he knows now, he would not have voted on the matter at the August 27 meeting.

(A) DID COUNCILLOR KERR HAVE A PECUNIARY INTEREST IN THE AUGUST 27 VOTE OF THE BIA TO CO-FUND AND EXTEND THE TROUBADOUR SERIES?

49. Yes.

50. I approached this question based on the standard that case law requires of me – that a pecuniary interest must be real and present, and not speculative and remote. In the words used by Ontario Courts, that standard is an interest that is actual,[5] definable,[6] and real.[7] A pecuniary interest does not arise from speculation based on hypothetical circumstances.[8]

---

[5] *Bowers v. Delegarde*, 2005 CanLII 4439 (Ont. S.C.), at para. 78; *Darnley v. Thompson*, 2016 ONSC 7466 (CanLII), at para 59; *Rivett v. Braid*, 2018 ONSC 352 (CanLII), at para. 51.

[6] *Lorello v. Meffe*, 2010 ONSC 1976, at para. 59; *Darnley v. Thompson*, at para. 59.

[7] *Methuku v. Barrow,* 2014 ONSC 5277 (CanLII), at paras. 43, 48; *Lorello v. Meffe,* at para. 59*; Darnley v. Thompson,* at para. 59.

[8] *Gammie v. Turner*, 2013 ONSC 4563 (CanLII), at para. 57; *Darnley v. Thompson,* at para. 63.

51. Significantly, a pecuniary interest must have crystalized by the time the matter is considered by Council or committee.[9] Possible and potential future happenings do not amount to a pecuniary interest.[10] These factors are designed to protect Council members from pecuniary interests that are too distant, remote, or hypothetical to fairly…

52. At the same time, case law on pecuniary interest supports the proposition that "likelihood that … can readily be foresee" or a "reasonable likelihood" is enough to give rise to a pecuniary interest that must be disclosed.

53. Section 3 of the MCIA deems the pecuniary interest of a parent, child, or spouse to be a pecuniary interest of a member.

54. On the balance-of-probabilities standard, I find that Councillor Kerr had a deemed pecuniary interest at the time of the August 27 BIA Board of Management decision to co-fund and to extend the Troubadour Series, and that this interest had to be disclosed in accordance with the MCIA.

55. Specifically, I find that Councillor Kerr had a pecuniary interest in the August 27 BIA Board of Management decision to co-fund and to extend the Series to further dates, because the decision made it reasonably foreseeable that his son would receive additional bookings.

56. I have reviewed the facts and assessed whether Councillor Kerr knew – or reasonably should have known – at the time of the August 27 meeting, that a decision by the BIA to co-fund and extend the Series would have the effect of providing his son more opportunities to perform and earn honoraria.

57. It would be one thing if there had been a surplus of musicians, and no reasonable expectation that individual musicians would perform on several occasions at separate venues. That is not what the evidence demonstrates.

58. The evidence indicates that a goal of the Troubadour Series was to build on positive audience reception and have musicians rotate through venues. One of the organizers, for example, explained that they "endeavored to provide musicians with opportunities to play each location." A review of the scheduling evidence suggests this rotational system was, in fact, implemented.

59. The evidence also shows that Councillor Kerr was aware of this rotational system. The Applicant directed me to several videos of meetings of the BIA; during the September 9 BIA Marketing Committee meeting, Councillor Kerr provided an update on

---

[9] *Darnley v. Thompson*, at para. 59.

[10] *Bowers v. Delegarde*, at paras. 76, 78; *Rivett v. Braid*, at para. 51.

the Troubadour Series and mentioned that his son was part it. He described musician bookings in this manner:

> We are trying to give everybody a fair shot, but we are also trying to focus the talent and audience connection and build the stable, but also put more thoroughbreds in the stable too.

60. The Applicant argues, based on this and similar comments from Councillor Kerr and the organizers, that there was an expectation that musicians who performed well during their shows were more likely to be rebooked for subsequent shows.

61. I am mindful that this comment was made on September 9 and may not necessarily reflect Councillor Kerr's understanding of the Series at the time of the August 27 meeting. I therefore do not rely on it in making my finding.

62. Considering only what was known to Councillor Kerr on August 27, I find on the balance of probabilities that it was reasonably foreseeable to Councillor Kerr that a decision by the BIA to co-fund and extend the Troubadour Series would have the effect of providing his son with the opportunity for additional performances, and thus, additional remuneration.

63. In making this finding, I acknowledge that Councillor Kerr has maintained throughout the inquiry that his son's participation in the Series was the "furthest thing from [his] mind" as he worked to establish and promote the Series. Councillor Kerr also points out that his son did not "seek out" subsequent bookings as the Applicant suggests; performers were re-booked by the organizers based on positive performance and feedback from venues and their customers and, in one case, Councillor Kerr's son performed as a result of a cancellation.

64. I accept that his son's participation was the furthest thing from Councillor Kerr's mind when he participated in the August 27 decision. This does not affect whether he had a deemed pecuniary interest in the matter of the August 27 vote, but judicial precedent suggests that this factor is relevant to whether the deemed pecuniary interest was exempt from disclosure under s. 4 of the MCIA.

(B) IF A PECUNIARY INTEREST EXISTED, WAS IT EXEMPT FROM DISCLOSURE?

65. It would be my view that, on these facts, no exemption from disclosure is available under the MCIA. However, I feel bound by Ontario Court of Appeal precedent to conclude that Councillor Kerr was exempt from the requirement to disclose the pecuniary interest because he was motivated by good intentions and not motivated by his son's interest.

66. Section 4 of the MCIA sets out eleven exceptions to the requirement to declare a pecuniary interest and withdraw from decision-making and voting. One exception is clause (k):

> Sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have ... (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.

67. Section 4 does not negate the existence of a pecuniary interest. Section 4 merely provides that the pecuniary interest does not need to be disclosed and that the Member does not need to withdraw from decision-making, voting and attempting to influence others.

68. The test, under clause 4(k), of what can be reasonably regarded as likely to influence is based on the standard of a reasonable elector fully apprised of all the circumstances.[11]

69. The wording of clause 4(k) suggests that the *nature of the pecuniary interest* should be examined to determine whether it is remote and insignificant. If I were to examine merely the nature of the pecuniary interest, I would conclude that it is neither remote nor insignificant. The vote to fund the Troubadour Series closely, not remotely, affected the pecuniary interests of musicians paid to perform. Payments of $100 per show were not insignificant.

70. However, I feel bound by the Ontario Court of Appeal decision in *Ferri v. Ontario* (2015)[12] to take into account surrounding factors such as a Council Member's length of service and whether a Council Member was motivated by good faith or private gain. According to the Court in *Ferri*, these factors are relevant to whether the pecuniary interest "is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member."[13]

71. It is not my place, as a municipal Integrity Commissioner, to ignore a judgment of the Ontario Court of Appeal, even one that alters the traditional understanding of conflict of interest.

72. An older view of conflict of interest is that propriety of motive and the presence of good faith are irrelevant to the existence of conflict.[14]

---

[11] *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683 (CanLII), at para. 16.

[12] *Ibid.*

[13] *Ferri v. Ontario*, at para. 19. According to the Court of Appeal, "under the current version of the legislation, good faith and motive are relevant to the question of whether a pecuniary interest is likely to influence the councillor, which lies at the heart of the analysis of whether a pecuniary interest is remote or insignificant under s. 4(k)." As noted, clause 4(k) refers to the *nature* of the pecuniary interest, namely: "an interest of the member which is so remote or insignificant in its nature …" As a result of *Ferri*, in considering the *nature* of a Council Member's pecuniary interest, a municipal Integrity Commissioner must also consider the Council Member's *motivation* for voting on the pecuniary interest.

[14] *Moll v. Fisher* (1979), 1979 CanLII 2020 (ON SC), 23 O.R. (2d) 609 (Div. Ct.) at 612; *Tuchenhagen v. Mondoux* (2011), 2011 ONSC 5398 (CanLII), 107 O.R. (3d) 675 (Div. Ct.) at 686, para. 28.

73. According to this view, a conflict of interest exists regardless of whether personal gain is preferred over public interest[15]. Conflict of interest "is not about acting dishonestly or for personal gain."[16] The suggestion that a conflict of interest only arises when a private interest actually interferes with decision making in the public interest is, as the Federal Court of Appeal has observed, to confuse conflict of interest with corruption.[17]

74. As Justice Cunningham wrote about a public-interest motivation in the context of conflict of interest, in the Report of the City of Mississauga Judicial Inquiry:

> I accept that the mayor's interest in the WCD project was driven principally by her desire for a four- or five-star hotel in Mississauga and not simply by a desire to assist her son. However, the fact that the mayor may not have acted primarily to further her son's pecuniary interests does not end the conflict of interest analysis, nor does it take into account questions surrounding apparent conflicts of interest. The mayor should have been more wary of using her influence where her son stood to gain financially from the transaction.[18]

75. Several reasons ground the traditional perspective that motivation is not relevant to the existence of a conflict of interest. One is the recognition that no human decision maker can be completely objective when a personal or family interest exists. Another is the importance of public confidence in the integrity of public decision making, based on what the public reasonably perceives to be happening.

76. If I did not feel bound by the Court of Appeal decision in *Ferri*, I would apply the traditional interpretation, that even the best of intention does not justify voting when one has a pecuniary interest. In other words, a conflict of interest is not eliminated by believing oneself to be acting for one's constituents and motivated by what is best for the municipality.

77. However, according to the Ontario Court of Appeal, in *Ferri*, the following subjective factors must be considered under clause 4(k) of the MCIA:[19] a Council Member's length of faithful service, whether the Member is acting in bad faith or good faith, whether the Member is motivated by a potential pecuniary benefit, and whether the matter before Council is of major public interest to constituents.[20] Further, in a case, such as this one, that involves a deemed pecuniary interest because of a family member, an

---

[15] *Cox v. College of Optometrists of Ontario* (1988), 1988 CanLII 4750 (ON SC), 65 O.R. (2d) 461 (Div. Ct.) at 469.

[16] *Tuchenhagen v. Mondoux*, at 686, para. 25.

[17] *Democracy Watch v. Campbell*, 2009 FCA 79, at para. 51.

[18] City of Mississauga Judicial Inquiry, Report, *Updating the Ethical Infrastructure* (2011), at 153-4.

[19] It is appropriate to observe that the Court of Appeal was applying the reasoning of the Divisional Court in *Amaral v. Kennedy*, [2012] O.J. No. 3766, and of Justice D.A. Broad in *Craig v. Ontario*, 2013 ONSC 5349.

[20] *Ferri v. Ontario*, at para. 21.

additional consideration is whether the Member is "there for [the Member's] constituents and not for [the Member's] [son]."[21]

78. I accept that Councillor Kerr had no intention of furthering his, or his son's, financial interest, and was instead motivated by a legitimate desire to support his constituents and his community. In his interview, Councillor Kerr stated that any financial remuneration for his son's performance in the Series was the "furthest thing from my mind." His submissions indicate that his focus was on helping the community:

> I had excellent reasons to be enthused about the possibilities of the Troubadour Series: it would bring live musical performances to economically struggling downtown businesses free of charge and with no contractual or legal liability to those businesses; it would provide not only employment to local musicians but also enjoyment for Oshawa and area residents as a means to endure the rigours of the COVID pandemic which had so restricted any live entertainment possibilities in the standard methods of indoor, non-socially-distanced performances.

79. The evidence in this case is that: Councillor Kerr felt he was voting in the best interests of the BIA and was not voting for his son; Councillor Kerr acted in good faith and was not motivated by a pecuniary benefit to his family member; he has served on City Council since 2014. Were the decision mine, I would hold that these factors are irrelevant to the obligation to disclose a pecuniary interest, as I do not believe a conflict of interest is obviated by good intentions. However, I feel bound to apply the Ontario Court of Appeal decision in *Ferri.* On that basis, I conclude that clause 4(k) of the MCIA applies and Councillor Kerr's deemed pecuniary interest was exempt from disclosure.

(C) SHOULD I MAKE AN APPLICATION TO A JUDGE?

80. No.

81. I have found, on the standard of a balance of probabilities, that Councillor Kerr did have a deemed pecuniary interest in the matter being considered and voted on by the BIA at the August 27 meeting. I have also concluded, albeit with misgiving, that an Ontario Court of Appeal precedent requires me to conclude that Councillor Kerr was exempt from disclosure based on subjective factors including the absence of motivation to help his son. In this context, I must consider whether I should apply to a judge for a determination under clause 8(1)(a) of the MCIA.

82. The following are the reasons why I do not intend to make application to a judge.

83. First, I believe that the Court of Appeal decision in *Ferri* would govern any MCIA application involving decision making that is reasonably foreseen to benefit a Council Member's son. *Ferri* states the current law of the Province, and is binding on the Superior Court of Justice to which an application would be brought. Further, the costs of a Court

[21] *Ferri v. Ontario*, at para. 17, endorsing the test in *Amaral v. Kennedy*, at para. 41. The specific words of the Court in *Amaral* were, "was there for her constituents and not for her sons."

application would be borne by the City. Regardless of my opinion of whether motive is relevant to section 4 of the MCIA, it would not be responsible for me to consume City resources on litigation in which I advance a position contrary to *Ferri*.

84. Second, I believe the cost of an application to a judge would be disproportionate to the amount of the pecuniary benefit at issue in this case.

85. Third, I believe that this inquiry and report are sufficient to advance the objective of promoting compliance with the MCIA.

86. Fourth, Councillor Kerr states that, had he known then what he knows now, he would not have voted on the matter at the August 27 BIA Board of Management meeting.

87. For these reasons, I do not believe it is appropriate for me to apply to a judge for a determination of whether Councillor Kerr contravened the MCIA.

CONCLUSION

88. I will not apply to a judge under section 8 of the MCIA for a determination as to whether Councillor Rick Kerr contravened the MCIA on August 27.

89. Despite the result in this particular case, I agree with Applicant that the public must have confidence that those holding elected office are always acting in the public interest. A Council Member must proceed with caution before taking part in decision making and voting on a matter that might affect the pecuniary interest of the Council Member or a family member.

PUBLICATION

90. The *Municipal Act* requires that after deciding whether or not to apply to a judge, the Integrity Commissioner shall publish written reasons for the decision. This decision will be published by providing it to the City to make public, and by posting on the free, online CanLII database as decision 2021 ONMIC 2.

91. Subsection 223.5(2.3) of the *Municipal Act* states that I may disclose in these written reasons such information as in my opinion is necessary. All the content of these reasons is, in my opinion, necessary.

Guy Giorno
Integrity Commissioner
City of Oshawa

March 24, 2021