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May 26, 2015

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Privileged & Confidential

Geraldine Caul
Town of Witless Bay
P.O. Box 130
Witless Bay NL A0A 4K0

Dear Ms. Caul:

Re: Potential Conflict of Interest

To retain solicitor and client confidentiality over this correspondence, please consider in a privileged meeting of Council.

I write further to your email of May 21, 2015. We previously wrote a more detailed opinion on the conflict of interest issues on May 12, 2015.

Specifically, you have asked a follow-up question as to whether the motion made at the May 12 public meeting (2015 – 084) negates the motions made at the privileged meeting of March 24, 2015 (2015 – 042, 2015 – 043, and 2015 – 044)?

Summary of Conclusions

The simple answer is that motion 2015 – 084 does not negate motions 2015 – 042, 2015 – 043, and 2015 – 044. Further, this appears to be the second time this issue of conflict was considered. It was determined on the December 9, 2014 that there was no conflict of interest in the Councillors voting on the matter, prior to resolution 2014 – 324 to adopt the Town Plan.

Facts

Property belonging to Deputy Mayor Wiseman, Councillor Carey and Councillor Smart, was rezoned by a previous council as that council was preparing their new town plan. The new town plan had proceeded to the Minister, but had not been formally endorsed. Subsequent to the election of the new town council in September, 2013 there were certain amendments to the new town plan which were being considered. **None of these amendments related to the property of Ms. Wiseman, Mr. Carey, or Mr. Smart.**

Furthermore, it was suggested that perhaps these people may have been in conflict of interest on December 9, 2014. This was discussed in the public council meeting, and it was determined that no violation of the conflict of interest provision of the Act had occurred. The minutes stated the following:

Mayor Depres confirmed that this has been investigated and unanimous decision has been made that there is no conflict of interest. The amendment to rezone properties to residential was previously decided, voted on and adopted by a

previous council a number of years ago. Sebastien explained that the amendment today has nothing to do with that, but that Council is now voting on changes that this Council made in the past months.

What was ultimately voted on was the following:

*2014-324 Ralph Carey/Rene Estrada
Be it resolved Council adopt the Town Plan 2014-2024
Motion carried unanimously.*

We previously determined that the conclusion was correct and that there was not a conflict of interest.

We have now learned that on March 24, 2015, Council made a further determination that Ms. Wiseman, Mr. Smart, Mr. Kerry, and Mr. Murphy, were not in conflict of interest. This determination was discussed in a privileged meeting of Council. The text of motions 2015 – 042, 2015 – 043, and 2015 – 044 are attached as Appendix A. This was ratified at a public meeting on May 12, 2015 (2015 – 078). In a subsequent motion of the May 12 meeting, the following resolution was included:

*2015 – 084 Councillor Rene Estrada/Councillor Ken Brinston
Be it resolved Council set up a meeting with Dan Noseworthy of Municipal Affairs
to determine who can vote on the issues of conflict.
Motion carried unanimously.*

I attach a copy of motions 2015-078 and 2015-084 as Appendix B.

Council has now twice confirmed (Wednesday, December 20, 2014 and March 24, 2015), that there is no conflict of interest in relation to the Town Plan issue. The fact that a motion was subsequently passed to “set up a meeting with Municipal Affairs” does not invalidate the prior motions. The earlier motions were already carried and there was no formal motion to reconsider.

Further, and as mentioned in my May 12, 2015 opinion, determining that the Councillors are now in conflict, or attempting to revisit that issue, after given assurances in the meeting that they were able to vote, raises a procedural fairness problem pursuant to section 209 of the Act. As I noted in my May 12 opinion, *Moss v Flatrock* confirms that there is precedent for the court to overturn a conflict in a situation where Council had given assurances that there was no conflict, even absent the formal section 209 resolution.

In *Moss v Flatrock*, there was a series of discussions about the developments adjacent to Councillor Moss' property. On several occasions, they had declared their conflict of interest, but Council did not clearly determine whether they were able to speak to the matters at issue or not. The court stated the following:

[22]...Again, no direction was given to the Appellant by Council nor was it suggested that they abstain from voting or speaking due to any conflict of interest possibility.

[24]...It was incumbent upon Council once the issue of conflict of interest was raised by the appellants to decide whether such conflict existed by majority vote pursuant to section 425 of the Municipalities Act. The respondent failed to do this and did not give the appellant any direction after the declaration of possible conflict of interest was raised.

[26]...Counsel cannot now arbitrarily determine that a conflict existed.¹

In this case, not only did Council provide guidance that there was not a conflict (minutes of December 9, 2014), Council also subsequently confirmed that there was no conflict in an additional privilege meeting.

None of the prior findings on conflict are negated by a decision to meet with Municipal Affairs to seek advice as to who can vote on the issues of conflict. Moreover, and as I have previously advised, finding that the Councillors at issue are now in a conflict, when there were repeated assurances that they were not, will very likely form the basis for a court to overturn such a finding.

We trust this is satisfactory.

Yours truly,

Stewart McKelvey



Stephen F. Penney*

SFP/reh

Enclosures
*Law Corporation

¹ (2000), 1987 Nfld & PEIR 264 ¶¶ 22-26 (NLSCTA)

Public Meeting of Witless Bay Council
Town Hall - 7:30 p.m.
May 12, 2015

DRAFT

Attending: Mayor Sébastien Després, Deputy Mayor Dena Wiseman, Councillors René Estrada, Kevin Smart, Ken Brinston, Albert Murphy, Ralph Carey

Recording: Geraldine Caul, Barb Harrigan

1. The meeting was called to order by Mayor Sébastien Després at 7:37 p.m.
2. **2015-077** Councillor Kevin Smart/Councillor Ralph Carey
Be it resolved Council adopt the May 12, 2015 Agenda.
Correction: Item 6a) under business arising should read:
Notice of Motion: Rules of Order for Public Comment session
Motion carried unanimously as amended.
3. **2015- 078** Deputy Mayor Dena Wiseman/Councillor Kevin Smart
Be it resolved Council adopt the Minutes of the March 24, 2015 Privileged Meeting of Council as presented.
For the motion: Mayor Sébastien Després, Deputy Mayor Dena Wiseman, Councillors, Kevin Smart and Ralph Carey.
Against the motion: Councillors Albert Murphy, René Estrada, and Ken Brinston.
Motion carried.
4. **2015-079** Councillor Ralph Carey/Deputy Mayor Dena Wiseman
Be it resolved Council adopt the Minutes of the Private Meeting (Friendly Hearing) of April 21, 2015 as presented.
For the motion: Mayor Sébastien Després, Deputy Mayor Dena Wiseman, Councillors, Kevin Smart and Ralph Carey.
Against the motion: Councillors Albert Murphy, René Estrada, and Ken Brinston.
Motion carried.
5. **2015-080** Councillor Albert Murphy/Councillor Ralph Carey
Be it resolved Council adopt the Minutes of Meeting of April 28, 2015 as presented.
Motion carried unanimously.
6. **Business Arising:**
 - a. Mayor Sébastien Després explained that at the April 28th public meeting it was agreed Council were to discuss the Rules of Order to help ensure the public comment session can be conducted with proper decorum, so Council unanimously agreed on the drafted Rules of Order. Mayor Després announced that this is also a Notice of Motion for their official ratification. [Appendix A].

2015-081 Councillor Ralph Carey/Deputy Mayor Dena Wiseman

Be it resolved Council apply the Rules of Order for tonight's Public Comment session.

For the motion: Mayor Sébastien Després, Deputy Mayor Dena Wiseman, Councillors, Kevin Smart and Ralph Carey.

Against the motion: Councillors Albert Murphy, René Estrada, and Ken Brinston.

Motion carried.

7. New Business:

- a. Report from Municipal Affairs - Mayor Després explained that Council received the report from the Department relating to the allegations of conflict of interest. He asked for a motion to table the report.

2015-082 Councillor Kevin Smart/Councillor Ralph Carey

Be it resolved Council table the report from Municipal Affairs.

Motion carried unanimously.

Mayor Sébastien Després said the report is a description of the two allegations of conflicts of interest. He said Municipal Affairs' conclusion relating to the snow clearing allegation of conflict of interest is that Council must decide whether or not Deputy Mayor Dena Wiseman and Councillor Ralph Carey were in a conflict of interest when they voted on the motions concerning snow clearing. [The two motions made on snow clearing are:

- 1. That Council ratify regulations on snow clearing;**
- 2. That Council empower public works via electronic means to award snow clearing contract for 2014-16.]**

The Department's conclusion for the second issue is that Council must decide whether or not Deputy Mayor Dena Wiseman, Councillor Kevin Smart and Councillor Ralph Carey were in a conflict of interest when they voted on the adoption of the new Town Plan. [The motion made on the Town Plan is:

That Council adopt the Town Plan 2014-2024.]

- b. Allegations of conflict of interest regarding motions relating to the Town Plan -

Mayor Després explained the progress Council made to date to deal with the allegation of conflict of interest on the Town Plan. Council held a privileged meeting on March 24 where Council decided unanimously by formal motion that Councillors Smart, Carey and Wiseman were **not in a conflict of interest when voting on the motion to adopt the Town Plan.**

Following that meeting Council held a discussion with the town lawyer to get his opinion. He informed Council he failed to see where there would be any conflicts of interest on either of the two allegations. At this information session with the lawyer, a motion was made to hold a friendly hearing on the allegations of conflict of interest on the two allegations, however, Municipal Affairs advised the Town this motion would need to be made again during a formal meeting of Council.

Deputy Mayor Dena Wiseman asked Council if she would be permitted to make a motion that Council disclose to the public and the media the lawyer's written submission to Council since this was information the taxpayers paid for. After reviewing the sections on conflict of interest in the Municipalities Act, Mayor Després concluded that since the release of this information does not constitute a financial advantage, Council could possibly allow the motion. Mayor Després asked Deputy Mayor Wiseman to read her motion.

2015-083 Deputy Mayor Dena Wiseman/Councillor Ralph Carey

Be it resolved Council table the opinion of the lawyer's report relating to conflicts of interest, in the interest of accountability, transparency, fairness and physical responsibility.

A debate followed whereby Councillor Albert Murphy stated Deputy Mayor Wiseman couldn't make this motion because she was in a conflict. He said we are supposed to have a public hearing on the town plan, and that a motion was made to do this at the April 21 meeting. Mayor Després corrected Councillor Murphy that councillors are not in conflict until they are found to be, but suggested the motion be withdrawn.

Motion to table report from the lawyer was withdrawn.

2015-084 Councillor Rene Estrada/Councillor Ken Brinston

Be it resolved Council set up a meeting with Dan Noseworthy of Municipal Affairs to determine who can vote on the issues of conflict.

Motion carried unanimously.

- c. Allegation of conflict of interest regarding motions relating to snow clearing -

2015-085 Councillor Murphy asked to make a motion they were in conflict on snow clearing on Pond Path.

Motion failed - no seconder.

Mayor Sébastien Després then left the Chair to make the following motion.

2015-086 Mayor Sébastien Després/

Be it resolved Council declare that Deputy Mayor Wiseman and Councillor Carey were not in a conflict of interest when they voted on motions relating to snow clearing.

Motion failed - no seconder.

Mayor Després asked for a motion to defer the decision on this matter until after Council meets with Municipal Affairs.

Deputy Mayor Wiseman asked for permission from Council for her and Councillor Carey to abstain from voting on this motion to avoid any potential conflict of interest. Both Councillors left the chamber at 8:55 p.m.

2015-087 Councillor Albert Murphy/Councillor Kevin Smart

Be it resolved Council defer making a decision on allegation of conflict of interest regarding motions relating to snow clearing.

For the motion: Mayor Sébastien Després, Councillors Ken Brinston, René Estrada, Albert Murphy, Kevin Smart

Motion carried.

Deputy Mayor Dena Wiseman and Councillor Carey returned to the chamber at 8:57 p.m.

- d. Correspondence from Municipal Affairs - Mayor Després called for a motion to table this document. [Appendix B]

2015-088 Councillor Ralph Carey/Deputy Mayor Dena Wiseman

Be it resolved Council table this document.

For the motion: Mayor Sébastien Després, Deputy Mayor Dena Wiseman, Councillors Kevin Smart, René Estrada, Ken Brinston, Ralph Carey.

Against the motion: Councillor Albert Murphy

Motion carried.

- e. Capital Works - Mayor Després reported that the project for upgrading Southside Track Road has been approved for funding. The total project cost is \$770,000, the cost less the GST rebate is \$735,929, the provincial contribution will be \$662,336 and the town's contribution will be \$73,593. Council will begin work immediately on getting the 2nd phase engineered.

2015-089 Deputy Mayor Dena Wiseman/Councillor Ralph Carey

Be it resolved Council authorize the Mayor and Clerk to enter into the following agreement on behalf of Council, 2015-16 Municipal Capital Works Program, Project no. 17-MCW-16-00041 Road Construction - Track Road, Phase 2.

Motion carried unanimously.

8. Finance:

- a. Income statement and payables - For information purpose.
Deputy Mayor Dena Wiseman suggested Council do a mid-year review of the budget. Council agreed and would follow up on this.
- b. East Coast Trail - request for financial support -

2015-090 Councillor Albert Murphy/Councillor Ken Brinston

Be it resolved Council empower the Finance Committee to make a decision on the East Coast Trail's request for financial support. Be it further resolved that the final decision be then brought back to Council.

Motion carried unanimously.

9 Community Enhancement Committee:

- a. Mayor Després reported that the Witless Bay Kinsmen Clean-up was very successful with 64 people participating. In total, the Kinsmen counted 170 bags, a lot less than garbage collected in previous years and especially last year. It was noted though that the Dean's Road area was very littered, with about one third of the garbage collected coming from Dean's Road. The Mayor thanked the organizers: the Witless Bay Kinsmen, and the Community Enhancement Committee, as well as the sponsors: the Witless Bay Kinsmen Club, Tim Horton's, the Witless Bay Home Hardware, the Knights of Columbus, and the Town of Witless Bay.

Mayor Després said that this cleanup was the first activity in the Community Improvement Calendar to prepare for the Communities in Bloom competition.

At the Witless Bay Kinsmen cleanup, the Community Enhancement Committee launched the official Adopt-A-Spot project. He said about 25 groups, businesses and associations, along with individuals, have signed up. The Mayor invited everyone to consider adopting a spot and to speak to him about signing up for this project. Participants will be invited to pick up garbage and debris, plant flowers, mow grass, etc. In turn their names will be placed on signs through the community. The signs would be designed and looked after by the Community Enhancement Committee.

Mayor's March - Witless Bay will be invited to join the Mayor's Hike for the Heart and Stroke Foundation. Anyone making a donation of \$25 or more will get a free T-shirt. As well, anyone wishing to accept pledges can contact the Mayor or visit the town office once the documentation is received. A receipt will be issued for any amount.

Car wrecks - Last year the Town contacted a number of companies and invite them to put quotes in to pay residents for car wrecks collected. He said about 3/4 of wrecks were collected. This year OK Towing has agreed to pay residents \$60 to come and pick up the wrecks directly from their properties.

10. Public Works & Compliance:

- a. **2015-091** Councillor Ralph Carey/Councillor Ken Brinston
Be it resolved Council approve in principle application for residential single family dwelling on Lot 90 Country Path Drive subject to approval from Government Services and any other government agencies having jurisdiction.
Motion carried unanimously.
- b. **2015-092** Councillor Ralph Carey/Councillor Kevin Smart
Be it resolved Council **refuse** application for residential single family dwelling on Birchy Hill/New Line Road due to an incomplete application.
Motion carried unanimously.

c. **2015-093** Councillor Ralph Carey/Councillor Kevin Smart
Be it resolved Council approve application for garage on 124 Gull Pond Road subject to compliance of the maximum 70 sq. m. regulation.
Motion carried unanimously.

d. **2015-094** Councillor Ralph Carey/Councillor Albert Murphy
Be it resolved Council approve garage on 4 Country Path Drive with the condition that the applicant complete the paperwork.

Amendment: Councillor Ralph Carey/Councillor René Estrada

Be it resolved Council approve garage on 4 Country Path Drive with the condition that applicant adjust the measurements for setbacks.

Amendment carried unanimously

Motion carried unanimously.

e. **2015-095** Councillor Ralph Carey/Councillor Albert Murphy
Be it resolved Council approve application for deck and steps on 67 Dunn's Lane.
Motion carried unanimously.

f. **2015-096** Councillor Ralph Carey/Councillor Albert Murphy
Be it resolved Council approve application for home-based business (Mobile Hair Salon Services) on 124 Gull Pond Road.
Motion carried unanimously.

11. **2015-097** Councillor Kevin Smart/Councillor Ken Brinston
Be it resolved Council adjourn at 9:33 p.m.
Motion carried unanimously.

Privileged Meeting of Witless Bay council
Town Hall - 7:00 p.m.
March 24, 2015

Attending: Mayor Sebastien Despres, Deputy Mayor Dena Wiseman
Councillors: Rene Estrada, Kevin Smart, Ralph Carey, Albert Murphy, Kenny Brinston

Recording: Barb Harrigan

1. The meeting was called to order by Mayor Sebastien Despres at 7:00 p.m.
2. **2015-038** - Councillor Kevin Smart/Councillor Ken Brinston
Be it resolved Council adopt the March 24, 2015 Agenda.
Amendment:
#3 Town Snow Clearing be moved from #3 to #7 on Agenda
-Under Privileged session of Council (iv) should just read Town Plan.

2015-039 - Councillor Kevin Smart/Councillor Ken Brinston
Be it resolved Council adopt the March 24, 2015 Agenda as amended.
Amendment carried unanimously.
Motion carried unanimously.
3. Town Snow Clearing: Moved to #7 on agenda.
4. Privileged session of Council:
 - a. Mayor Sebastien explained that a Privileged session of Council is a judicial process and entail delicate details on a matter. Minutes of the meeting are taken and will be ratified at the next Public meeting. All discussions at a Privileged session are fully confidential.
 - b. Motion to hold a privileged session:

2015-040 - Councillor Ralph Carey/Councillor Kevin Smart
Be it resolved Council hold a privileged session of council.
Motion carried unanimously.
 - c. Motion to disclose all information related to this privileged session to the Town Clerk-Manager.

2015-041 - Deputy Mayor Dena Wiseman/Councillor Rene Estrada
Be it resolved that Council disclose all information related to this privileged session to the Town Clerk-Manager.
Motion carried unanimously.
- c. (i.ii.iii.) Review of the Legislation on Conflicts of Interest
Review of Council members' and staff members' responsibilities in terms of conflict of interest.
Review of process to be followed when possible conflicts of interest are identified.

Information Purposes Only - Mayor Sebastien read and explained the Act on Conflict of Interest.

iv.

Conflict of Interest Concerns:

Town Plan:

This matter involved Conflict of Interest.

Councillor Kevin Smart was asked by Mayor Despres to leave the Chamber at 7:25 p.m. for discussions on whether or not he was in conflict when he voted on the approval of the Municipal Town Plan.

2015-042 - Councillor Rene Estrada/Councillor Ken Brinston

Be it resolved Council declare that there was no conflict of interest in the case of Councillor Kevin Smart voting on the approval of the Municipal Town Plan.

For the Motion: Mayor Sebastien Despres, Councillor Ken Brinston, Councillor Rene Estrada, Deputy Mayor Dena Wiseman, Councillor Ralph Carey

Against the Motion: Councillor Albert Murphy

Motion Carried.

Councillor Kevin Smart returned to the Chamber at 7:45 p.m.

Deputy Mayor Dena Wiseman and Councillor Ralph Carey were asked by Mayor Sebastien Despres to leave the Chamber as the matter of Conflict of Interest regarding their participation in the approval of the Town Plan was to be discussed.

Deputy Mayor Dena Wiseman and Councillor Ralph Carey left the Chamber at 7:46

Councillor Albert Murphy invited Council to make a formal vote on whether or not he was in Conflict of Interest in regards to the decision making on whether or not Deputy Mayor Dena Wiseman and Councillor Ralph Carey were in conflict of interest when they participated in voting on the approval of the Municipal Town Plan.

Councillor Albert Murphy left the Chamber at 8:05 p.m.

2015-043 - Councillor Rene Estrada/Councillor Kenny Brinston

Be it resolved that Council declare that Councillor Albert Murphy is not in conflict of interest in regards to the decision of whether or not Deputy Mayor Dena Wiseman & Councillor Ralph Carey were in conflict of interest when they participated in voting on the approval of the Municipal Town Plan.

Motion carried unanimously.

Councillor Albert Murphy returned to the Chamber at 8:13 p.m.

2015-044 - Councillor Rene Estrada/Councillor Kevin Smart

Be it resolved that Council declare that there was no conflict of interest in the case of Deputy Dena Wiseman and Councillor Ralph Carey voting on the approval of the Municipal Town Plan.

For the Motion: Mayor Sebastien Despres, Councillor Kevin Smart, Councillor Rene Estrada.

Against the Motion: Councillor Ken Brinston, Councillor Albert Murphy

Motion Carried.

iv.(2)

Pond Path Snowclearing:

2015-045 - Councillor Ken Brinston/Councillor Kevin Smart

Be it resolved that Council hold a private meeting with Deputy Mayor Wiseman & Councillor Ralph Carey to discuss the potential Conflict of Interest regarding the snow clearing of Pond Path.

For the Motion: Councillor Rene Estrada, Councillor Kevin Smart, Councillor Ken Brinston, Councillor Albert Murphy

Against the Motion: Mayor Sebastien Depres

Motion Carried.

4. d.

2015-046 - Councillor Albert Murphy/Councillor Ken Brinston

Be it resolved that Council end the Privileged session of meeting.

Motion carried unanimously.

Deputy Mayor Dena Wiseman and Councillor Ralph Carey returned to the Chamber at 9:11 p.m.

8.

April Public Meeting of Council - Request for postponement

2015-047 - Councillor Ken Brinston/Councillor Kevin Smart

Be it resolved that Council hold the Private Hearing for Deputy Mayor Wiseman and Councillor Ralph Carey on April 21, 2015 at 7:30 p.m.

Be it further resolved that the Public Town Meeting be changed from April 14th to April 28, 2015 at 7:30 p.m.

Motion carried unanimously.

4. v.

Decision of how to proceed from here:

1. Informing Municipal Affairs regarding decision of Council.
2. Informing residents and stakeholders.

An email will be sent to Municipal Affairs regarding decisions of Council
No statements to be given as no decisions have been made.

5.

Projects of Council - Deferred to April meeting.

6.

Council Committees:

Finance:

Councillor Rene Estrada (Chair), Councillor Ralph Carey, Deputy Mayor Dena Wiseman

Recreation:

Councillor Ralph Carey, Councillor Ken Brinston

Fire Committee:

Councillor Albert Murphy

Waste Management:

Mayor Sebastien Depres

Works & Compliance:

Councillor Albert Murphy, Councillor Ken Brinston, Councillor Ralph Carey

Culture, Heritage & Env.

Deputy Mayor Dena Wiseman, Councillor Kevin Smart

Northeast Avalon Joint Council:
Planning & Dev.

Councillor Rene Estrada
Councillor Kevin Smart, Deputy Mayor Dena Wiseman (Chair)

Communication & Community
Relations:

Deputy Mayor Dena Wiseman, Mayor Sebastien Depres

Southern Shore Joint Council:

Mayor Sebastien Depres, Councillor Rene Estrada

7. **Town Snow Clearing** - Meeting with Ernie Dunne (Harbour Construction) postponed until a later date.

9. **2015-048** - Councillor Albert Murphy/Councillor Kevin Smart
Be it resolved Council adjourn meeting at 9:23 p.m.
Motion carried unanimously.

Mayor

Town Clerk