# OFFICE OF THE CONFLICT OF INTEREST COMMISSIONER

# PROVINCE OF PRINCE EDWARD ISLAND

**Supplement to the Report to the Speaker of the Legislative Assembly concerning the Investigation by the Commissioner into allegations involving the Honourable Ronald MacKinley Minister of Transportation and Public Works**

**July 24, 2008**

## BACKGROUND

On April 15, 2008, Mr. Michael Currie, Member of the Legislative Assembly (Georgetown-St. Peters) (hereinafter referred to as "the Complainant") wrote to the Conflict of Interest Commissioner (hereinafter referred to as "the Commissioner") to request a reconsideration of the January 9, 2008 Report (hereinafter referred to as "the Report") to the Speaker of the Legislative Assembly concerning the investigation by the Commissioner into allegations involving the Honourable Ronald MacKinley (hereinafter referred to as "the Minister").

The Complainant's letter indicated that his request was *"...due to the new information revealed on the Town of Cornwall audio tapes and the CBC Compass interview with Cornwall Deputy Mayor Charles Easter on April 14, 2008."*

On April 18, 2008, the Commissioner responded to the Complainant requesting that the Complainant outline what new information was revealed and its relevance. In response, the Complainant provided a detailed Request for a Reconsideration (hereinafter referred to as "the Request") dated April 24, 2008, which was forwarded to the Minister for his Rebuttal.

The Minister in his response outlined various jurisdictional objections to the Commissioner considering the request. The jurisdictional objections made by the Minister were forwarded to the Complainant for comment. The Complainant responded on May 30, 2008 and those comments were forwarded by the Commissioner to the Minister along with a request that the Minister provide a Rebuttal to the substance of the Complainant's Request.

On June 16, 2008, the Minister provided his Rebuttal to the Request . That Rebuttal was forwarded to the Complainant so that he could respond. The Complainant's Response was received on June 27. The Response was forwarded to the Minister for Reply. The Minister's Reply was received July 11, 2008.

## Issue

Whether the Report concerning the Minister may be reopened or reconsidered by the Commissioner and, if so, whether there is reason to do so.

## Referenced Documents

(1) Request for a Reconsideration April 15, 2008;
(2) Complainant's detailed Request for a Reconsideration April 24, 2008;
(3) Jurisdictional objections of the Minister May 9, 2008;
(4) Comments of the Complainant concerning the jurisdictional objections May 30, 2008;
(5) Rebuttal of the Minister June 16, 2008;
(6) Response of the Complainant June 27, 2008;

(7) Reply of the Minister July 11, 2008;
(8) 2002 Town of Cornwall Strategic Plan - Draft Report
(9) 2003 Town of Cornwall Official Plan;
(10) 2004 Town of Cornwall Zoning and Sub-division Control (Development) By-law;
(11) Transportation Master Plan - Town of Cornwall Draft Report August 2006.
(12) Town of Cornwall - Zoning & Subdivision Control (Development) Bylaw - July 26, 2004
(13) Commissioner's Report of January 9, 2008.

## Response of Minister MacKinley to the Request for a Reconsideration

By correspondence dated May 9, 2008, the Minister raised two jurisdictional objections, the first of which is as follows:

## First Jurisdictional Objection:

> "***I. No Power of Reconsideration: Conflict of Interest Act***
>
> "There is no inherent power in a statutory tribunal. Jurisdiction and authority must be derived from the constituting legislation. Except for the correction of minor clerical errors and omissions, a statutory tribunal generally lacks the capacity to reopen or reconsider a matter it has finally adjudicated, unless such power is explicitly authorized by the constituting legislation. Allowable corrections are to make the decision or order accord with what the decision-maker intended at the time and not the product of the emergence of new evidence. Absent authorization in the legislation, upon delivery of the decision, the decision maker is *functus officio* and is prohibited from further reconsideration.
>
> "The provisions of the Act provide a clear structure for the consideration of allegations of a violation of the Act and provide no authority for reconsideration of decisions. The Commissioner is given broad powers to make any inquiries as deemed to be appropriate during the investigation, and may even elect to exercise some or all of the powers of a commissioner pursuant to the *Public Inquiries Act*, R.S.P.E.I. 1988, Cap. P-31. Following the completion of his investigation and inquiries, the Commissioner is required to report to the Speaker of the Legislative Assembly, detailing the opinion of the Commissioner on the matter and any recommended penalty, if appropriate.
>
> "The Act further states that the Legislative Assembly has no power to impose a penalty if the Commissioner recommends that none be imposed. Given that no conflict of interest was found to exist in this matter, no penalty was recommended in the Report to the Legislative Assembly and, therefore, no penalty was imposed.
>
> "The Legislative Assembly has no power to inquire further into the allegation and its decision is final and conclusive. <u>There are also no provisions in the Act that allow for a reconsideration of the matter by the Commissioner</u>. The decision of the Legislative Assembly, based upon the Report prepared by the Conflict of Interest Commissioner on January 9, 2008, is final and conclusive.
>
> "Mr. Currie's request for a reconsideration of an issue which has already been investigated and determined by the Conflict of Interest Commissioner is not authorized by the Act.''

The Minister is correct in stating that the *Act* does not contain an express provision authorizing a reconsideration of a previous decision of the Commissioner. It is also true to say that a statutory decision-maker has only those powers that have been conferred on it, explicitly or implicitly, by a parliament. A grant of authority to make decisions does not necessarily include the authority for a decision-maker to reopen those previous decisions.

The Minister contends that the Commissioner is *functus* and has no authority to consider the Complainant's Request. The term "*functus officio*" literally means "having performed its function" and originates from the courts of common law, which were said to be *functus officio* in respect of a case once a decision had been rendered. To determine whether the doctrine of *funtus officio* applies, in this instance, some discussion of its origin and evolution is required.

Over time the doctrine of *functus officio* evolved, placing a prohibition on the power of a court to reassume jurisdiction of a matter about which it had previously made a decision. Once having rendered a purportedly final decision, the doctrine applied to prevent that court from reconsidering that decision unless ordered to do so by an appeal court. The manifest purpose of the doctrine was to promote certainty and finality in judicial decision-making.

Originally, the doctrine of *funtus officio* was a common law remedy which was only applicable to courts and not applicable to administrative agencies except in very limited instances. However, in 1989 the Supreme Court of Canada in *Chandler vs. Association of Architects (Alberta)*[1] expanded and brought greater clarity to the application of the doctrine of *functus officio* to decisions of administrative agencies. The Supreme Court's decision was delivered by Mr Justice Sopinka, who in part stated:

> *"...there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in Paper Machinery Ltd vs J.O. Ross Engineering Corp..."*

Were the foregoing all that was stated by the Supreme Court, the application of the doctrine of *functus officio* to administrative agencies would have been identical to the way it is applied to courts. Mr Justice Sopinka elaborated further however and stated that the application of the *functus officio* doctrine:

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[1] [1989] 2 S.C.R. 848

> *"...must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require reopening of administrative proceedings in order to provide relief which would be otherwise available (only) on appeal."*

Following the *Chandler* decision and subsequent case law, it appears that in a limited set of circumstances, statutory decision-makers have the authority to reopen a decision that has already been made. Macaulay and Sprague in their text *Practice and Procedure before Administrative Tribunals* outline the exceptions to the doctrine of *functus officio* as follows:

"*a. when there is legislative authority to do so, which may be found:*
- *i) in an express legislative power to reconsider,*
- *ii) to be implied by other provisions or from the overall structure of the legislation, or*
- *iii) to be implied by the nature of the decision-making power in question;*

*b. when it is necessary to correct a clerical error, an accidental error or omission, or an ambiguity in the decision;*

*c. when the decision mandated by statute has not yet been made, or the decision made is void or voidable for lack of jurisdiction (including breaches of the principles of natural justice or fairness), or there remains an issue outstanding; or*

*d. where the decision in question was procured by reason of fraud, mental disability or some other circumstance which calls its integrity into question."*

The question is whether, in the particular circumstances, any of these exceptions exist such that the Commissioner may reconsider the decision contained in the Report. First, with respect to the submissions set out in the Complainant's letter of April 24, 2008, the exceptions set out in paragraphs (b) (c) and (d) above have no application. Second, as previously stated, the *Conflict of Interest Act*, R.S.P.E.I. 1988, Cap. C-17-1 (hereinafter referred to as the *Act*), does not contain an express legislative power to reconsider. Therefore, Sub-paragraph a(i) above cannot be relied on to support an exception to the doctrine.

Therefore, for the Commissioner to have the authority to reconsider the Report as requested by the Complainant, it must be based on an implied authority to do so as described in Sub-paragraphs a(ii) or a(iii). Such authority would have to be implied by other legislative provisions, the overall structure of the legislation or from the nature of the decision-making power in question.

As indicated previously, when there is no express legislative power to reconsider, the courts have sometimes inferred an implicit authority to do so. In *Chandler, supra*, the Supreme Court of Canada stated that the *functus officio* doctrine had to be applied with

greater flexibility where the administrative agency's original decision was subject to an appeal only on a point of law.

The *Conflict of Interest Act* does not provide any right to appeal a Commissioner's decision. A dissatisfied party is restricted to having the Commissioner's decision reviewed under the *Judicial Review Act, R.S.P.E.I. 1988, Cap. J-3*. Such a review would not constitute an appeal on the merits of the decision, rather it would only review whether the process in arriving at the decision was appropriate and within the Commissioner's jurisdiction.

In some instances, to ensure that justice is done, the courts have inferred an implied power on the part of a statutory decision-maker to reconsider a previous decision where there is no right of appeal in the governing statute.[2] The underlying principle is that where a legislature confers exclusive jurisdiction on a statutory decision-maker over a given subject and where there is no express right of appeal, it must be implied that the statutory decision-maker has the implicit power to correct an injustice created by a previous decision.

Similarly the courts have also found that some statutory decision-makers have an "equitable and continuing power" implied by the very nature of their function.[3] In recent years, the courts have broadened the ambit of the "equitable and continuing power" as an exception to the doctrine of *functus officio* to cases beyond those that are simply compassionate in nature to include decisions that are generally beneficial and in the public interest and where there is no express right of appeal.[4]

In the *Lornex* case, the court determined that where there was no right of appeal from a statutory decision-maker's decision and where the doctrine of *functus officio* would have precluded a reconsideration there is an "equitable jurisdiction" exception which would allow such a rehearing based on "new evidence." In the *Ombudsman* case, the court came to a similar conclusion, but appeared to extend the "equitable jurisdiction" exception to cases where there might not be any new evidence at all:

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[2] Carde vs. R. (1977), 34 C.C.C. (2nd) 559 (Ont. H.C.)

[3] Grillas vs. Canada [1972] S.C.R. 577

[4] Lornex Minima Corp. Ltd., Re [1976] 5 W.W.R. 554 and Ombudsman of Ontario vs. R. (1979) 103 D.L.R. (3rd) 117 (Ont. H.C.)

> *"I repeat in this context what I have said earlier, that it would not be appropriate to lay down in definitive terms the limits of the exercise of discretion of the Ombudsman in all circumstances as to when he can and when he cannot investigate a matter in respect of which some investigation has already been made. We do not think that the further investigation of the Ombudsman is precluded by any lack of "new evidence" in the sense in which that term should be used when considering the activities of the Ombudsman."*

Other recent cases have extended the exception to include decision-making powers given in the public interest to secure justice.[5] One such case was *Zutter*, which involved a decision by the British Columbia Council on Human Rights refusing to reopen its previous decision to dismiss a human rights complaint, on the basis that it was *functus officio*. The decision not to reconsider was subsequently overturned by the BC Supreme Court, and that decision was upheld by the Court of Appeal. The Supreme Court ruled that the Human Rights Council had been granted an equitable and continuing power in light of the nature of the empowering legislation, the broad investigative powers of the Council and the absence of a right of appeal. The Court of Appeal affirmed the Trial Division decision and stated that the nature of the Council's statutory purpose was such that a previous decision of the Council could be reopened, where the interests of justice and fairness require the re-opening. The Court of Appeal based its decision on the principle that the Council had been granted a power to "do justice' and that the public interest obligated the Council to do so.

In a like manner, the *Conflict of Interest Act* was enacted by the Legislative Assembly to deal with all matters arising and associated with conflicts of interest involving Members of the Legislature. The *Conflict of Interest Act* was enacted to provide Members of the Legislative Assembly with guidelines and principles to insure that they discharge their public responsibilities in a manner that is in the best interests of the public. Where a Member's private interests and the public interests are in conflict, it is the public interest that must prevail.

It is manifestly in the public interest that citizens have faith in the integrity of the decision-making of its elected representatives. Towards that end, the Legislature empowered the Commissioner to fully and fairly resolve conflict of interest complaints involving its Members. The public interest would not be served if cogent and

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[5] Metropolitan Separate School Board vs. Ontario (Minister of Education) (1988) 50 D.L.R. (4th) 570; Zutter vs. British Columbia (Council of Human Rights) (1995) 122 D.L.R. (4th) 665.

unequivocal evidence of a conflict of interest were permitted to remain unconsidered due to a mechanical application of a legal doctrine.

Having considered the above, although the *Act* does not expressly provide a mechanism for the Commissioner to reopen or reconsider a previous decision, in my view, given the nature of the legislation and its purpose, the absence of an express mechanism to reconsider a previous decision does not necessarily mean that the Legislature intended that no such reconsideration should take place. Silence on this point may merely mean that the Legislature left the decision whether to reconsider or not to the Commissioner.[6]

In my view, there is an implied power on the part of the Commissioner to reconsider a previous decision where the circumstances warrant such a reconsideration. This implied power to reconsider is discretionary and should only be used in exceptional circumstances such as where an injustice is discovered and remedial reconsideration is required. Only where it is manifestly in the public interest to do so should the Commissioner exercise the discretion to reconsider a previous decision.

Whether the Complainant has met that standard in this case must be determined by reviewing the "new evidence" being tendered to support the request for a reconsideration.

**Second Jurisdictional Objection**:

The second jurisdictional objection raised by the Minister in his May 9, 2008 letter is as follows:

> ***"II. Res Judicata***
>
> "Although in his correspondence Mr. Currie states that he seeks a reconsideration of the Commissioner's decision, which is not authorized, Mr. Currie would likewise be prohibited from raising a new allegation based upon the circumstances of his previous complaint. The principle of *Res Judicata* states that where an issue actually and directly in dispute has already been adjudicated upon by a competent tribunal, it cannot be litigated again. The principle applies not only to points upon which the tribunal was actually required to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of the matter and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> "Mr. Currie's most recent correspondence raises the same allegation as his correspondence dated October 19, 2007, relating to the same decision to signalize the intersection leading into the Cornwall Business Park. The matter was first addressed in detail by Mr. Currie and the Minister, following which an extensive investigation was

[6] Nouranidoust vs. Canada (Minister of Citizenship and Immigration) [2000], 1 F.C. 123 (T.D.)

> conducted by the Office of the Conflict of Interest Commissioner leading ultimately to a Report to the Speaker of the Legislative Assembly on January 9, 2008. The issue raised by Mr. Currie has been reviewed and adjudicated upon.
>
> "The further information provided by Mr. Currie in his correspondence of April 24, 2008, existed at the time of the previous investigation into the matter and might have been brought forward by Mr. Currie at the time of the previous investigation. As Mr. Currie notes, "[t]hese plans are all public knowledge".
>
> "This matter has been fully decided and it is not appropriate that it be re-opened over and over each time Mr. Currie reviews something which he feels might be relevant to the matter. The issue raised by Mr. Currie was canvassed thoroughly by the parties involved, was investigated extensively by the Office of the Conflict of Interest Commissioner, was decided by the Legislative Assembly based upon the report of the Conflict of Interest Commissioner and this decision is final and conclusive..."

As with the doctrine of *functus officio*, the principle of *res judicata* developed as a common law remedy in support of the need for finality in court proceedings. The principle primarily evolved in the criminal courts to ensure that an accused would not be tried multiple times for essentially the same offense. In popular culture, the principle of *res judicata* would be described as the rule against double jeopardy.

*Res judicata* has two distinct forms: **"**issue estoppel**"** and **"**cause of action estoppel.**"** It is the element known as issue estoppel that is applicable in these circumstances.

The term "issue estoppel" was defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*[7] as follows:

> *"When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains."* [Emphasis added.]

[7] [1924] 4 D.L.R. 420, at p. 422

Where the circumstances are met and the defence of *res judicata* (issue estoppel) is raised by a defendant, the Court will order that the plaintiff is "estopped" or stopped from proceeding further and the plaintiff's action will be dismissed.

Over time the principle has evolved into the area of administrative law*,* however, this is a relatively new development. Until recently, there was considerable doubt as to whether the principle applied to administrative processes and if it did apply, whether its application was different than before the courts.

The principle of *res judicata* and its applicability to administrative agencies has been recently reviewed by the Supreme Court of Canada in *Danyluk vs. Ainsworth Technologies Inc.*[8]

In *Danyluk*, the plaintiff filed a complaint against her employer for unpaid wages and commissions. The complaint was heard by an administrative tribunal. The tribunal rendered a decision without the plaintiff's participation in the process. The plaintiff then brought a court action against the employer for wrongful dismissal seeking unpaid wages and commissions. The employer pled the doctrine of *res judicata* and was successful. Eventually, the matter was appealed to the Supreme Court of Canada where it determined that the principle of issue estoppel (*res judicata*) did apply. The court decided however that because issue estoppel is a *'public policy doctrine designed to advance the interests of justice,'* and because the administrative decision was manifestly unfair, the court exercised its equitable jurisdiction and decided that issue estoppel (*res judicata)* should not be applied.

Mr. Justice Binnie in giving the judgement of the Supreme Court of Canada said in part:

> "*...The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. An issue, once decided, should not generally be re-litigated to the benefit of losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.*

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[8] (2001) SCC 44

> *"Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal...Estoppel is a doctrine of public policy that is designed to advance the interests of justice...*"

In *Danyluk*, the Supreme Court of Canada quoted with approval the following test as to when issue estoppel is to apply:

> *"The preconditions to the operation of issue estoppel are:*
>
> *1. That the same question has been decided in earlier proceedings;*
> *2. That the earlier judicial decision was final;*
> *3. That the parties to the decision or their privies are the same in both proceedings*;"[9]

The present Request appears to meet the three preconditions. The Complainant is seeking a new answer to the same question that prompted his initial complaint. The Report was judicial in nature and was final. The parties to this application are once again the Complainant and the Minister. If nothing further were required, issue estoppel would apply and the Complainant's Request would be dismissed.

The Supreme Court of Canada in *Danyluk* established that merely fulfilling the three preconditions is not sufficient. The Court went further in stating that where the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. In other words, it must be in the public interest for issue estoppel to be applied.

Mr. Justice Binnie in delivering the decision of the Court went on to say:

> *"...A judicial doctrine developed to serve the ends of justice should not be applied mechanically to work an injustice..."*

In determining that the rules governing issue estoppel (*res judicata*) should not be mechanically applied, the Supreme Court established that there is a requirement to balance the public interest for finality of litigation with the public interest of ensuring that justice is done. A list of the factors to be considered with respect to the exercise of

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[9] Angle v. Minister of National Revenue [1975] 2 S.C.R. 248 at 254

discretion was not provided by the Supreme Court. The Court did establish that the objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case.

The Supreme Court of Canada in *Danyluk*, quoted with approval the following principle:

> *"It must always be remembered that although the three requirements for issue estoppel must be satisfied before it can apply, the fact that they may be satisfied does not automatically give rise to its application. Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case."*[10]

Among the factors that were found applicable in *Danyluk* were (a) the purpose of the legislation, (b) the availability of an appeal, (c) the safeguards available to the parties in the administrative procedure, (d) the expertise of the administrative decision-maker, (e) the circumstances giving rise to the prior administrative proceeding and (f) the most important factor, any potential injustice.

The exercise of the discretion is necessarily case specific and depends on the entirety of the circumstances. In exercising the discretion the decision-maker must ask – is there something in the circumstances of this case such that the usual operation of the doctrine of issue estoppel would work an injustice?

As stated, in the matter of the Complainant's Request, the three previously enumerated preconditions necessary to warrant the application of the principle *res judicata* (issue estoppel) have been satisfied. Consequently, the principle of *res judicata* will apply, subject to the discretion of the Commissioner as to whether the principle ought not to apply.

The fundamental question then is whether the evidence advanced by the Complainant is sufficient to warrant the Commissioner exercising the discretion to deny the operation of the principle of *res judicata*. Simply stated, would the application of the principle in this case create an injustice? Is the new evidence of such a nature that failing to consider it would result in an injustice?

Whether the Complainant has met the test in this case must be determined by reviewing the new evidence being tendered to support the Request.

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[10] *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc. (1998), 50 B.C.L.R. (3d) 1 (C.A.)*

## Complainant's Request for a Reconsideration

On April 24, 2008, the Complainant outlined the specific particulars upon which he based his Request for a Consideration. To fully outline the particulars and for ease of reference the letter is fully set forth as provided to me:

> "This is further to your correspondence of April 18, 2008 replying to the above-captioned matter, that I requested you reconsider your Report of January 9, 2008.
>
> "I have reviewed the new information which I have gathered concerning this issue. I will gladly outline this information in specific detail. This information will show that Mr. MacKinley ("the Member") stood to gain significantly from the installation of these lights. The relevant information will indicate that the Member acted in a manner which violates the *Conflict of Interest Act* ("the Act").
>
> "Briefly stated, my position is that the decision to install the intersection at the corner of the Trans Canada Highway and MacPhail Drive in Cornwall, Prince Edward Island ("the Decision") was done to further the Minister's private interests. The wealth of new information which has come forward clearly illustrates the intentions of Town of Cornwall to have this Member's property serve as the new centre of the Town. This intention coupled with the planned corridor road, also on the Member's property stand to vastly benefit the Member.
>
> This corridor road would connect up to the intersection in question, becoming the fourth leg. **Connection to the Trans Canada Highway, is planned to occur through this new corridor road and not Jessie Street as previously believed.** These plans are all public knowledge and were communicated to the Member. The Member's previous knowledge of these plans influenced his decision to construct the intersection in question.
>
> "My detailed position follows.
>
> "The scope of the initial Report was focused on the issue of access to the Member's land, specifically parcel no. 245936. In the Member's original affidavit, it states;
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> > *'The Minister [Member] participated in a decision to install a three-way signalized intersection at the intersection of the Trans-Canada Highway and MacPhail Drive in Cornwall.' [Page 2]*
>
> "This statement clearly showed the Member was actively involved in the decision to install the intersection in question. This fact has never been disputed by the Member.
>
> "The original complaint centered around the question of access to the intersection in question, by way of the Madison Heights subdivision. The scope of this question was slightly inaccurate in the details, however the Member's parcel no. 245936 remains the focal point. It is my personal feeling that if individuals would have been more forthcoming with yourself, this new information would have come to light in the proper context during your initial investigation.
>
> **"2002 Town of Cornwall Strategic Plan, Draft Report (Annex A)**

"In the Town of Cornwall Strategic Plan, Draft Report dated November 2002, the following passages clearly show the intentions of the Town of Cornwall which were public knowledge:

"Page 23

*"Under the section "Physical Components of Main Street" a bullet which reads; - "Town Centre" - incl. Business Park*

"Page 24

"A large scale sketch of the "Town Centre" concept, which clearly illustrates the new desired centre for Cornwall. This centre includes four parcels which the Member owns (245936, 566273, 491274, 685867), the Business Park, and the Madison Heights subdivision. This sketch includes the corridor road which Deputy Mayor Charles Easter clearly made reference to in the media.

"This road has an intersection linking Keri Drive through Madison Avenue into a four way intersection on the parcel in question. This intersection would link up Madison Avenue and MacRae Drive to the corridor road. These two roads run directly into parcel no 245936 as mentioned by the Member in his affidavit.

"The corridor road is also drawn linking up with an intersection at the corner of the Trans Canada Highway and MacPhail Drive. This four way drawn intersection and Madison Heights had yet to be constructed at the time of this Report. The aforementioned corridor road runs up to connected with the Kingston Road. **The Member owns significant acreage where the road will run (Annex B).**

"Page 25

*"Under the section "Goal #6 - Town Centre", a bullet which reads;*
- *Pursuing possibility of new arterial road across from Business Park*

"As previously stated, the Member actively lobbied government concerning highways during his time in Opposition. This new arterial road would have been communicated to the Member so he could lobby government appropriately. Secondly, the fact that the said road was to run almost exclusively on the Member's land, would indicate that the Member was quite versed on the issue. **This arterial road will become the main access route in the Town of Cornwall.**

"Page 29

*"Under Economic Development Strategies:*

*Internal Design and Planning Strategy;*

- *Examine opportunities for greater flexibility in the use of the TCH as a Main Street for Cornwall.*

*Connections Strategy:*

- *Identify desired (sic) connections to the proposed Bypass, especially in the areas of the western entrance to the Town, the Cornwall/Kingston Rd area, and the Warren Grove Rd area.*

**"These two points show that the town of Cornwall is totally dependent upon a four-way intersection, including the corridor road and the Cornwall Business Park at the TCH for any further economic development or growth.**

"Page 33

*"Under Economic Growth Strategies:*

*Land Use and & Infrastructure Strategy:*

- ***Review the possibility of a connector road linking the Business Park with the Cornwall Rd/Kingston Rd intersection, with potential future link to proposed Bypass.*** *[emphasis added]*

"This bullet indicated without doubt, that the Town of Cornwall is planning to construct a connector road to serve as a corridor road. This bullet states empathically that the Business Park is to be linked by this said road to the Cornwall Rd/Kingston Rd intersection, and eventually to the Bypass. The only means of accomplishing such a task would be an intersection at the entrance to the Cornwall Business Park, the Trans Canada Highway and MacPhail Drive. The Town of Cornwall could only propose such a road if they had already had at the very least preliminary discussion with the landholders of the area. As indicated earlier, the Member owns the majority of the land this road would run on. This land includes the parcel in question, numbered 245936. **As area MLA for the past twenty two years, and landholder of numerous parcels which would be affected, the Member has to have been informed of these plans.**

**"2003 Town of Cornwall Official Plan (Annex C)**

"In the official plan of the Town of Cornwall, dated December 5, 2003, the following passages clearly show the intentions of the Town of Cornwall which were public knowledge:

"Page 17

*"Section 2.7 Transportation*

> *'While Council generally supports the limited access status of the TCH through much of the Town for the time being, it will be critical to locate at least one more major intersection near the Business Park in the core area in order to expedite further commercial development [...]'*

"This statement clearly shows that the Town of Cornwall intended to place one more major intersection for commercial development purposes. This major intersection is stated to involve the TCH, such as the intersection in question, which is also the intersection featured in the Town of Cornwall's Town Centre sketches.

"Page 35

*"Section 4.4 Commercial*

> *'Given the significant development limitations of the existing commercially zoned land in the Town, it is evident that Cornwall's commercial development potential can only be achieved by the designation of a newly expanded commercial area. By placing this new commercial area adjacent to the TCH in the undeveloped core area of the Town, there is also the potential to create a future "downtown" area [...]'*
>
> ***'The precise location of the new commercial core will be determined through negotiations with affected land owners and negotiations with the Department of Transportation and Public Works for a new intersection on the TCH. The location of this intersection will greatly influence the precise development patterns in this area.*** *[emphasis added]'*

"This clearly demonstrates the affect the intersection in question will have on development within Cornwall. The large majority of the land in question is owned by the Member. **This ownership and the Member's position as head of the Department of Transportation and Public Works would seem strongly to suggest that the Act has been breached.** The very fact that the intersection did not become permanent until the Member assumed control of the Department, shows the decision was made primarily to service the Member first, and the taxpayers second.

"Page 38

*"Policy PC-6: Comprehensive Development Area*

> *'It shall be the policy of Council to designate a large block of land adjacent to the Trans Canada Highway in the geographic centre of the Town as a "Comprehensive Development Area" and to continue negotiations with land owners and the Provincial Government to develop a long term plan for the development of a new commercial core area within this zone.'*

"It is reasonable to believe that the Town of Cornwall would have had in depth discussions with the Member prior to releasing the draft Report, the sketch, and the re-zoning of his property. Indeed, the Member was advised by public meeting on May 5,

2003; May 12, 2003; and received a correspondence dated September 9, 2003 as indicated in your original decision. These instances all occurred prior to the release of the Official Plan on December 5, 2003. Therefore, ample time was available for clarification between the Member and the Town. It should be surmised then, that the Member had full knowledge of all aspects of the Official Plan.

"Page 39

- *Council shall work with the Department of Transportation and Public Works to identify the most appropriate location and design for a new four-way intersection on the TCH and commercial access road within the Comprehensive Development Area.*

"This bullet shows the Member clearly violated the Act. At no time, did the Member excuse himself from the decision concerning the intersection location or design. **As area MLA, landholder, and Minister of the Department; the Member was a stakeholder on many levels.** This multiple level involvement illustrates the sad ignorant the Member showed towards the Act, the House and the general public.

"Page 40

*"Section 4.5 Industrial*

> *'In order to facilitate appropriate linkages between the Business Park and the new commercial core area, it is appropriate that their locations be planned concurrently. Council shall, therefore, assign an expanded "Comprehensive Development Area" designation which may include industrial activities. In the final Development Concept for the "Comprehensive Development Area," the location of the Business Park shall be clearly shown, together with transportation linkages, servicing proposals and appropriate buffers.'*

"This clearly demonstrates that the intersection in question has always been considered a four-way. The Town of Cornwall fully intended to connect the Business Park with any new commercial development. The proposed corridor road which will run on the Member's property, has been referred previously as a connector road. **Therefore any new development within the Town of Cornwall will take place along the corridor road, to which the Member's owns a large portion of the said land.**

"Page 43

*"Policies PT-1: Co-ordination*

*Plan Action*

- ***The Town shall work with the Province on improvements to the intersection at the Business Park, including*** *street widening when appropriate, lights, and* ***a four-way intersection connecting the Business Park with the Kingston Road.*** *[emphasis added]*

"This policy bullet highlights the intention of the Town to make a four-way intersection at the Trans Canada Highway and MacPhail Drive, that connects up through a corridor road to the Kingston Road. As stated numerous times, the corridor road will run on the Member's property, including the parcel in question. **This public information which is almost five years old, indicated the Member knew full well what he was doing in regards to this intersection. The Member is the Minister responsible, the MLA responsible, and the majority landholder.**

**"Deposition**

"The Town of Cornwall is fully intending to use this area as the new Town Centre. Seeing as the Member has been serving this area for twenty plus years, and is a significant landholder, it is reasonable to believe that he would well versed in this intent. Such a Town Centre requires a focal point intersection as the sketches show. As the evidence shows, this intersection has always planned to be a four-way intersection. **This fourth leg will connect with the Kingston Road through the newly constructed intersection, and not as previously believed through Jessie Street.**

"As Minister responsible, any actions taken to further this corridor road plan, which include the installation of the intersection in question, must be deemed in violation of the Act. Therefore I must urge you to immediately re-open this investigation.

Sincerely,

(signed)
Michael F. Currie
MLA, District 2"

## Basis for the Complainant's Request for Reconsideration:

To succeed in his request for a reconsideration of the Report, the Complainant must meet the following requirements:

a) there must be new evidence; and

b) there must be unequivocal and cogent evidence of a conflict of interest; and

c) failure to consider the evidence would create an injustice.

All three requirements must be met for the Complainant to succeed in his Request for a reconsideration of the Report. The standard that the Complainant must meet is necessarily high because, if it were otherwise, there would be no finality in proceedings.

What follows is an examination and discussion of the evidentiary basis for the Complainant's Request under each of the requirements.

**A) There must be new evidence**

In any proceeding under the *Conflict of Interest Act*, the onus is on the Complainant to prove that a breach of the Act has occurred. The adage *'he who asserts must prove'* is applicable. Normally, the Complainant has one opportunity to marshal the evidence and make his case.

In the circumstances leading up to the Report, the Complainant made his complaint on October 19, 2007. The complaint was replete with particulars of evidence that he felt proved that his allegations were true. Following the Minister's Rebuttal, the Complainant filed his Response on November 20, 2007 which contained even more particulars of evidence that he thought proved his case. Each of those particulars were considered and were reviewed in detail in the Report. The Commissioner's decision as outlined in the Report was that the Minister was not in a conflict of interest.

The Complainant now alleges that there is new evidence proving that the Minister was in a conflict of interest. Based on this new evidence, the Complainant requests that the Report be reconsidered.

The Complainant's Request is based on two documents*:* the *2002 Town of Cornwall Strategic Plan, Draft Report* and the *2003 Town of Cornwall Official Plan*. Both documents are public documents and were in existence prior to the Report. In the Complainant's words from the first page of his April 24, 2008 letter *"...these plans are all public knowledge..."* Notwithstanding the Complainant's acknowledgement that they are public documents, he did not cite them in any of his documentation leading to the Report.

The Complainant asserts that these publications were unknown to the Commissioner before the Commissioner issued the Report. In his Request of April 24, 2008, the Complainant states: *"...It is my personal feeling that if individuals would have been more forthcoming with yourself, this new information would have come to light in the proper context during your initial investigation..."*

The Complainant is mistaken. Both documents were in the Commissioner's possession and were considered in the preparation of the Report.

The *2003 Town of Cornwall Official Plan* is listed as Number 6 under the title “Referred Documents” on Page 4 of the Report and is quoted specifically on pp.26-27 thereof.

The *2002 Town of Cornwall Strategic Plan - Draft Report* was not specifically listed in the “Referred Documents” list because it was a draft version of a document that was intended to be a supplementary tool in the creation of the *2003 Town of Cornwall Official Plan,* as well as serving as a strategic document identifying a long term vision of what the community could look like in the future *.* Elements of the *2002 Town of Cornwall Strategic Plan - Draft Report* appear in the *2003 Town of Cornwall Strategic Plan* and the *Transportation Master Plan - Town of Cornwall Draft Report August 2006.* All three reports were reviewed and in the possession of the Commissioner prior to the issuance of the Report.

Additionally, and contrary to the Complainant’s implication, the officials of the Town of Cornwall were most cooperative in providing all of the documents which are specifically enumerated in the Report under the heading: “Referred Documents.” If, as the Complainant asserts, Town officials were not so cooperative with him, that is regrettable; however, I am not privy to that situation nor is it relevant to this proceeding.

Following the Complainant’s filing of the Request and during the exchange of documentation process, the Complainant gave an interview on June 11, 2008 to CBC Compass. In the interview, the Complainant discussed the merits of his Request and elaborated on his belief that certain information was not available to the Commissioner prior to the issuance of the Report.

During the CBC interview the Complainant stated as follows: *“The information wasn’t forthcoming and it’s disappointing that it wasn’t, but now that is there, I think the Commissioner has to make a decision on it.”* The CBC reporter, Mr. John Jeffrey, confirmed that the information referred to by the Complainant is the Town of Cornwall’s (hereinafter referred to as “the Town”) “2006 Transportation Plan” which provides for a corridor road.

The Complainant then stated:

> *“This information regarding the corridor road was never made available to us and I don’t think the Commissioner ever saw it either, so I’m just hoping that he’ll collect all this information and make a decision on it.”*

The Complainant is mistaken. The document was in the possession of the Commissioner prior to the Report. The *“Transportation Master Plan - Town of Cornwall Draft Report August 2006"* is listed as number 7 on the list of “Referred Documents” found on page 4 of the Report.

In conclusion, the information provided by the Complainant as “new evidence” supporting his Request of the complaint of conflict of interest against the Minister is not

new at all; that evidence was available and was considered by the Commissioner in the preparation of the Report.

**B) Unequivocal and cogent evidence of a conflict of interest:**

An abbreviated history of the subject intersection that is the centerpiece of this request may assist to place the Complainant's evidence in context . A detailed history appears in the Report at pp.8-16.

In 1997, the previous provincial government approved the intersection of the road that became known as MacPhail Drive and the TCH. The approval was temporary but allowed for public use of the intersection. In 2001, the previous government approved the intersection as a permanent access onto the TCH.

On February 20, 2001 a letter was sent to the Town by Mr. Alan Aitken, then Central Regional Engineer for the Province, wherein he stated in part:

> *"We (the Department) feel it is prudent for the Town to decide where they wish to locate the permanent access, be it at its present location or an alternative approved location, as upgrading of the TCH may be required to provide for safe movement of vehicles to and from the (Business) park..."*

The permanent status of the intersection was confirmed to the Town by a letter dated July 30, 2001, wherein the then Chief Engineer for the Province, Mr. Foch McNally advised the Town as follows:

> "...*The Department of Transportation and Public Works approves the development of the sub-division road* (later known as MacPhail Drive) *to the Cornwall Business Park. Access to the Route 1 highway* (TCH) *shall be at the temporary access previously approved by the Department..."*

Later in the same letter, Mr. McNally stated:

> *"Improvements to the Route 1 highway will be required in the future to provide access to the business park road; and the Department will provide the improvements as required..."* (Emphasis added)

Both letters from the Department of Transportation and Public Works advised the Town that the TCH might require future upgrading to allow vehicles safe ingress and egress to the Cornwall Business Park.

The Report at page 12 described the safety situation as follows:

> *"From its inception as an intersection in 1997 until the fall of 2007, the MacPhail Drive/TCH intersection was a three way intersection. The TCH*

> *which passes through the area has two lanes running generally north and south, with MacPhail Drive on the eastern side of the highway leading to the Cornwall Business Park. There were no traffic lights at the intersection, nor were there any turning lanes. The only traffic signal was a stop sign on MacPhail Drive to advise traffic to halt before entering onto the TCH. Many of the vehicles entering or leaving the business park were larger and slower trucks which often created dangerous conditions, as these vehicles attempted to turn onto the TCH to proceed either north or south. Equally, as those vehicles attempted to leave the TCH and enter the Cornwall Business Park, they often slowed or blocked approaching traffic from either direction until they had exited onto MacPhail Drive."*

On April 18, 2007, the safety of the intersection was discussed in the Legislature by the previous government's Minister of Transportation and Public Works, the Hon. Gail Shea who stated:

> *"...There are a number of issues right across the province where we have intersections that aren't safe and we've gotten to a number of them. So yeah, we do have Cornwall on the radar..."*

In the general election of May 28, 2007 the previous government was defeated. On June 12, 2007 the Minister was sworn in as the current Minister of Transportation and Public Works.

During early September of 2007 a significant Departmental project that had been expected to proceed in the Town of Souris was deferred until the 2008 construction season. The deferment of that project allowed the Department to consider other smaller projects that could be completed in what remained of the 2007 construction season.

In late September 2007, the Minister authorized installation of safety features to the intersection of MacPhail Drive and the TCH to remedy the unsafe conditions that had been acknowledged by the previous government five months earlier.

The Minister authorized the creation of a left turn lane on the TCH and the installation of traffic lights at the pre-existing intersection of MacPhail Drive and the TCH. The Minister has stated that the work authorized was for the purpose of public safety.

It is manifestly obvious that the intersection is much safer today because of the improvements authorized by the Minister.

It is the contention of the Complainant that there is new evidence contained in the *2002 Town of Cornwall Strategic Plan - Draft Report* and the *2003 Town of Cornwall Plan* that demonstrates that the Minister did not make the improvements for the purpose of public

safety, but rather he made the improvements to further his own private interests and in particular to increase the value of his land parcel number 245936.

The Complainant states: "*...The Member's previous knowledge of these plans influenced his decision to construct the intersection in question...*"

The Complainant states that because the Minister knew about these two documents, he was influenced in his decision to *"construct the intersection."*

The Complainant is mistaken. The Minister did not "construct" the intersection; it was created under the previous government of which the Complainant was a member.

The Complainant further says:

> *"Briefly stated my position is that the decision to install the intersection at the corner of the Trans Canada Highway and MacPhail Drive in Cornwall, Prince Edward Island ("the Decision") was done to further the Member's private interests..."*

The Complainant mistakenly asserts that it was the Minister's decision *"...to install the intersection..."* The Minister did not authorize the "installation" of the intersection. The intersection was created in 1997 at the time when the Complainant was the Minister of Transportation and Public Works. The intersection of MacPhail Drive and the TCH existed under the previous government from 1997 until 2007.

In his letter of April 24, 2008, the Complainant further states:

> *"The very fact that the intersection did not become permanent until the Member assumed control of the department shows the decision was made primarily to service the Member first, and the taxpayers second."*

The Complainant is mistaken. The intersection did not become permanent after the Member became a Minister. The decision to make the intersection permanent was made by the previous government in 2001. This is set forth in the Report at page 10.

What the Minister actually did was to authorize the creation of a left turn lane and the installation of traffic lights at an existing intersection which had been created by the previous government and which had been acknowledged by that previous government as being "unsafe."

The Complainant is of the opinion that the Minister did not make the improvements for the purpose of making the intersection safe, but rather to advance his own private interests. The Complainant states:

> "*The wealth of new information which has come forward clearly illustrates the intentions of Town of Cornwall to have the Member's property serve as the new centre of the Town. This intention coupled with the planned corridor road, also on the Member's property stand to vastly benefit the Member..."*

The evidence advanced by the Complainant is evidence of what the Town hopes will happen in the future. The Complainant contends that the Minister's decision to make improvements to the intersection advances the wishes of the Town and thereby furthers the Minister's private interests.

Given the language used by the Complainant that the Minister *"installed"* or *"constructed"* the intersection and the intersection was *"always intended to be a four-way intersection,"* it is reasonable to conclude that the Complainant sees the presently improved three-way intersection as being merely the first phase of a phased construction of the four-way intersection that the Town wants and that when completed would further the Minister's private interests. If that is the Complainant's belief, the belief is not based on unequivocal and cogent evidence. To this point in time, there is nothing that the Minister has done that cannot be justified on the grounds of improving public safety.

It appears that the Complainant's theory is that any improvement to the pre-existing three-way intersection must inevitably lead to the creation of a four-way intersection which the Town wants and which would arguably enhance the value of the Minister's land. Accepting the theory would mean that the Minister ought not to have authorized safety improvements because they advance the likelihood of the intersection becoming a four-way intersection in the future. If one accepts this logic, it would mean that the Minister ought to have left the intersection in its acknowledged unsafe condition. Clearly, that outcome is unacceptable. The facts are that the Minister authorized the installation of safety features at the pre-existing three-way intersection and ignored the wishes of the Town to have a four-way intersection created.

As indicated above, the Complainant's request for a reconsideration is solely based on two documents: the *2002 Town of Cornwall Strategic Plan, Draft Report* and the *2003 Town of Cornwall Official Plan.*

Both documents were created by the Town and reflect the aspirations and wishes of the Town for its future development. The documents are speculative as that is the very nature of such planning documents. These documents are "living documents" subject to revision, amendment and change. The plans are not final or binding on the Town and certainly not binding on the Government of P.E.I. or the Minister.

The Complainant offers quotes from both documents that reflect the desire of the Town to have a four-way intersection on the Trans Canada Highway which would accommodate a corridor road connecting the Cornwall Business Park and the Cornwall

Road/Kingston Road intersection. Other quotes highlighted by the Complainant indicate the desire of the Town to have the Town core move to the area between the present Town core and the Community of North River.

The Complainant asserts that these quotes prove that the Minister was in a conflict of interest when he approved the creation of a left turn lane into the Cornwall Business Park and the installation of traffic lights at the pre-existing intersection of MacPhail Drive and the TCH.

To consider that action by the Minister to be a conflict of interest, one would have to be able to conclude that:

a) because the Town wants a *four-way* intersection at the present intersection of MacPhail Drive and the TCH; and,

b) because the Town wants that *four-way* intersection to be connected to the intersection of the Kingston Road/Cornwall Road by a *corridor road* that crosses land owned by the Minister; and,

c) because the creation of a four-way intersection and the creation of a corridor road would increase the value of the Minister's land; therefore,

d) the Minister's decision to create a left turn lane on the TCH and signalize the pre-existing *three-way* intersection means the Minister was in a conflict of interest.

With respect, such a conclusion cannot be drawn.

The Complainant's logic is predicated on the assumption that the Minister created a *four-way* intersection at the site of the existing three-way intersection of MacPhail Drive and the TCH. It is manifestly obvious that the intersection is not a four-way intersection and there is no fourth leg giving access to the land north of the TCH.

Contrary to the express wishes of the Town, the Minister did not create a four-way intersection. Instead of doing what the Town wanted, the Minister decided only to install needed safety measures to improve the pre-existing three-way intersection.

Without the four-way intersection, there can be no corridor road connecting it to the Kingston Road/Cornwall Road intersection.

The two plans cited by the Complainant also acknowledge the fact that neither the corridor road nor the four way intersection can be built without the express approval of the Department of Transportation and Public Works. The Town cannot unilaterally change the three-way intersection at the juncture of MacPhail Drive and the TCH to a four-way intersection, nor can the Town unilaterally create a corridor road from the TCH.

Jurisdiction over public highways and intersections within the Town is the exclusive responsibility of the provincial government. [11]

Neither the four-way intersection nor the corridor road has been authorized by the Minister and he has indicated that there are no plans to do so.

The happenings that the Complainant cite as placing the Minister in a conflict of interest have not occurred and cannot occur without the Minister's express approval.

The Complainant mistakenly states that there is new information clearly illustrating the Town's intention to have the Member's property serve as the new centre of Town. That information is not new and was specifically referenced in the Report on pp. 26-28. The Complainant's assertion also overstates the case, as property presently owned by the Minister is only part of what the Town hopes will be the new centre of Town.

In 2003, the Town, at its own initiative, rezoned all the properties between the present Town core and the Community of North River to "comprehensive development." Such a zoning allows all manner of development of the properties affected as outlined in Sub-paragraph 17.2 of the *Town of Cornwall Zoning and Subdivision Control (Development) Bylaw of July 26, 2004.* The "Comprehensive Development Area" which includes the property owned by the Minister can be developed for virtually any use approved by the Town Council.

Since 2003, four years prior to becoming a member of Executive Council, the Minister has been free to develop his property in any manner he wished, subject only to the approval of the Town Council. The presence or absence of a corridor road has no effect on that reality nor, for that matter, does the presence or absence of a four-way intersection.

At most, the two documents cited by the Complainant only prove that the Town wishes to have a four-way intersection on the TCH connecting the Cornwall Business Park via a corridor road to the intersection of the Kingston Road and the Cornwall Road. Assuming that to be true, one still cannot conclude that the Minister is in a conflict of interest when the only changes made to the intersection to date have no impact on the land to the north of the TCH where the Minister's land is located.

The language used in the *2002 Town of Cornwall Strategic Plan - Draft Report* reflects the "wish list" nature of the document. The document reflects the hopes and aspirations of the Town. Examples of such language from the quoted portions cited by the Complainant include: "*Pursuing <u>possibility</u> of new arterial road...*"; "*Examine <u>opportunities</u> for greater flexibility in the use of the TCH as a Main Street for Cornwall...*"; "*review the <u>possibility</u> of a connector road linking the Business Park with*

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[11] *Roads Act*, R.S.P.E.I. 1988, Cap. R-15, s. 5

*the Cornwall Rd/ Kingston Rd intersection with potential future link to proposed Bypass...*" (Emphasis added). The document is nothing more than a vision statement reflecting the wishes and dreams of the Town in 2002.

At para. 2.1.3 of the *Transportation Master Plan-Town of Cornwall 2006*, the Town describes the *2002 Town of Cornwall Strategic Plan - Draft Report*:

> *"A strategic planning exercise for the Town was completed in 2002. This exercise sought to obtain opinions from residents as to the manner in which they would like to see the Town develop. As a visioning document, the Strategic Plan does not have the same status as the Official Plan and the information contained within the plan does not constitute Town policy..."*

The *2003 Town of Cornwall Official Plan* quotations cited by the Complainant reflect the Town's wish for the location of a four-way intersection on the TCH to allow for development of the proposed new commercial core, all of which was discussed in the Report. The Town's wish for a four-way intersection remains merely that - a wish.

This is the "new evidence" that is being advanced by the Complainant as unequivocal and cogent evidence of the Minister being in a conflict of interest.

For a conflict of interest complaint to succeed, the private interest must be present and identifiable at the time the decision is made. It is not sufficient that a decision of a Minister might affect a contingent or potential interest of the Minister. As indicated in the Report, the Minister's decision to improve the safety features of the pre-existing intersection had no impact on his present or future private interests.

The basis for the Complainant's case against the Minister is based solely on what might happen in the future. There is no unequivocal and cogent evidence that the Minister was or is now in a conflict of interest. To suggest that the Minister is in a conflict of interest because of what might happen in the future is manifestly contrary to all our traditions of justice and not contemplated by the Act.

As discussed, the Town's wishes can only be realized if the Minister expressly authorizes them to occur. To extend the Complainant's argument to its logical conclusion, the Minister cannot be in a conflict of interest until the Minister authorizes those further acts to occur. Therefore, until such time as he authorizes those further actions, he cannot be said to be in a conflict of interest.

The information advanced by the Complainant is not unequivocal and cogent evidence proving that the Minister was in a conflict of interest.

**C) Failure to consider the evidence would create an injustice**

The third requirement that the Complainant is required to meet is that the new evidence be of such a nature that failure to consider it would create an injustice.

As indicated, the Complainant has not advanced evidence that is either new or unequivocal and cogent proof that the Minister was in a conflict of interest. It can therefore be said that there is no evidence being advanced which would create an injustice, were it not considered.

The information that the Complainant has provided does not indicate that an injustice was created by the decision in the Report, nor does the information indicate that it is manifestly in the public interest to reconsider the original decision. Rather, the information cited by the Complainant was known at the time of the Report and deemed to be irrelevant to the issue at hand which was whether the Minister made or participated in a decision which furthered the Minister's private interest. The Report found that the Minister did not participate in making a decision which furthered his private interest and nothing that has been advanced by the Complainant proves the contrary.

The standard necessary is that the new evidence must be of such a nature that failure to consider it would create an injustice. In effect, the new evidence would have to be conclusive or determinative of the issue at hand. In this instance, the Complainant's evidence clearly does not meet that standard.

**Request for a Reconsideration is Denied:**

As previously stated, for the Complainant to succeed in his Request, he had to satisfy three requirements: that there be new evidence; that the evidence be unequivocal and cogent proof of a conflict of interest; and that failure to consider the evidence would create an injustice.

The Complainant has not satisfied the requirements necessary to justify a reconsideration of the previous decision.

Further, there is no compelling reason in the public interest to deny the applications of the doctrine of *functus officio* or the principle of *res judicata*.

The Complainant's request for a reconsideration is denied.

**Potential Further Requests for Reconsiderations:**

In his letter of May 30, 2008, the Complainant made a number of queries to the Commissioner which may portend future requests for reconsiderations. The Complainant stated:

> *"Last Fall my staff made a request to the Town of Cornwall to review its Development Plan and we were refused. Have your (sic) reviewed this plan? Did you have access to this information before rendering your decision in January?"*

The Commissioner was advised by the Town's Chief Operating Officer, Mr. Kevin McCarville, that the Complainant's office made no requests to the Town for a copy of the Town's Development Plan. Mr. McCarville advises that the Town does not have a Development Plan. The planning documents referred to in this Report are the only applicable documents and, as indicated previously, they were in my possession prior to the Report.

The Complainant went on to ask:

> *"I also asked (sic) indicated that the Department of Transportation and Public Works refused to provide our office with a set of "as-built' blueprints" for the proposed intersection, and asked that you secure this information. Were you provided with this information and what was your evaluation of the blueprints? We continue to ask for this information but our requests have been ignored."*

The information provided by Departmental officials concerning blueprints for the intersection and my assessment of that information is discussed in the Report at pp. 32-34. I am satisfied with the information provided by those officials.

The Complainant further asked:

> *"We have also made requests to see reports that substantiate claims by the Minister of Transportation that the decision to install traffic lights at this intersection were made in the interest of public safety. We have asked to see accident and traffic count reports and received minimal statistics in return. Are you in receipt of this documentation?*

The evidence given by Departmental officials was that there were no accident and traffic reports prepared prior to the installation of traffic lights at the intersection of MacPhail Drive and the TCH. The Commissioner concluded that it is self-evident that, to give the greatest possible safety to the motoring public, an intersection on the TCH leading to a commercial business park should have traffic lights and a left turn lane rather than a single stop sign. The preparation of accident and traffic reports were unnecessary to confirm that an unsafe situation existed. The situation is outlined in the Report at page 12. On April 18, 2007, the Minister of Transportation and Public Works in the previous government acknowledged in the Legislature that the intersection was not safe. The present Minister authorized corrective action five months later.

The Minister's decision resulted in public safety improvements that are clearly in the public interest and for the benefit of all Islanders**.**

It is my hope that following both the Report and this Supplement, that all Members of the Legislature clearly understand that the onus of proof is on a Complainant when laying a complaint under the *Act* and that the standard of proof is high. Each Member should ensure that any complaint made under the *Act* is motivated by a genuine desire to ensure that decisions made by our elected officials are made in the public interest.

Dated this 24th day of July, 2008

Neil Robinson
Conflict of Interest Commissioner