

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KENNETH HARPER

Applicant

- and -

BRYAN HELLWIG

Respondent

Application under the *Conflict of Interest Act*, R.S.N.W.T. 1988, c.C-16.

Heard at Iqaluit November 27 and 29, 1996

Reasons Filed on March 5, 1997

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicant: Earl D. Johnson, Q.C.

Counsel for the Respondent: Anne Crawford

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REASONS FOR JUDGMENT

1 This case is a good illustration of the difficulties that
can arise when a person in a small community wears several different hats.

2 The Applicant and Respondent are both members of
the Town Council of Iqaluit. The Applicant claims that the Respondent contravened
the *Conflict of Interest Act*, R.S.N.W.T. 1988, c. C-16 by failing to declare a conflict
of interest arising from the "Kiddie Kan Day" project. On Kiddie Kan Day, the
residents of Iqaluit collect aluminum cans for recycling.

3 Both the Applicant and the Respondent testified at the hearing of the application. I also heard a tape recording of the June 11, 1996 meeting at which it is alleged the Respondent failed to declare the conflict.

4 The Respondent owns and operates the Iqaluit Recycling Centre ("IRC"). For the last two years IRC has had a contract with the Town of Iqaluit to recycle the aluminum cans collected on Kiddie Kan Day. For this, IRC is paid a fee of \$1000.00 by the Town. The Respondent in his evidence said that for that amount, the contract was not worth the trouble and that he did it instead for the goodwill of the community.

5 The Respondent also chairs the Town's Development and Works & Public Safety Committee (the "Committee"). That Committee met on June 5, 1996 and discussed options put forward by the Town's administration with respect to the future of Kiddie Kan Day.

6 The Applicant said in his evidence that he believed that he attended the June 5 meeting but had no specific memory of what was said or whether the Respondent was there or excused himself from the meeting. This is in contrast to his affidavit filed September 12, 1996, in which the Applicant swore that

the Respondent, "participated in the discussion and supported the continuation of the Kiddie Kan Day program".

7

The Respondent testified that he in fact chaired the June 5 meeting. He stated that he declared a conflict of interest when the Kiddie Kan Day matter came up and left the meeting, having asked someone else to take the chair until he returned.

Having heard both witnesses, I am satisfied that the Respondent has the better recollection of that meeting and I accept his evidence of what happened there.

8

The options considered by the Committee on June 5, 1996, as set out in a report to the Committee, were as follows:

1. Continue to operate Kiddie Kan Day as in previous years
2. Tighten controls on the day and ensure that only kids under 16 and no commercial producers participate
3. Abandon Kiddie Kan Day in its current form and

ask the Waste Management Committee to examine it as part of the development of the recycling program.

9 The end result of the Committee's consideration of these options was a recommendation to Town Council, which read:

to tighten controls and ensure only kids under 16 and no commercial producers participate and that Waste Management Committee continue to examine the recycling program.

10 Next there was a meeting of the Town Council on June 11, 1996. Both the Applicant and the Respondent were present. The Respondent, as Chair of the Committee, brought forward the Committee's recommendation in the form of a motion worded exactly as set out above.

11 The Respondent read the motion out loud and commented that it did not make sense. From my review of the tape, there appears to have been momentary confusion or uncertainty on the part of the Respondent as to what the motion meant. He then explained to Council that it related to Kiddie Kan Day. One of the other councillors asked whether there was a conflict because the

Interest Act.

18 The Respondent also testified that at some later point a property lot came up for tender and a company with which the Applicant was connected bid on it. The Respondent spoke against the bid on Council. It was only after this incident that the present application under the *Conflict of Interest Act* was commenced. The Applicant was not questioned about this at the hearing. Although it might raise a question about the Applicant's motives in bringing this application, since the Applicant was not cross-examined on the point, I decline to draw any inference adverse to him.

19 Clearly, the *Act* applies to the Respondent as a member of the Iqaluit Town Council: section 1(1).

20 Section 2(1) of the *Act* reads as follows:

2.(1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any direct or indirect pecuniary interest

(a)in a contract or proposed contract with the municipality or board,

(b)in a contract or proposed contract that is reasonably likely to be affected by a decision of the council or board, or

(c)in any other matter in which the

council or board is concerned,
and is present at a meeting of the council, board or committee of the
council or board at which the
contract, proposed contract or other matter is the subject of
consideration, the member
(d)

shall, as soon as practicable after
the commencement of the meeting,
disclose his or her interest and the
extent and nature of the interest,
and

(e) shall not take part in the
consideration or discussion of, or
vote on any question with respect
to, the contract, proposed contract
or other matter, or attempt in any
way whether before, during or after
the meeting to influence the voting
on any such question.

21 It is clear that the Respondent, as the owner of IRC,
had a direct pecuniary interest in the \$1000.00 Kiddie Kan Day contract with the
Town of Iqaluit. The first question is whether that contract was the subject of
consideration at the Council meeting of June 11, 1996, so as to make section 2(1)
of the *Act* applicable.

22 Counsel for the Respondent submits that it was not,
that the matter under consideration was just what was set out in the motion and
nothing more and that the Respondent had no pecuniary interest in the tightening of
controls, ensuring that only kids under the age of 16 and no commercial producers
participate, or the Waste Management Committee continuing to examine the
recycling program.

23 Counsel for the Applicant submits that the matter under consideration was the Kiddie Kan Day contract because the motion necessarily assumed that the Kiddie Kan Day contract would continue. He points out that this was admitted by the Respondent in his evidence.

24 As poorly worded as the motion was, I have to agree with counsel for the Applicant that it implies that the Kiddie Kan Day program (and thus IRC's participation in it) would continue. When one considers the motion in the context of the three options that the Committee had before it, it seems clear that the intention was that Kiddie Kan Day continue to operate as in previous years. That means that the pecuniary interest of the Respondent in the contract would continue. It matters not, in my view, that the pecuniary interest was relatively minor or that the contract may not have been a good bargain for the IRC.

25 In my view, the words "is the subject of consideration" in section 2(1) should be interpreted broadly. They do not require that the contract be the sole or main issue being discussed by Council.

26 I find that the Kiddie Kan Day contract was the subject of consideration. But even if that is not so, the Respondent had a direct pecuniary

interest in "any other matter in which the council is concerned" pursuant to s. 2(1)(c), that other matter being the Kiddie Kan Day project. That matter was also the subject of consideration at the meeting.

27 That takes me to subsections (d) and (e) of section 2(1). Did the Respondent "as soon as practicable after the commencement of the meeting" disclose his interest?

28 In *R. v. Cambrin* (1982), 1 C.C.C. (3d) 59, in dealing with the definition of the phrase "as soon as practicable" in then s. 237(1)(c)(ii) of the Criminal Code in relation to the taking of breath samples, the British Columbia Court of Appeal said at p. 61:

Something is "practicable" when it is capable of being done, having regard to all the circumstances. Another way of saying virtually the same thing is that something is "practicable" if it is "feasible".

29 In *R. v. Cander* (1981), 59 C.C.C. (2d) 490, the same Court held that the phrase, again in the context of then sections 235 and 237, meant "within a reasonably prompt time under the circumstances". See also *R. v. Carter*

(1980), 55 C.C.C. (2d) 405.

30 I see no reason not to apply the same definition to the phrase in the *Act*. Therefore, the obligation under s. 2(1)(d) is that the councillor disclose his or her interest within a reasonably prompt time under the circumstances after the commencement of the meeting. In my view, that would be after the "housekeeping" or non-contentious matters are completed. The minutes of both the June 11 and July 9, 1996 Town Council meetings were filed as exhibits on this hearing. They indicate that declarations of interest are dealt with early in the meeting, after approval of the minutes of the Council's previous meeting. That would appear to be the time when such declarations should be made, where the matter giving rise to the conflict is on the meeting's agenda, as this one was.

31 In this case, it is common ground that although the minutes of the June 11, 1996 meeting reflect that the Respondent declared his interest in the item entitled "Kiddie Can Recycling Program" at the time provided for that purpose early in the meeting, he did not, in fact, do so at that time. Counsel for the Respondent argued that it is open to Council to consider that the Respondent had made an adequate declaration of interest and, in effect, to approve that by having the minutes reflect that he had made the declaration at the appropriate time. I do not

accept that argument. Why the minutes were prepared as they were was not explained. I do not think that I can assume that there was any conscious decision made by Council to deem what occurred a declaration properly made, although the fact that the minutes were subsequently approved does indicate to me that perhaps none of the councillors considered the lack of an early declaration to be significant in the circumstances.

32 I find that the Respondent did not disclose his interest as soon as practicable after the commencement of the meeting.

33 It is also clear that the Respondent took part in the consideration or discussion of the contract (or the "other matter", being the Kiddie Kan Day project), contrary to s. 2(1)(e) of the *Act*. He did this by explaining what the motion was meant to address and by answering the questions about the past year's project and commenting on how the terms of the motion might address certain problems that had arisen.

34 Accordingly, I find that there was a contravention of section 2(1) of the *Act* arising out of the failure by the Respondent to make a declaration of interest and his participation in the discussion. Section 6(1) therefore

interest at the Council meeting because he got carried away with other discussions. He said that although he knew the motion dealt with renewal of the Kiddie Kan Day contract, the same considerations that occurred to him at the Committee meeting, where he did declare a conflict and left the meeting, did not occur to him at the Council meeting.

40 As indicated above, the tape recording itself leads me to conclude that there was some uncertainty or confusion on the part of the Respondent when he read the motion to Council. There was no evidence that he had given any real consideration to the motion or its meaning between the time it originated at the Committee level (in his absence) and the moment he read the motion to Council. It is significant, in my view, that the Respondent had already declared his interest at the Committee stage. That indicates to me that he was not trying to hide anything, that it was really through inadvertence that he failed to declare the interest as soon as practicable at the Council meeting. Then, once the other Council member brought up the conflict issue, it was on the table.

41 At that point, the Respondent should not have participated in the discussion. But it has to be considered that his participation was first of all to point out that there were issues other than Kiddie Kan Day itself

involved, being the examination of other recycling programs. The discussion that followed was a broad one and involved some issues not directly related to the Kiddie Kan Day contract or project, for example, whether plastic could be recycled and whether there was a fair way of dealing with deposits so that people who had not borne the cost could not collect later. At that stage, I am satisfied that the Respondent was trying to provide the information requested by his fellow councillors as well as to present the motion from the Committee as the Chair of that Committee.

42 I also note that the Applicant himself participated in the discussion and at no time raised any concerns about the Respondent's participation.

43 I am satisfied that the Respondent, in trying to respond to or clarify the various concerns raised and to fulfil his role as Chair of the Committee, made a bona fide error in judgment in participating in the discussion. I am satisfied that it was bona fide in that he was trying to help his fellow councillors understand what the motion purported to address and answer their questions and that he did not properly appreciate the conflict of interest issues even though alerted to the existence of a conflict by the one councillor who spoke up. The fact that the Respondent later raised the issue with the Applicant suggests to me that he did feel

uncomfortable about what he had done and soon realized that he should have acted differently. It does not, in my view, detract from the bona fides of his error.

44 I find that the exception in section 6(2) applies and therefore decline the application for an order declaring the Respondent's seat vacant.

45 As the issue of costs was not argued, if counsel are unable to agree, they may file written submissions on that issue within 30 days of the filing of these Reasons for Judgment.

V.A. Schuler
J.S.C.

Yellowknife, Northwest Territories
Dated this 5th day of March 1997

Counsel for the Applicant:	Earl D. Johnson, Q.C.
Counsel for the Respondent:	Anne Crawford