

Lessons From the Conflict of Interest Decision of the Integrity Commissioner

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By Debbie Tarshis

On March 5, 2020, the Integrity Commissioner, the Honourable J. David Wake, made a conflict of interest determination about the recent appointment to the Ontario Human Rights Commission (OHRC) of Police Constable Randall Arsenault. The Chief Commissioner of the OHRC had requested that the Integrity Commissioner consider whether the appointment of Mr. Arsenault created a conflict of interest since the OHRC is involved in matters that involve Mr. Arsenault's employer, the Toronto Police Service (TPS). The Integrity Commissioner determined that there are conflict of interest concerns and directed that certain steps be taken to mitigate potential conflicts.

The directions to Mr. Arsenault included the following:

1. to recuse (or remove) himself from any OHRC discussions or decision-making related to the on-going TPS inquiry or other policing services matters;
2. to be conscious that he may need to recuse himself from additional OHRC matters, notably those related to the criminal justice system;
3. to immediately seek authorization from the TPS to be an appointee of the OHRC and provide a copy of the authorization to the OHRC;
4. to recuse or remove himself from discussions and decision-making at the TPS related to matters which fall under the jurisdiction of the OHRC; and
5. not to publicly comment, including through social media, on any subjects related to matters which fall under the jurisdiction of the OHRC.

There are differences between being a commissioner for the OHRC and being either a public appointee or an elected Council member of a regulatory body. One notable difference is that, a commissioner, as a part-time appointee to the OHRC, is a public servant and subject to the Conflict of Interest Rules under the Public Service of Ontario Act, 2006. Nonetheless, this decision addresses a situation that can arise on Councils of a regulatory bodies; that is, when a Council member has obligations to more than one organization. A conflict of interest arises where it is not possible to meet both sets of obligations or when a Council member's role in one organization could reasonably be perceived as interfering with their ability to properly perform their duties as a Council member.

Consider this scenario. A Council member is the chair of a department at a university. The university offers the degree program for the profession governed by the regulator but the Council member is not the chair of the department that offers the degree program for that profession. Does the Council member have a conflict of interest when there is a matter on the Council agenda that relates to the degree program for that profession offered at the same university? Does the Council member have a conflict of interest when there is a matter on the Council agenda that relates to the degree program for the profession at another university in Ontario?

As stated by the Integrity Commissioner, a conflict of interest can arise when a person has obligations to more than one organization

and it is not possible to meet both sets of obligations. The Integrity Commissioner expressed concern that Mr. Arsenault's work for the OHRC could create the appearance that he or the OHRC is giving preferential treatment to his employer (the TPS).

As a regulator, it is important to educate Council members on their fiduciary duties as a director of the governing body and the importance of identifying conflicts of interest, both actual and perceived. It is equally important that Council members understand how to mitigate potential conflicts by declaring conflicts of interest and recusing themselves from discussion about any matters in which they have an actual or perceived conflict of interest. The decision of the Integrity Commissioner reminds us that there are also steps that may need to be considered with respect to any other organization to which the Council member has obligations such as obtaining the authorization of that organization to be a Council member, ensuring that the Council member recuses themselves from discussions and decision-making at that organization related to matters that relate to the jurisdiction of the regulator and not to publicly comment, including through social media, on any subjects related to matters which fall within the regulator's jurisdiction.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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