Court of Queen's Bench of Alberta

Citation: Kissel v Rocky View (County), 2020 ABQB 406

Date: 20200716
Docket: 1901 11027
Registry: Calgary

Between:

Crystal Kissel, Samanntha Wright and Kevin Hanson

Applicants

- and -

Rocky View County, also known as the Municipal District of Rocky View No. 44 and Alastair Hoggan, Chief Administrative Officer of Rocky View County

Respondents

Reasons for Decision
of the
Honourable Mr. Justice J.T. Eamon

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I Introduction and issues

[1] The Applicants are Councillors of Rocky View County, a municipal government under the *Municipal Government Act*, RSA 2000, c M-26 (the "***Act***"). In this judicial review, they challenge two actions of the County:

(a) On May 8, 2019 the County's Chief Administrative Officer ("**CAO**") imposed communication restrictions between him and the Applicants.

(b) On June 11, 2019 Rocky View Council decided the Applicants breached the County's Code of Conduct (Rocky View County Bylaw C-7768-2018, the "**Code**") and imposed sanctions:

(i) Requiring each Applicant to make public apologies for each of the breaches of the Code. The requirement on Councillor Kissel to apologize for one of the breaches (for which she had already apologized) was subsequently rescinded at the same meeting.

(ii) Providing that representation and travel on behalf of the County by each Applicant be subject to approval by request presented at a regular Council meeting, until June 11, 2020. (The "**representation and travel sanction**").

(iii) Removing each Applicant from "all Council committees and bodies to which Council has the right to appoint members, until the Organizational Meeting of October 20, 2020, or at Council's discretion". (The "**removal sanction**").

(iv) Decreasing each Applicant's gross remuneration by 30%, corresponding to a reduction in their duties, until "the Organizational Meeting of October 20, 2020, or at Council's discretion". (The "**compensation sanction**").

(v) Providing that each Applicant "is to have no contact with Rocky View County staff, including the Chief Administrative Officer, with the sole exception of appropriate Councillor and administrative communications at regular Council meetings or as otherwise approved by Rocky View Council. Rocky View Council will direct by resolution, the actions of Administration regarding any request made by [the sanctioned Applicant]". Council did not provide any time limitation on this sanction. (The "**staff communication sanction**").

[2] The CAO's communication restrictions were imposed by email, purportedly based on the CAO's conclusion that that the Applicants engaged in inappropriate contacts with County staff and released confidential information to a staff member. The County did not deliver a certified record in connection with the communication restrictions. The nature of these contacts or any elaboration why the restrictions were appropriate is not apparent.

[3] Council's sanctions arose from three complaints made by the County's Reeve or Deputy Reeve against the Applicants under the Code, arising from (1) the Applicants' releasing a privileged County legal opinion to their own lawyer (this lawyer, whom I will refer to as the "**Applicants' third party lawyer**", is not counsel for the Applicants on this judicial review); (2) the Applicants' writing a letter to the editor in a local media outlet which was harshly critical of their colleagues on Council; and (3) Councillor Kissel's use of insulting language concerning the CAO.

[4] On May 14, 2019, Council passed a resolution appointing a law firm to the office of "investigator" under the Code to address "any and all complaints" made under the Code. (I will refer to this law firm and the lawyer who carried out the matter on its behalf, as the "**law firm**" or the "**Investigator**"). A lawyer from the law firm considered the complaints against the Applicants and provided an opinion to Council on May 27, 2019 as to whether the Applicants breached the Code.

[5] On June 11, 2019, Council held an in camera meeting to consider the complaints. There were no records provided to the Councillors other than the law firm's report. Following the in camera meeting, Council convened in public and passed resolutions finding that the Applicants breached the Code and imposing sanctions.

[6] The issues raised by the parties are:

(a) Whether I should decline judicial review of some of the sanctions because they have expired.

(b) Whether I should strike all or a portion of the Applicants' affidavits as inadmissible on a judicial review application.

(c) Whether the CAO's communication restrictions are judicially reviewable.

(d) Whether the CAO's communication restrictions (if judicially reviewable) are outside his jurisdiction under the *Act*.

(e) Whether the Applicants were treated unfairly by reason of the law firm's alleged reasonable apprehension of bias. This requires me to consider a number of sub-issues, including:

(i) Whether the Applicants' claim of reasonable apprehension of bias is precluded because the time limitations in which to file a Court application for judicial review of Council's resolution appointing the law firm as investigator had expired before the Applicants applied for judicial review.

(ii) Whether the reasonable apprehension of bias standard applies to the Investigator.

(iii) Whether a reasonable, informed person would have a reasonable apprehension that the Investigator was biased in light of its previous

professional dealings with Rocky View County or another Alberta County where the CAO had previously served as chief administrative officer.

(iv) Whether the Investigator or Council adequately considered or disclosed the circumstances alleged to give rise to reasonable apprehension of bias.

(f) Whether Council acted in bad faith in making its findings or sanctions, with the objectives of politically silencing the Applicants, retaliating against the Applicants, or retroactively validating the alleged improper conduct of the CAO in issuing his communication restrictions on the Applicants.

(g) Whether Council's findings and sanctions are outside its jurisdiction under the *Act*, because the sanctions prevent the Applicants from fulfilling their legislated duties contrary to *The Code of Conduct for Elected Officials Regulation*, AR 200/2017, s 6.

(h) Whether Council's decisions are substantively invalid because they are unreasonable or patently unreasonable.

II Facts

(a) Introduction

[7] The Certified Record of the proceedings of Council provided pursuant to R 3.19 of the *Alberta Rules of Court* contains the records that were before Council in respect of its consideration of the three complaints. The County certified "There are no further documents in our possession". The County did not return, in its Certified Record, some of the records on which the complaints were based (a Notice of Motion before Council and a letter to the editor, both prepared by the Applicants and alleged to contain evidence of breaches of the Code), or records (if any) of Council's debates during the in camera or public meetings.

[8] Council did not provide formal reasons for its decisions. The Investigator did not describe the extent of its professional relationship with the County or CAO which underlies the Applicants' allegations of reasonable apprehension of bias. The County did not return any records in respect of the bias allegations, apart from the Investigator's explanation (in its report to Council) of its refusal to recuse itself from participation in respect of the complaints against the Applicants.

[9] The CAO did not provide a certified record or return of any records in relation to the CAO's communication restrictions.

[10] These gaps in the facts, and the Applicants' assertions that Council acted in bad faith, led to two rounds of lengthy affidavits from the Applicants that widely addressed their grievances with Council or its decisions, cross-examinations, and a cross-application from the Respondents to strike large parts of these affidavits.

[11] This Part contains my findings from the Certified Record, and a description of the Code under which Council's decisions were made. I will deal with the objections to and content of the affidavits later in these reasons.

(b) The CAO's communication restrictions

[12] The CAO's communication restrictions were provided to the Applicants by email dated May 8, 2019 addressed to one of the Applicants, wherein the CAO stated:

> As per your request.
>
> As a result of the inappropriate contacts with staff and releasing of confidential information to a staff member not entitled to the information the following is effective immediately.
>
> 1. I will no longer meet privately or have private telephone conversations with Kevin Hanson, Crystal Kissel, and Samantha [sic] Wright. Any meeting requested or required, will need to set up in advance and the Reeve or Deputy Reeve will be required to be in attendance.
>
> 2. Councillors Hanson, Wright and Kissel, will have no access to any staff outside of the Chief Administrative Officer. This includes Belen Scott, anyone in the Municipal Clerks office, as well as all the Executive Directors. Any request for staff action or request for information will be referred to the CAO office and will be dealt with accordingly. Any email sent to staff will be forwarded to the CAO with no comment from the staff and any phone call to a staff member will go unanswered.
>
> 3. No staff will be present in any meeting with Councillors, Hanson, Wright , or Kissel without the Reeve or Deputy Reeve present.
>
> 4. Any incoming correspondence with the CAO from Councillors Hanson, Wright, and Kissel will be required to have either the Reeve, the Deputy Reeve, or the remainder of Council carbon copied. In going any outgoing correspondence to the authors will have either the Reeve, the Deputy Reeve or the remainder of Council carbon copied.

(c) The Complaints under the Code of Conduct

[13] The Code is a County bylaw passed in 2018. Extracts from the bylaw (prior to recent amendments made after the matters in issue) are set out in **Appendix "A"** to these Reasons.

[14] The law firm was appointed by Council Resolution on May 14, 2019 as the "Investigator in accordance with section 62 of the [Code] to investigate any and all Code of Conduct formal complaints".

[15] The Reeve or Deputy Reeve made three formal complaints of breaches of the Code of Conduct.

[16] The first complaint, made April 30, 2019, alleged the following:

(a) The Applicants submitted a Notice of Motion for consideration by Council at its April 30, 2019 meeting. This motion either evidenced or constituted breaches of the Code.

(b) The motion shows that the Applicants disclosed a privileged and confidential legal opinion obtained by the County to an independent third party legal advisor

retained by the Applicants (the Applicants' third party lawyer) without the consent or authorization of Council. This conduct breached the confidentiality provisions of the Code, sections 28, 29(a), 30, 31(d), (e), (i).

(c) The motion includes a backhanded insult aimed at all the Councillors other than the Applicants. This breached the Code, sections 17, 21, 22, 24.

(d) The motion contains statements insinuating that Council is out of control, including lack of control in the hiring process of the CAO, which resulted in Council hiring a weak chief administrative officer. This breached the Code, section 27(e).

[17] The Notice of Motion purported to address hiring procedures of the County, arising from the deficiencies in the manner in which the CAO had been recently hired. The motion itself and the minutes of the April 30, 2019 Council meeting where the Applicants attempted to present it are not contained in the Certified Record. The Certified Record indicates the majority of Council decided to remove the motion from the agenda at the April 30, 2019 Council meeting. I infer that during the June 11, 2019 in camera and public meetings, Councillors probably recalled the basic history of the motion being proposed and removed from the agenda at the April 30, 2019 meeting.

[18] The second complaint, made May 7, 2019, alleged that the Applicants made offensive and derogatory remarks in a letter to the editor posted online in the Rocky View Weekly Newspaper of that same day. The complainant alleged the article included allegations that the Deputy Reeve was placing his interests above the public, did not respect democracy or good government, and manipulated discussion. Further, the Deputy Reeve acted with a tyrannical majority, inferring that the remainder of Council was tyrannical in nature. The complainant asserted that this conduct breached "many of the tenets" of the Code.

[19] The Applicants claimed that the letter to the editor also arose from the Applicants' concerns over deficiencies in the process through which the CAO was hired.

[20] The full text of the letter is not contained in the Certified Record. There is no evidence in the Certified Record to determine whether or not all the Councillors who participated in the deliberations on June 11, 2019 had a copy of the letter, or received additional information beyond that provided in the Investigator's report, during the process. It would be speculation to make inferences about which Councillors, apart from the complainant and the Applicants, actually knew of the entire contents of the letter to the editor. I decline to make such inferences.

[21] The third complaint, made May 13, 2019, alleged that Councillor Kissel left a voicemail with the Deputy Reeve on that same day making offensive and disparaging remarks about the CAO. This allegedly breached the Code, section 24.

[22] Council received a copy of the transcription of the voicemail with the Investigator's report. Councillor Kissel had said:

> ... I would appreciate you taking the time to call me, I do need to get some work done this week and based on the infantile behaviour of the CAO I am going to need a babysitter....

[23] The Applicants responded to the Investigator through legal counsel on May 27, 2019, reserving their right to object to various alleged procedural deficiencies. They have not raised these issues on the judicial review so I will not further mention those.

[24] The Applicants objected to the law firm's participation in the complaint process, because it does legal work for the Council and was solicitor for the County administration (headed by the CAO). They contended that "much of this dispute involves [the CAO] and his flawed hiring process". They submitted that the fact the law firm answers to Council in its investigatory capacity and to the County administration as its lawyers placed it in an untenable position, seriously compromised its independence as Investigator, and raised a reasonable apprehension of bias.

[25] The Applicants generally responded to the Investigator on the question whether the complaints were substantiated, as follows:

(a) The tone and content of the Notice of Motion were innocuous in the context of the heated exchanges and debates in municipal politics.

(b) The Applicants did not breach confidentiality by providing the County's legal opinion to the Applicants' third party lawyer. They received the legal opinion from the County for the discharge of their duties. They were entitled to provide it to a lawyer retained by them to obtain legal advice on the matters in question.

(c) The Deputy Reeve's subjective distaste for the Notice of Motion is not a basis to sanction the Applicants. The Applicants merely noted issues in the hiring process of the CAO and brought a motion to address it. They cannot be sanctioned for performing their duties as councillors.

(d) The Investigator's assessment of matters relating to the letter to the editor should be guided by the law of defamation. The letter arose from the Applicants' concerns over the procedural defects in hiring the CAO, and were fair comment on a matter of public interest in the County. Further, the comments could not be defamatory because they were both fair comment and made on an occasion of qualified privilege under the law of defamation.

(e) Councillor Kissel would be sending a letter of apology to the CAO concerning the voicemail message.

[26] The law firm reported to Council on the complaints by letter dated May 27, 2019.

[27] It noted that the Code does not provide clarity or guidance over the content of an investigator's report, and undertook the following mandate:

> In this case, as the facts are straightforward, I have assumed it is intended that I provide an opinion as to whether there was a breach of the Bylaw in each case for Council's consideration ...
>
> [My emphasis]

[28] The law firm refused to recuse itself. It applied the reasonable apprehension of bias test. It acknowledged it provided legal advice to the County. It did not specify whether that meant that it did legal work for County Council, County administration, or both. It noted that it is not unusual in a municipal law context that lawyers have to answer in different contexts to both Council and administration, and where Council authorizes legal advice to be provided directly to Council it is common that the same law firm has provided advice to the CAO. It observed it was not involved in the underlying events and had not provided the legal opinion which the Applicants had allegedly disclosed to their lawyer. The circumstances did not create a reasonable apprehension of bias.

[29] The law firm's conclusions on the substance of the complaints were:

(a) The Notice of Motion did not make derogatory comments. Heated exchanges and debates are common in municipal politics.

(b) The Applicants breached the Code in providing the County's legal opinion to the Applicants' third party lawyer. The Applicants were entitled to obtain a legal opinion on their concerns over the County's procedures, but not to disclose the County's legal opinion on such matters. Such disclosure could undermine the County's legal position and the trust Council has in engaging in full and frank discussion of privileged legal advice. The Code does not include an exception for disclosure to other lawyers engaged by individual Councillors.

(c) Portions of the letter to the editor breached the Code. Council was free to determine expected behaviour under the bylaw without regard to defences under the law of defamation. Councillors may publicly criticize decisions of Council, as long as the underlying facts are accurately communicated. The Applicants could have made their point without speculating on the motivations of their colleagues on Council or suggesting other Councillors were acting with improper motivations or contrary to the best interests of the County. The conduct did not amount to "abuse, bullying or intimidation". However, the following passages in the letter failed to treat the majority of Council with courtesy and respect and failed to respect individual differences of opinion, in breach of sections 21 and 22 of the Code:

> The only plausible explanation [for voting to remove the Notice of Motion from the April 30, 2019 meeting agenda] is that the majority on council found it embarrassing council had not given any direction regarding the CAO hiring policy. They may also have felt supporting the motion would somehow imply they had done something wrong in the first place.

> However, when that majority places its own interests above the people as a whole, it becomes the 'tyrany [sic] of the majority'. Good governance requires a respect for the spirit of democracy and healthy debate, not censorship and manipulated discussion.
>
> [Underlining added by law firm in its May 27, 2019 report]

(d) Councillor Kissel characterized some behaviour of the CAO as infantile. In doing so, Councillor Kissel used insulting words toward an employee of the County, in breach of section 24 of the Code.

[30] The law firm confined itself to non-controversial facts appearing from the content of the written documents on which the complaints were based, and "did not consider there a need to gather any other evidence, or to contact the complainants for further information or argument as the substance of the complaint was clear based on the complaints themselves, which enclosed copies of the documents at issue." It did not make findings concerning the Applicants' motivations or intentions in committing the acts constituting breaches of the Code or ask for or receive records or other evidence that would substantiate or refute the Applicants' explanations for their actions in their May 27, 2019 response. It did not make recommendations concerning factors that could or ought to be considered in deciding any sanctions.

[31] The few observations it offered relevant to sanctions were incomplete:

(a) The complainant had alleged that the disclosure of the legal opinion also breached the prohibition on a Councillor using confidential information for their personal benefit (Code, section 30). The Investigator did not provide an opinion whether the Applicants breached section 30, but stated that it "expected" the Applicants would argue they disclosed the opinion "to obtain a second opinion that would serve the County's best interests (as opposed to arguably advancing their own personal interests as expressly forbidden by section 30)".

(b) The law firm observed that Council "may wish to consider the Councillors' position in the Response that their intention [in writing the letter to the editor] was simply to inform the public..."

(c) The law firm suggested the matter of the third complaint was "a relatively minor breach that Councillor Kissel has sought to address, but I will leave it for Council to determine whether anything floes [sic] from that breach".

[32] Council resolved on June 11, 2019 that:

(a) The Applicants each breached section 29(a) of the Code by releasing the privileged legal opinion to the Applicants' third party lawyer. Council sanctioned the Applicants with a requirement to apologize to Council, the removal sanction, and the compensation sanction.

(b) The Applicants each breached sections 21 and 22 of the Code by using language which was without courtesy and respect in the letter to the editor. Council sanctioned the Applicants Wright and Hanson with a requirement to apologize to Council and the media, the representation and travel sanction, and the staff communication sanction. Council sanctioned the Applicant Kissel with a requirement to apologize to Council and the media, and the representation and travel sanction.

(c) The Applicant Kissel breached section 24 of the Code by using derogatory language in the voicemail to the Deputy Reeve concerning the CAO. Council sanctioned her with a requirement to apologize (later rescinded during the same meeting) and the staff communication sanction.

III The mootness objection

[33] At the oral hearing on June 9, 2020 counsel for the Respondents submitted the judicial review of the committee sanctions and representation and travel sanction should be dismissed because they had or would soon become moot. She observed that Council has since reorganized the committees and decided not to appoint the Applicants to committees until October 2021. Therefore, the removal sanction was moot. She further submitted that the representation and travel sanction would expire June 11, 2020 and would then be moot.

[34] It appears the subsequent committee reorganization occurred after the judicial review was heard on January 22, 2020 and before the supplemental oral submissions on June 9, 2020 (these had been scheduled for March 30, 2020 but cancelled by the Court's Master Order #1 due to the impact of the pandemic of COVID-19 disease on the Court's operations, and could not be rescheduled for hearing earlier).

[35] The Respondents did not provide any records, including reorganization resolutions, in support of their position on mootness. However, counsel for the Applicants did not object to counsel's characterization of the event. I will accept her representations for the purpose of addressing the matter of mootness.

[36] The Court may decline judicial review where the matter has become moot; that is, where "subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties..." (***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342 at 353).

[37] The Respondent has not persuaded me that the sanctions are moot.

(a) There is no evidence that any decision to reorganize is final. The removal sanction may continue to impact the Applicants indefinitely in relation to any future committee appointments, because that sanction gave Council discretion to change the term of the sanction. I am not satisfied it is actually inoperative or no longer affects the Applicants' prospects for appointment to committees.

(b) Removal from committee service was intertwined with the compensation sanction which was made under section 275.1 of the *Act*. It might be that if the removal

sanction is set aside, the compensation sanction must also be set aside. Counsel did not submit that the compensation sanction has become moot, or is not ongoing until October 20, 2020 or some later date pursuant to Council's discretion (built into that sanction) to change the fixed term.

(c) The removal, and representation and travel, sanctions impact the Appellants' reputations as elected officials. The public would likely think that the severity of the sanctions reflects grave misconduct and unwillingness of the target to comply with their obligations in future. The sanctions have an ongoing impact on the Applicants' reputations.

(d) In the case of the Applicants Wright and Hanson, the representation and travel sanction was imposed along with the staff communication sanction for writing the letter to the editor. These sanctions may need to be considered together to decide whether they are so grossly disproportionate that they are unreasonable under the highly deferential standard of review. The representation and travel sanction remains a live issue and is not hypothetical.

IV Review standard for procedural fairness issues

[38] The court decides as a matter of law the required standard of fairness (***Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry***, 2016 ABCA 354 at para 5; ***Ho v Alberta Association of Architects***, 2015 ABCA 68 at para 19, leave to SCC refused 36395 (April 20, 2015)), by applying the test in ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699, [1999] 2 SCR 817 at paras 21 to 28. However, depending on the line of inquiry, some deference may be needed; for example, on questions of fact (*ibid*). The ***Baker*** factors require the Court to consider the decision-maker's choices of procedure in assessing the required fairness.

[39] The Court in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 summarized the ***Baker*** test as follows:

> [77] ... The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific .... Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27....

V Review standard for merits of decision

[40] In deciding the standard by which to review the merits of a decision of an administrative decision-maker such as Council, a Court starts with the presumption that the applicable standard is reasonableness (***Vavilov*** at para 16). This presumption can be rebutted, including where the legislature has indicated that it intends a different standard or set of standards to apply by using clear statutory language (*ibid* at paras 17, 33-35).

[41] The presumptive standard applies to the CAO's communication restrictions, if reviewable.

[42] A higher review standard applies to the resolutions of Council. Section 539 of the *Act* provides:

> 539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

[43] Generally, Alberta case law interprets section 539 as a legislative prescription of the applicable review standard (***Nor-Chris Holdings Inc v Sturgeon (County)***, 2013 ABQB 184 at paras 63-70; ***Gendre v Fort Macleod (Town)***, 2015 ABQB 623 at paras 24-26, 59; ***Brodylo Farms Ltd v Calgary (City)***, 2019 ABQB 123 at para 47; ***Koebisch v Rocky View (County)***, 2019 ABQB 508 at paras 53-65; but see ***Bergman v Innisfree (Village)***, 2019 ABQB 326 at paras 24-27, 61).

[44] That standard requires a high degree of deference by the Courts, akin to the concept of patent unreasonableness. That standard no longer has general application in Canadian administrative law, but the concept is useful to understanding the higher degree of deference when a court conducts a review under section 539. The patent unreasonableness standard focussed on the magnitude and obviousness of the defect (***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 40). ***Dunsmuir*** approved the following description from ***Law Society of New Brunswick v Ryan***, 2003 SCC 20 at paras 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" . . . . A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" ... Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

[45] The "precise degree of deference" the reasonableness standard requires is "calibrated" according to general principles of administrative law or the context of the decision (***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para 19; ***Gateway Charters Ltd (Sky Shuttle) v Edmonton (City)***, 2012 ABCA 93 at paras 21, 23). A legislative stipulation of the patent unreasonableness standard indicates the Courts should "accord the utmost deference" to the decision-maker's decision (***West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)***, 2018 SCC 22, [2018] 1 SCR 635 at para 29). I agree with

Graesser J in ***Nor-Chris*** (at para 69) that the standard is best described for the purpose of the present review in ***Catalyst Paper Corp v North Cowichan (District)***, [2012] 1 SCR 5, 2012 SCC 2 at para 20: "... courts have refused to overturn municipal bylaws unless they were found to be 'aberrant', 'overwhelming', or if 'no reasonable body' could have adopted them".

[46] ***Vavilov*** reaffirms that the courts, in conducting reasonableness review, must consider both the reasoning process of the decision-maker and the outcome under review. It emphasized that the Court's jurisprudence "should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review." (*ibid* at para 87 [emphasis in original]). The Court observed at para 86:

> … It is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
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> [Emphasis in original]

[47] Where the decision-maker is required to give reasons, the following principle from ***Vavilov*** applies:

> [136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.
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> [Emphasis is mine]

[48] The Applicants did not argue that Council was required to give reasons, and during oral submissions on June 9, 2020 Mr Niven QC stated Council is not required to give reasons.

[49] In situations where reasons are not required, the Court in ***Vavilov*** recognized two situations: (1) where the record and context permit the Court to deduce reasons or shed light on the basis for the decision, and (2) where the record and the context do not shed light on the basis for the decision. The Court stated:

> [137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a

> reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.
>
> [138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

[50] The Respondents suggested during oral argument on June 9, 2020 that I might direct Council to provide reasons to assist me in reviewing their decisions. Counsel cited ***Yew v Edmonton (City)***, 2016 ABCA 207 in support of that approach. In ***Yew***, the Court remitted a matter to a tribunal whose reasons were wanting, to better explain its rationale and address the grounds of appeal before the Court.

[51] ***Yew*** is distinguishable. It dealt with a tribunal required to provide reasons (*Act*, s 687(2); ***Stuber v County of Barrhead No. 11 (Subdivision and Development Appeal Board***), 2015 ABCA 339 at paras 16-20). Neither side argued that Council in the present case was required to give reasons and it provided no reasons. I do not think I have discretion to force a tribunal in such circumstances to provide reasons or risk its decision being quashed. Rather, the governing principles are set out in ***Vavilov*** at paras 137-138 (quoted above).

[52] If I have discretion to require reasons, I nevertheless prefer the ***Vavilov*** approach in this case. There is no evidence that Council kept a record of the in camera debates, and none was produced in the Certified Record. Directing Council to produce reasons after a year has passed from the decision is likely to be burdensome and further delay the matter to the prejudice of the Applicants. The passage of time and lack of a record might also raise reliability issues, and embroil the parties in further disputes over whether the product of a direction to give reasons accurately reflects the actual rationale for Council's decisions.

VI The Respondents' application to strike portions of the Applicants' Application and Affidavits

(a) Introduction

[53] The Respondents applied:

(a) To strike out the challenge to the CAO's communication restrictions because they are not a decision subject to judicial review.

(b) To strike out challenges to the Investigator's report on the basis of reasonable apprehension of bias, because that is a collateral attack on Council's resolution appointing the Investigator that was brought after the expiry of time limitations in which to challenge such a resolution in court.

(c) To strike out the six affidavits of the Applicants, because they are inadmissible on a judicial review.

[54] I will deal with the application to strike out the affidavits in this part of my reasons. I will deal with the application to strike the application for judicial review of the CAO's communication restrictions in Part VII and the collateral attack issue in Part VIII of my reasons.

[55] The Respondents submit the affidavits are not admissible because:

(a) Generally speaking, evidence that was not before the decision-maker and which goes to the merits of the decision is not admissible on the review (Rule 3.22; ***JK v Gowrishankar***, 2019 ABCA 316 at para 60; ***Sobeys West Inc v Alberta College of Pharmacists***, 2017 ABCA 306 at para 67, leave to appeal to SCC refused 37864 (August 9, 2018); ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904 at para 42).

(b) Some of the contents of the affidavits are opinion, argument or hearsay.

(c) The Applicants split their case by filing a second round of affidavits on November 19, 2019 after cross-examination on the first set filed August 21, 2019.

[56] The Applicants submit that extrinsic evidence may be admitted on a judicial review in exceptional cases. The cases submitted by the Applicants support that Courts have allowed extrinsic evidence in judicial review applications: to show bias or reasonable apprehension of bias, where the facts in support of the allegation do not appear on the record; to demonstrate a breach of procedural fairness which is not apparent from the record; in exceptional cases on other issues such as standing in the judicial review proceeding; and, to show what evidence was actually placed before the tribunal where the tribunal makes no record, or an inadequate record, of its proceedings (***Alberta Liquor Store Association*** at paras 35, 41). Similarly, the Applicants submit that extrinsic evidence may be admitted to show that statutory powers were used in bad faith or for an improper purpose, citing ***Nova Scotia Provincial Judges' Association v Nova Scotia (Attorney General)***, 2018 NSSC 13 at paras 212-219, var 2018 NSCA 83, leave to appeal allowed 38459 (March 29, 2019) and judgment reserved (December 9, 2019)).

[57] The Applicants submit their affidavit evidence is admissible to show that the effect of the sanctions prevents them from fulfilling their legislated duties (contrary to *The Code of Conduct for Elected Officials Regulation*); to infer that Council had in mind a "specific history of events" when making its decision, which is not apparent from the inadequate record; to show Council acted in bad faith, with the objectives of politically silencing the Applicants, retaliating against them and retroactively validating the improper conduct of the CAO in issuing his communication restrictions; and, to show reasonable apprehension of bias on the part of the Investigator.

[58] The Applicants further submit the rules against case splitting do not apply in a judicial review, and the Court should consider their second round of affidavits.

(b) Admissibility of the affidavit evidence

[59] There are two standards for admissibility of the affidavit evidence: first, compliance with the basic admissibility rules for evidence, including the personal knowledge requirement under R 13.18(3) of the *Rules of Court* for final applications; and second, compliance with the additional restrictions on admissibility in judicial review applications described in para 56 above.

[60] I disregard any evidence which does not comply with Rule 13.18 (3): in final applications the affidavit must be sworn on the basis of personal knowledge.

[61] Personal knowledge encompasses a wide variety of personal observations. A witness might have observed some relevant event; be able to identify an otherwise admissible record such as a business record; describe his or her belief held at some material time which is relevant to the issues (eg, evidence of belief which explains why the witness took a particular action at a particular time); or describe some relevant act or statement made by another person out of Court if otherwise admissible (eg, an admission against interest, a spontaneous exclamation). In contrast, the Applicants in their affidavits often infer matters of fact, presumably based on what they saw or heard others doing or saying. With few exceptions (which do not apply in this case), inferences are for the judge, not fact witnesses. The inferences are not admissible evidence.

[62] The Applicants' affidavits contain many other instances of inadmissible evidence: the Applicants' expressions of current beliefs or opinions about the merits of the law suit; advocacy or speculation of the motivations or intentions of other Councillors; opinions of mixed fact and law; and inadmissible hearsay such as news media articles appended to their affidavits without proving an appropriate hearsay exception. It is appropriate in a well drafted affidavit to describe an allegation to provide the reader with context to better understand the evidence in the affidavit (***Alberta Treasury Branches v Leahy***, 1999 ABQB 185 at para 84) but the statements in the Applicants' affidavits sometimes go well beyond that purpose and amount to advocacy.

[63] Examples illustrating the types of inadmissible evidence from the affidavits filed August 21, 2019 follow:

(a) Allegations of wrongdoing, attributing motives to other Council members, or attributing beliefs in the minds of other Councillors, including:

> "It is obvious that the majority's desire to silence dissenting opinion is what is driving their behaviour".
>
> "It is commonplace for the Reeve to censure our opinions and limit debate when he believes what we are saying weakens the majority's position."
>
> "... the Reeve and the Deputy Reeve cooked up a series of complaints between them".
>
> The sanctions "are an attempt to silence me in retaliation for questioning the flawed CAO hiring process, for bringing forward the Notice of Motion to ensure that such a flawed process would

not recur at the County, and for expressing our concerns to County residents by way of the Letter [to the editor]".

[Emphasis is mine]

(b) Advocacy about or characterizations of other Councillors' conduct, including:

"In my view, the approach taken by [the other Council members] was undemocratic, autocratic ..."

The appointment of the Investigator "was unnecessary and inappropriate".

The refusal of the Investigator to recuse amounts to "impropriety".

Perhaps the Investigator was "trying to send a message to Council that Council might deal with the complaints in a reasonable way.... However, as set out below, that was not to be."

(c) Opinions of mixed fact and law that the sanctions are unreasonable or disproportionate.

(d) Exhibiting several news media articles, without adopting the content as an accurate summary of the deponent's personal knowledge or showing that an exception to the hearsay rule applies. Rather, they appear to have been appended to bolster the witness' version of events.

[64] The following portions of the Affidavits filed August 21, 2019 are inadmissible on the basis they contravene the basic admissibility rules for affidavits:

Para number	**Inadmissible portion**
7	Exhibit "A"
12	Sentence 2
13	Sentence 1, portion reading: "when he believes what we are saying weakens the majority's position" Exhibit "B" - hearsay
14	Sentence 2
15	Sentence 2 (Sentence 3 and its subparas are admissible as factual context in which the Applicants acted)
16	Sentence 1
23	Sentence 1; sentence 2 so far as it speaks to the state of mind of a co-Applicant (but admissible as evidence of the state of mind of the

	deponent himself or herself at the time).
25	Sentence 1, portion reading: "40% of whom are directly and negatively impacted by these sanctions."
28	Sentence 1, " took it upon himself to"
29	Sentence 2
31	Sentence 1
35	Sentence 2
36	Sentence 2
37	Sentence 1, portion reading: "It was unnecessary because"
38	Sentence 3; Sentence 4, portion reading: "The impropriety of the situation is further highlighted by the fact that"
41	All
47 [46 in Kissel Affidavit]	Sentence 1, so far as it speaks to the state of mind of a co-Applicant (but admissible to evidence the state of mind of the deponent at the time). (Sentence 2 standing alone reads as an opinion of law, but I read it in context as part of the deponent's reason why he or she has refused to comply with the apology sanctions and therefore it is admissible).
51 [50 in Kissel Affidavit]	Sentence 1, portion reading: "to justify our removal from the Board".
54 [53 in Kissel Affidavit]	Sentence 1
56 [54 in Kissel Affidavit]	All
57 [56 in Kissel Affidavit]	Sentences 3 and 4 are admissible to extent they are some evidence tending to show that the deponent cannot represent the residents in the division in which they were elected, but their opinions of duties and obligations are not admissible.

[65] The affidavits filed November 19, 2019 address how the sanctions impact the Applicants' duties. There are several instances where the Applicants express conclusions of mixed fact and law, opinions, or advocacy to the effect that the sanctions infringe on their rights or duties,

contravene the *Act*, are not in the best interests of their constituents or the County, or have been applied by Council in an arbitrary, capricious or inconsistent fashion.

[66] The following portions of the Affidavits filed November 19, 2019 are inadmissible on the basis they contravene the basic admissibility rules for affidavits:

Para number	**Inadmissible portion**
15	All
16	Sentence 1
17	All
19	Last sentence
20	Last sentence
26	All, except: "I have no duties or functions outside of attending regular RVC Council meetings and special meetings".
36 [34 in Hanson Affidavit]	All
40 [38 in Hanson Affidavit]	Sentence 2, portion reading: "and is a clear departure from RVC's duty to 'work collaboratively with neighbouring municipalities' ".
41[39 in Hanson Affidavit]	Sentence 1, portion reading: "arbitrary and capricious"

[67] The November 19, 2019 affidavits (at paras 29, 31) contain conclusions that are technically not admissible, but I have considered them only as an aid to understanding the context of the remainder of the paragraphs. To the extent the issues of whether the sanctions are disadvantageous to residents or fair to presenters before Council are relevant in this proceeding, I will make those determinations based on the facts and will not treat the Applicants' opinions on those facts as evidence.

[68] The foregoing reasons should not be taken as my refusing to consider the Applicants' submissions on the judicial review concerning bad faith and the other matters asserted. They simply reflect that there are different roles for witness and counsel in any legal proceeding. The same points are made in the Applicants' submissions through counsel and I address these points later in these reasons.

[69] Next, I assess the otherwise admissible evidence to see if it falls within an exception to the bar against extrinsic evidence in a judicial review. On this aspect, my conclusions are as follows.

[70] First, evidence is not admissible for the purpose of challenging the sanctions on the basis they do not conform to the limitation in section 6 of *The Code of Conduct for Elected Officials Regulation*.

[71] The Applicants did not provide any transcription or narration of what was actually discussed or debated at the Council meetings (in camera or public) and it is impossible to ascertain from the Certified Record and the Affidavits whether the Applicants' evidence concerning the effect of the sanctions on their duties was before Council. I do not agree with the Applicants' submission (para 43 of their written brief filed January 10, 2020) that they are merely supplementing an inadequate record of Council's proceedings. They could have filed affidavits narrating or describing the in camera debates, but did not do so. They may well be adding to the actual debates, discussions and considerations that were before Council.

[72] I must review the alleged breach of section 6 on the basis of the record before Council, not on the basis of any evidence the Applicants later choose to put forward. I am not permitted to conduct a de novo proceeding to determine this question. As Slatter J (now JA) stated in ***Alberta Liquor Store Association*** at para 46:

> Whenever it may be appropriate to file affidavits on judicial review applications one thing is clear: the applicants are not entitled to turn the judicial review application in a trial *de novo* on the merits of the issue before the tribunal....

[73] Second, affidavit evidence of explanations why the Applicants submitted the Notice of Motion to Council, and their belief that providing the County legal opinion to the Applicants' third party lawyer was not a breach of the Code, are not admissible. This evidence only goes to the merits of the sanctions. There is nothing to suggest that the Applicants did or did not put this evidence before Council. The evidence does not appear to be directed at describing the record of proceedings during the in camera or public meetings, rather it is an apparent attempt to re-try the imposition of sanctions.

[74] Third, the exception of evidence to supplement an inadequate record generally does not apply to the Applicants' affidavits.

[75] The record of Council lacks transcriptions or narrations of debates or discussions during the Council meetings which probably would assist in discerning the considerations before Council or their reasons underlying the findings and sanctions (see ***Vavilov*** at para 137; ***Catalyst*** at para 29).

[76] However, the affidavits do not purport to contain such evidence. Rather, they invite me to undertake a de novo assessment of the complaints. The exception for bad faith might apply, but not the exception for supplementing the record.

[77] Fourth, the Applicants are permitted to adduce evidence relevant to the issues whether Council acted in bad faith, and whether the Investigator had a reasonable apprehension of bias or the Investigator or Council inadequately considered the reasonable apprehension of bias issue. I have considered their evidence to the extent it meets the basic admissibility criteria (paras 59-62 above) on these issues.

[78] This permitted use includes their evidence on the severity of the sanctions. I have doubts that the evidence is probative of the Applicants' bad faith claims, but I will admit it for the purpose of those claims and assess its weight later in these reasons. However, as mentioned, it cannot be used in an attempt to impugn Council's decision on the basis it did not comply with

section 6 of *The Code of Conduct for Elected Officials Regulation*. The latter assessment must be conducted on the Certified Record.

[79] Much of the debate over evidence of bad faith focussed on a separate Code complaint made against Councillor Gautreau. He initially joined the Applicants in questioning the manner in which the CAO was hired, and was working with the other Applicants when the County legal opinion was disclosed to the Applicants' third party lawyer. The Reeve and Deputy Reeve did not include him in their complaints. Eventually, a complaint was lodged against him (the record does not disclose by whom) and on January 14, 2020, he was sanctioned and required to make apologies.

[80] The Applicants deposed that Councillor Gautreau was part of their group questioning the manner on which the CAO was hired, and participated in giving the County legal opinion to their third party lawyer. They claim his conduct proceeding was handled more quietly and covertly, and he received a far lighter sanction despite engaging in the same behaviour. In support of their position, they tendered the Council minutes of January 14, 2020, where Councillor Gautreau was sanctioned.

[81] The Respondents submitted this evidence is irrelevant. Further, if I were to consider that evidence I should also consider the minutes of the January 28, 2020 Council meeting, where Councillor Gautreau apologized. The Respondents say those minutes show important factual differences which explain the alleged disparity between the sanctions. In making his apology, he emphasized that he did not release the legal opinion or authorize its release, but was sorry to have become involved in actions outside of Council proceedings over the hiring of the CAO.

[82] In my view, the Applicants should be permitted to refer to the treatment of Councillor Gautreau in support of their bad faith arguments.

[83] Consequently, I considered the evidence in the Applicants' affidavits (where otherwise admissible) where relevant to any of the following issues:

(a) Judicial review of the CAO's communication restrictions. This category is limited to evidence of the existence and description of the restrictions. This is not a determination that the communication restrictions are judicially reviewable. It is proper to admit evidence of the existence and description of the restrictions in support of the claim to judicially review the restrictions. Although I have found the restrictions are not reviewable in the circumstances of this case, it was an arguable claim and the evidence should not be struck out (see Part VII below).

(b) Reasonable apprehension of bias. To be clear, I still apply the basic admissibility requirements. Consequently, I have not given consideration to the Applicants' personal opinions of the propriety of the Investigator's acting. That issue is assessed on an objective basis, not on the basis of their subjective beliefs.

(c) Bad faith. Evidence of the Applicants' backgrounds, the history of the events leading up to the complaints, the complaint proceedings against Councillor Gautreau, the severity of the sanctions on the Applicants, and the existence, background and impact of the CAO's communication restrictions, is relevant to the Applicants' bad faith claims. While I am skeptical of the probative value of

much of this evidence, the proper course in this case is to allow the Applicants to provide the evidence. I deal with the weight of the evidence in Part IX.

[84] It is unnecessary to apply to strike inadmissible affidavit evidence, and typically a court simply ignores such evidence. However, a litigant is entitled to seek a striking order, at least from the judge hearing the merits of the underlying application (***Lysyk*** at paras 30, 84; ***ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)***, 2019 ABQB 653 at paras 23-27). Therefore, an order will issue striking the portions of the affidavits identified in the tables (paras 64, 66 above). I ignore that evidence.

[85] There were also passages in the cross-examinations which were irrelevant. Some of the cross-examination was an effort to show the Applicants acted in bad faith or committed acts which aggravated the misconduct found by Council.

(a) The Respondents submitted evidence through cross-examination that on December 12, 2018 the Applicants, through the Applicants' third party lawyer, approached the Minister of Municipal Affairs to request an inspection of the County's hiring of the CAO.

(b) The Applicants had a County employee help them draft their Notice of Motion, thereby disclosing contents of the County's privileged legal opinion to a staff member.

(c) Some or all of the Applicants helped to create a website expressing various opinions about their colleagues, sought signatures on a petition, held open houses, or participated in other activities all as particularized at length in para 37 of their written brief filed January 10, 2020. These activities occurred after Council sanctioned the Applicants.

[86] This evidence, apart from some limited information showing the Applicants had approached the Minister through their third party lawyer to seek a statutory remedy against the County, does not appear in the Certified Record. It is not admissible to buttress Council's decisions on sanctions. Further, it does not appear relevant to refute the Applicant's allegations that the majority of Council acted in bad faith in passing the resolutions. Most of the events occurred after the sanctions were allegedly made in bad faith. The evidence of the disclosure of the County's legal opinion does not assist in resolving the specific allegations of bad faith made by the Applicants against the Respondents. Apart from the information in the Certified Record, this evidence is irrelevant.

(c) The Respondents' objection to case splitting

[87] The Respondents' submit that the Applicants should not be permitted to file two rounds of affidavits rather than including all their evidence in the first set.

[88] In ***Davidson v Patten***, 2003 ABQB 996, Mahoney J described the rule against case splitting:

> [7] It's an old trial maxim that Plaintiffs must exhaust their evidence at the outset. They cannot split the case. In other words, they cannot rely on one set of facts, and when these have been shaken by the opponent, try to adduce more or other facts. The

> Plaintiff must present the case in its entirety before the Defendant is called upon to choose whether to elicit its own evidence. This rule allows the Defendant to know the case to be met and plan the defence. (***Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.,*** [1976] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22)
>
> [8] The purpose of this rule is obvious. It is only in this way that endless wrangling and never-ending re-hearings and never-ending re-openings to hear new evidence can be avoided. ***Sales v. Calgary Stock Exchange***, 1931 CanLII 600 (AB QB), [1931] 3 W.W.R. 392.

[89] I agree with the Applicants that Courts do not apply the principle with the same rigour in chambers applications. Instead, "the approach is a flexible one that requires a balancing of interests of truth seeking, fairness, and prejudice" (***Cantlie v Canadian Heating Products Inc***, 2014 BCSC 2029 at para 11). In applications, unfairness might be addressed by giving appropriate time extensions or imposing appropriate costs consequences, but ultimately it is a balancing exercise ensuring both sides are fairly treated (*ibid* at para 12).

[90] The Respondents conceded they were not prejudiced by the Applicants' submission of two rounds of affidavits rather than including all their evidence in one round. Submitting the second round of affidavits did not delay the hearing. The Applicants should be allowed to adduce their second round of evidence to the extent it is admissible, but the costs consequences of doing so, if any, will be decided later.

VII The CAO's communication restrictions

[91] The Applicants seek to set aside the CAO's communication restrictions. The Respondents submit the restrictions cannot be reviewed by a Court.

[92] The Court's jurisdiction to review in this instance depends on whether the application satisfies the two part test in ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall***, 2018 SCC 26 at para 14: "where there is an exercise of state authority and where that exercise is of a sufficiently public character".

[93] The second branch of the test requires me to weigh all the relevant factors (***Air Canada v Toronto Port Authority***, 2011 FCA 347 at para 60). In ***Air Canada*** the Court described several factors derived from case law:

> (a) The character of the matter for which review is sought. Is it a private, commercial matter, or is it of broader import to members of the public?
>
> (b) The nature of the decision-maker and its responsibilities. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?
>
> (c) The extent to which a decision is founded in and shaped by law as opposed to private discretion. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be

more willing to find that the matter is public. Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review.

(d) The body's relationship to other statutory schemes or other parts of government. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter.

(e) The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature.

(f) The suitability of public law remedies. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature.

(g) The existence of compulsory power. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature.

(h) An "exceptional" category of cases where the conduct has attained a serious public dimension. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable.

[94] The Applicants submit that the CAO is a statutory entity under the *Act*, with specific public responsibilities whose decisions have broad implications for the public. Section 558(a) of the *Act* requires the CAO to discharge his duties under the *Act*. By imposing the communication restrictions, he failed to perform his duty under section 207 to advise and inform Council on the operation and affairs of the municipality. They also rely on section 153(d), which imposes a duty on Councillors "to obtain information about the operation or administration of the municipality from the chief administrative officer or a person designated by the chief administrative officer".

[95] The Respondents submit the communication restriction is not an exercise of authority that is of sufficiently public character to be subject to judicial review. It is simply a private communication setting out the manner of interaction between the Applicant Councillors and county administration. If Council is unhappy with the CAO, it may terminate his appointment. Further, Mr Hoggan is not a proper respondent on the judicial review application. The relief ought to have been sought against the County.

[96] In my view, the CAO's email is an exercise of state authority but it is not of a sufficiently public character to be subject to judicial review.

[97] Some factors favour judicial review. The CAO's communication restrictions and his functions have a broader public nature. Although many of the CAO's functions are operational, they are "woven into the network of government" and the CAO is "exercising a power as part of

that network" (***Air Canada*** at para 60). The *Act* requires Councillors "to obtain information about the operation or administration of the municipality from the chief administrative officer or a person designated by the chief administrative officer" (s 153(d)). This is an individual duty on each and every Councillor, because section 153 distinguishes between individual Councillors and Council as a whole as apparent from subsections (a), (c), (e), (e.1), and (f). Section 153.1 of the *Act* contemplates that such information gathering can occur outside a formal Council meeting or on other occasions where not all Councillors are present, and requires that such information must be provided to all other councillors as soon as practicable.

[98] Consequently, the CAO's decisions concerning the manner in which specific Councillors can obtain information can affect a Councillor's ability to efficiently perform their duties under the *Act* as an elected governor of a municipality. Differential treatment of Councillors has potential negative implications for the good governance of the municipality as a whole and for the residents of the electoral division who would expect that the candidate they elected is treated fairly and reasonably by the County so that he or she may best perform their elected functions.

[99] I also must consider the suitability of public law remedies and the CAO's relationship to other parts of government. These factors strongly suggest it is neither necessary nor desirable for the Court to generally assume the direct role of supervising the CAO in the present matter.

[100] It is not necessary for the Court to directly supervise the CAO because Council has a significant oversight role. The *Act* defines the functions of a chief administrative officer (s 207) and excludes a council from exercising those functions (s 201(2)). Nevertheless, a council must ensure the chief administrative officer appropriately performs their duties and functions under the *Act* (s 205(5); see also ss 205.1 and 206).

[101] In Rocky View's case, this oversight authority is reinforced by Art 4.1 of its Chief Administrative Officer (CAO) Bylaw, C-7350-2014 (provided by counsel at the hearing): the CAO is accountable to the majority of Council for the "exercise of all powers, duties and functions".

[102] If Council determines the CAO is not performing appropriately, it can correct the matter. If Council fails in its duty to ensure the CAO is acting appropriately, that can be reviewed on the appropriately deferential standard by the Court.

[103] It is not desirable for the Court to directly supervise the CAO in this case -- sometimes deteriorated relationships are better addressed by flexible measures, such as facilitating mediation or discussion among those in conflict or providing governance training to some or all concerned. If additional correction on the part of the CAO is required, Council could provide formal direction to the CAO under section 205(5) of the *Act*, or suspend or terminate the CAO under section 206 of the *Act*. In contrast, the Court does not have a remedial process which is sufficiently expeditious, cost effective, and flexible to deal with the numerous differences and disputes which might frequently arise during interactions between individual councillors and the CAO.

[104] Consequently, the CAO's decision in this case does not have a sufficiently public character for judicial review to be available. It may be that exceptional cases will arise, where the dispute with the CAO has attained a serious public dimension requiring direct judicial review. That is not this case. The Applicants can still obtain information from the CAO, there is no cogent evidence that the residents of their electoral divisions have been materially prejudiced by

the restrictions, and the Applicants had an available adequate remedy in asking Council to review the CAO's communication sanctions and applying to the Court to review Council's decision on the appropriately deferential standard.

[105] I decline to deal with the argument that the CAO exceeded his jurisdiction. It is up to Council to decide in the first instance whether the CAO is acting appropriately in respect of the communication restrictions.

VIII Whether Council breached the Applicants' rights to procedural fairness

(a) Introduction

[106] The Applicants submit that procedural fairness required the Investigator to be free of reasonable apprehension of bias, the proceeding was tainted by such apprehension, and the outcome must be set aside.

[107] The Respondents submit that the time in which the Applicants can object to the Investigator's appointment has expired, and that there is no basis for the bias allegations on the facts of this case.

[108] I note at the outset that the Applicants do not contend that the Investigator was actually biased in the sense of predisposition to a particular result or a closed mind. Rather, the question posed by the Applicants is whether there is a reasonable apprehension of bias.

[109] The Court of Appeal recently summarized the test for reasonable apprehension of bias in ***Fitzpatrick v College of Physical Therapists of Alberta***, 2019 ABCA 254, leave to appeal to SCC refused 38736 (Nov 28, 2019):

> [38] The test for determining whether there was a reasonable apprehension of bias is whether an informed person, reviewing the matter realistically and practically, would have a reasonable apprehension of bias. The ground must be serious and substantial. There must be a real likelihood or probability of reasonable apprehension of bias not just a mere suspicion: *Committee for Justice and Liberty v Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394-395, 68 DLR (3d) 716 and *College of Physicians and Surgeons of Albert v Ali*, 2017 ABCA 442 at para 22, 67 Alta LR (6th) 16. The burden of proof is on the party alleging the bias.

(b) Whether bias issues can be considered in this review

[110] The Respondents submit that the Applicants' challenge of the Investigator's decision refusing to recuse itself is a collateral attack on Council's May 14, 2019 resolution to appoint the Investigator and cannot be permitted to circumvent time limits in which a challenge to the resolution can be commenced. They rely on section 537 of the *Act* (a 60-day limitation in which to challenge Council's resolution) and R 3.15(2) of the *Alberta Rules of Court* (a six-month limitation in which to commence judicial review of a decision to appoint the Investigator). Both time limits expired before the Applicants commenced this judicial review proceeding.

[111] I agree the Applicants cannot challenge the appointment resolution, because they are out of time to do so. However, they do not only assert that the Investigator's appointment was void. They also submit that the Investigator's participation in the specific complaints against the Applicants violated their procedural fairness rights.

[112] The collateral attack doctrine involves parties bound by a decision who seek to avoid the effect of the decision by challenging it in the wrong forum (***Garland v Consumers' Gas Co***, 2004 SCC 25 at paras 72-73). The question is whether the Applicants have made their objections in the wrong forum.

[113] The answer is no. The Applicants' insistence on procedural fairness in the complaint proceedings is not a collateral attack on the appointment resolution.

[114] The Code contemplates that the Council appoints an investigator in advance of any specific complaint. The Code (s 62) requires Council to appoint one or more investigators. The investigator's role is to receive complaints (s 57(b)), decide whether to investigate or summarily dismiss a complaint (s 57(f)), investigate (s 2(e), 57(g)), and report to the Council and the Councillor against whom the complaint was made (ss 2(e), 57(i)).

[115] In this case, the law firm was appointed as investigator under the Code after the complaints against the Applicants were made, but the appointment was nevertheless a general appointment and not aimed specifically at those complaints (para 14 above).

[116] Review of the general appointing resolution cannot be the forum in which to challenge the law firm's independence or impartiality.

[117] The appointment of the law firm applies to all complaints under the Code, both present and future. Yet, it is impossible to decide in advance whether the law firm is suitable to act in any and all complaints. Deciding the existence of reasonable apprehension of bias "is an inquiry that remains highly fact-specific" and cannot be addressed through peremptory rules (***Wewaykum Indian Band v Canada***, 2003 SCC 45, [2003] 2 SCR 259 at para 77). You cannot decide whether the law firm is suitable, unless you know the facts underlying the complaint. The law firm might need to recuse itself on a specific future complaint depending on the circumstances.

[118] Barring the right of the target of an investigation to object to the independence and impartiality of an investigator even before a complaint is made leads to an absurdity, and illustrates the dangers of finding that a review of the initial appointment decision is the proper forum in which to make such challenges.

[119] Rather, it is up to the Court to decide, on the ***Baker*** factors, whether the subject of any specific complaint proceeding was treated fairly, including whether an investigator or decision maker was precluded from participating by reason of bias issues. As mentioned, bias is a very fact specific inquiry. In fairness, councillors ought to have the normal opportunities to make their request for recusal directly to the investigator and, ultimately, to advance their bias objections after proper procedural opportunities, including knowing the factual context of the specific complaint made against them.

[120] Therefore, judicial review of specific complaint proceedings is the proper forum to determine procedural fairness complaints, rather than challenging the general appointment resolution under the Code.

[121] Should it be otherwise in the Applicants' complaint proceedings because the complaints pre-existed the appointment resolution? It might be that Council decided the law firm was suitable to investigate the existing complaints against the Applicants or that the Applicants waived any objection they might otherwise have had to the participation of the law firm.

[122] Resolving these questions raises important factual issues. Did the Councillors (other than the complainants) know of the complaints against the Applicants when they passed the appointment resolution, and was Council asked to address their minds to the suitability of the law firm to participate in these existing complaints? Did the Applicants have sufficient knowledge of the complaints when the resolution was presented to Council on May 14, 2019 to permit them to object to the law firm's participation?

[123] The Applicants did not directly address this issue in their affidavits. The Respondents did not cross-examine them about their knowledge of the complaints on May 14, 2019. The complaints were addressed to the Reeve or Deputy Reeve and do not indicate they were copied to other Councillors or the Applicants. Records produced in cross-examination undertakings indicate the complaints were sent to the Applicants by the Investigator on May 16, 2019.

[124] Consequently, there is no evidence to raise any suggestion that the Applicants or other Councillors (apart from the complainants) knew of the particulars of the complaints, when they resolved on May 14, 2019 to appoint the law firm as investigator generally under the Code. In the absence of some basis to think the decision-makers could have reasonably considered apprehension of bias issues on May 14, 2019, I refuse to conclude that the appointment resolution was the proper forum to consider the Applicants' bias objections in the pending complaint proceedings or to find that those of the Applicants who voted in favour of the resolution waived bias objections.

[125] Consequently, the bias objections are not barred by the expiry of the time limitations.

(c) Whether reasonable apprehension of bias

(i) Introduction

[126] The Applicants submit that the law firm has or had a professional relationship with the County, and reports or is responsible in its relationship to the CAO. Further, they submit the CAO had a similar professional relationship with the same law firm when he was chief administrative officer for another Alberta County immediately prior to taking the CAO position with Rocky View County.

[127] They submit these facts give rise to a reasonable apprehension of bias, because a reasonable and right thinking person, applying themselves to the question and obtaining thereon the required information, would conclude that it is more likely than not that the Investigator, whether consciously or unconsciously, would not decide fairly.

[128] The Applicants further submit that the Investigator ought to have made better disclosure of its professional relationship with the Respondents, and the other county while the Respondent Hoggan acted as its CAO. They submit that failing to do so violated their procedural fairness rights.

[129] The Applicants rely on ***Carbone v McMahon***, 2017 ABCA 384 and ***Quattro Farms Ltd v County of Forty Mile No 8***, 2019 ABQB 135 at para 65-66. In ***Carbone***, a case management judge decided that he was not required to recuse by reason of a previous professional relationship between him and one of the lawyers appearing on the case under management. The Court of Appeal found that the judge's disclosure of their past relationship with the lawyer was inadequate and set aside the decision. It observed:

> [12] .... Unfortunately the details of that retainer are obscure. The brief overview provided does not permit a meaningful appellate review. Accordingly, the appeal must be allowed. We respectfully request that the Chief Justice immediately assign another judge to case manage the matter.

In ***Quattro Farms***, Dilts J applied ***Carbone*** to the proceedings of an administrative tribunal.

[130] The Applicants further submitted during oral submissions that Council's reliance on the Investigator's report gave rise to reasonable apprehension of bias, and that Council was responsible to decide on the question of reasonable apprehension of bias but either failed to do so or did so on an inadequate record.

[131] The Respondents submit that the Investigator's merely having acted for the two counties would not give rise to a reasonable apprehension of bias. Further, the Investigator was not the decision-maker in this case.

(ii) Whether reasonable apprehension of bias standard applies

[132] Does the reasonable apprehension of bias standard apply to the Investigator? The Investigator assumed that it did, but concluded it did not have a reasonable apprehension of bias. The Applicants submit that this standard applies. The Respondent pointed out in oral submissions, that the Investigator is not the decision-maker (and at another point, that Council is not discharging a disciplinary function but rather a legislative function or a management function) but did not appear to directly challenge the application of this standard. Neither side cited authority as to which standard applies for the purpose of assessing the bias issue.

[133] I have decided to apply the reasonable apprehension of bias standard to the Investigator and the complaint proceedings of Council generally.

[134] In doing so, I am mindful of case law (not cited by counsel) that the level of procedural fairness owed at an investigative stage of an administrative proceeding is lower than that owed at an adjudicative stage. It is often said that an investigator need only keep an open mind (***MK Engineering Inc v Association of Professional Engineers and Geoscientists of Alberta Appeal Board***, 2017 ABCA 17 at paras 7-8 and authorities cited therein; ***Fitzpatrick*** at para 43) or act with neutrality (***Slattery v Canada (Human Rights Commission)***, [1994] 2 FCR 574 at 598-599, affd [1996] FCJ No 385 (CA)).

[135] Nevertheless, the mere use of the label "investigator" in the Code is not determinative of the law firm's actual function. If the Investigator functions akin to a subordinate decision-maker who played a significant role in making decisions, the reasonable apprehension of bias standard may well apply.

[136] This standard was applied to a subordinate officer whose recommendations were subject to review in ***Baker***, where the Supreme Court of Canada observed:

> 45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of

> bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

[137] This reflects the basic proposition that the scope of the duty of fairness and the rigour with which it is applied will vary with the nature of the tribunal in question (***R v S (RD)***, [1997] 3 SCR 484 at paras 32 and 92). It is well established that the duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific (***Vavilov*** at para 77). Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances including the well-known ***Baker*** factors (described in para 39 above).

[138] The question is whether the procedure was fair in the circumstances. I turn to the ***Baker*** factors.

<u>The nature of the decision being made</u>

[139] The Code's purpose is to establish standards for ethical conduct relating to the roles and obligations of elected officials and a procedure for the investigation and enforcement of those standards (Code, s 3). Council has power to sanction Councillors for breach of the Code (Code, ss 57(k), 61).

[140] The Respondents submitted during oral argument that Council is performing a legislative or managerial function. It relied on the ***Gendre*** case.

[141] In ***Gendre***, a municipal council removed a mayor's authority to chair council meetings, sign bylaws, and call special meetings; removed the mayor from boards and committees; and restricted the mayor from representing the municipality or speaking for it.

[142] In responding to the mayor's submission that council acted to punish him, K Nixon J observed at paras 38-39 that council had power to determine the governance structure that best met its needs including removing the mayor's authorities and positions, and continued:

> [41] Council was engaged in a legislative, not an adjudicative, function. It was not punishing the Mayor for his conduct. The issue here is not whether the Mayor's actions were deserving of punishment; it is whether Council acted in bad faith, that is, for the ulterior purpose of silencing him, as opposed to the legitimate purpose of good governance.

[143] ***Gendre*** was decided on matters arising before the statutory regime for codes of conduct (s 146.1 of the *Act*) came into force. Many governance regimes utilize discipline or enforcement proceedings for breach of ethical or conduct standards as a means to maintain good governance and public confidence in the institution. In my opinion, the regime under section 146.1 of the *Act* is such a means. ***Gendre*** is distinguishable because it was decided under different provisions of the *Act*.

[144] Not every decision of a municipal council is necessarily legislative (***Catalyst*** at para 31). In the present case, Council is adjudicating misconduct complaints: interpreting the Code, finding facts, applying the Code to those facts, deciding whether the Applicants breached the Code, and determining a suitable sanction. The complaint proceedings before Council were adjudicative and (as provided in s 3 of the Code) to enforce ethical standards.

[145] There is leeway in the application of the bias tests to recognize that some pre-disposition is inherent in the role of an elected councillor when performing a legislative function. Perhaps the same could be said of key participants in decision making in such matters. However, even in legislative matters where Councillors allegedly have a personal or pecuniary interest, a more exacting common law standard may apply to bias issues (***Old St Boniface Residents Assn Inc v Winnipeg (City)***, [1990] 3 SCR 1170 at 1197-1198; see also ***Hutterian Brethren Church of Starland v Starland (Municipal District)***, 1993 ABCA 76 at paras 36-37). A higher standard applies to the enforcement proceedings under the Code.

[146] The law firm decided its mandate included providing an opinion, and proceeded to apply its legal expertise. Council appears to have accepted its interpretation of the mandate. It is reasonable to conclude that Council, having chosen to appoint the law firm as Investigator and receiving the opinion of a municipal lawyer, would be heavily influenced in its decision making by such legal advice.

[147] Similar to ***Baker***, this role was central and important in the decision making process. Given the adjudicative nature of the function and the Investigator's central role within it, a higher standard of fairness is suggested.

<u>The nature of the statutory scheme</u>

[148] The statutory scheme requires each municipality to enact (by bylaw) a code of conduct. Rocky View's Code, in its recitals, recognizes the importance of transparent and accountable government. It recites that the public is entitled to expect the highest standards of conduct from the elected officials of Rocky View County, and that the establishment of a Code for Councillors is consistent with the principles of transparent and accountable government. As mentioned, the Code further contains a statement of its purpose (para 139 above) which provides for formal investigation and enforcement of alleged breaches of prescribed conduct standards.

[149] These features indicate that the key purposes under the *Act* for a code of conduct, and of Rocky View's Code, include maintaining public confidence in municipal councils and ensuring effective decision making through establishing and enforcing ethical conduct standards.

[150] The importance of transparent, accountable and trusted municipal governments would be supported by the appointment of an investigator who is, and is reasonably perceived by informed persons to be, independent and unbiased.

<u>The importance of the decision to the persons who are the subject of the complaints</u>

[151] Individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm, as recently reiterated in ***Vavilov*** at para 133. Examples of particularly harsh consequences for the affected individual include decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[152] A finding of a serious ethical breach or the imposition of a serious sanction threatens the Applicants' dignity (as public figures in local politics and the impact on their reputations) and livelihood (the compensation sanction).

Choices of procedure by the tribunal

[153] The Code guarantees procedural fairness but does not exhaustively define it (Code, s 57(k)). A respondent to a complaint is entitled to an opportunity to respond (s 57(k)) and to be represented by a lawyer in the proceedings (s 57(l)). The Code contains limitations on who may act as an investigator (s 63), although I do not regard those as exhaustive in terms of who is considered free of reasonable apprehension of bias.

[154] These procedural choices contemplate a formal procedure.

[155] Further, Council chose to appoint a legally qualified, third party investigator. I infer that they chose a lawyer to act in the investigative role to provide not merely expertise, but also the assurances of objectivity that are associated with an Alberta lawyer's professional ethics.

[156] An Alberta lawyer generally does not act (absent informed consent) in circumstances giving rise to a conflict of interest. Generally speaking, such conflicts may arise where there is a substantial risk that a lawyer's loyalty or objectivity would be materially and adversely affected by the lawyer's own interests or duties to others; in other words, where there is a substantial risk of impaired representation (***Canadian National Railway Co v McKercher LLP***, 2013 SCC 39 at paras 8, 25, 26, 32, 40).

[157] These point to the intention to implement a formal procedure befitting the gravity of the consequences to one's reputation and livelihood arising from a finding of breach of ethical obligations.

Reasonable expectations of the Applicants

[158] As mentioned, there is no evidence that the Applicants had disclosure of the particulars of the complaints when the law firm was appointed to the role of investigator of any and all complaints under the Code. They would reasonably expect that a central advisor to Council in the proceedings would not have a significant professional relationship with any individual materially involved in the subject matter of the complaints.

Conclusion

[159] In the context I have described, the Applicants were entitled to an investigator who was free from actual and reasonable apprehension of bias.

(iii) Whether reasonable apprehension of bias or failure to adequately consider reasonable apprehension of bias

[160] "... Deciding bias and apprehension requires a 'careful and thorough examination of the proceeding': ***Miglin v Miglin***, 2003 SCC 26 (CanLII) ..." (***Beaverford v Thorhild (County No 7)***, 2013 ABCA 6 at para 28). The categories of apprehension of bias are not closed. Some of the more common arise from particular professional or business relationships with one of the parties, partisanship or friendship (Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters Canada Limited, 2017, loose-leaf), Art 11:3100).

[161] The alleged conduct underlying the complaints related to or arose from the Applicants' concerns over the Reeve's manner of hiring the CAO, and in one instance, Councillor Kissel's

use of insulting language in a voicemail she left with the Deputy Reeve to describe unspecified behaviour of the CAO.

[162] A chief administrative officer is the most senior staff member of the County and exercises many operational and advisory functions (*Act*, s 207). The CAO's duties are further particularized in the CAO Bylaw (para 101 above). The CAO is the "principal administration link" between the general operations of the County and Council (art 3.4). The CAO's powers and functions include "Instruct legal counsel on any matters involving any potential legal and administrative proceedings involving the Municipality, and without limiting the foregoing: provide legal services to Council, Committees and departments of the Municipality" (art 3.4.15).

[163] In responding to the Applicants' objection, the Investigator observed that municipal lawyers often advise both council and county administration. That role might be acceptable where there is an alignment of interests. But in the present case, the extent of the professional relationship between the law firm and the County/CAO would need to be carefully considered.

[164] The Applicants demonstrated a pressing concern that an informed person would have a reasonable apprehension of bias. The law firm appears to have had a recent, and perhaps ongoing, professional relationship with Rocky View County. The CAO was entitled to control selection of legal counsel under the CAO Bylaw. Much of the context in which the complaints arose involved hiring the CAO. One complaint included that the Applicants' conduct insinuated that Council hired a "weak candidate" as chief administrative officer. Another was that Councillor Kissel insulted the CAO.

[165] The record does not make clear the extent of the professional relationship between the law firm and the County/CAO. It does not address whether the CAO selected the law firm, whether the County was a current or former client, whether the law firm had open matters for the County, or if it did not have any open matters, how much time had passed since the last matter.

[166] Given the lack of clarity, I decline to find reasonable apprehension of bias. That does not end the matter. Under the principle in ***Carbone***, the Investigator's process was flawed for failing to adequately address the apprehension of bias allegations. There was insufficient disclosure in the Investigator's letter to make a "careful and thorough examination of the proceeding" and ascertain whether an informed person, reviewing the matter realistically and practically, would have a reasonable apprehension of bias.

[167] If Council adopted the Investigator's Report, it made the same error. That is so, either on the correctness or a deferential standard. The evidence was insufficient to make the required careful and thorough examination of the proceeding and decide whether the Investigator had a reasonable apprehension of bias.

[168] I infer on the balance of probabilities that Council adopted the Investigator's report on the issues whether the Investigator had a reasonable apprehension of bias and whether the Applicants breached the Code. Two considerations lead me to this inference.

[169] First, the critical evidence of the most serious misconduct alleged against the Applicants (the Notice of Motion and letter to the editor) was not included in the Certified Record or appended to the Investigator's report. The Respondents suggested I should infer these documents were before Council. That would be speculation, and contrary to the County's certification of its record (para 7 above). It is more probable that Councillors simply relied on the only record

placed before them in the in camera meeting – the Investigator's report. Their reliance would necessarily be very heavy.

[170] Second, Council's findings mirror the Investigators' conclusions, except that Council decided to characterize Councillor Kissel's reference to the CAO's behaviour as more serious than the Investigator had concluded (derogatory rather than insulting). For example, the Investigator did not provide an opinion whether the Applicants did or did not breach section 30 of the Code, although that was alleged in the first complaint. Similarly, Council did not resolve that the Applicants breached section 30. This is a clear indication that Council largely adopted the report.

[171] I therefore conclude that the Applicants were not fairly treated because the consideration of the reasonable apprehension of bias objection was inadequate under the ***Carbone*** principle. This is not a finding that any participant, Councillor or law firm, intended any impropriety.

[172] I will deal with the June 10, 2019 letter from the Applicants' counsel to the Investigator that alleged a second ground for reasonable apprehension of bias. The Applicants became aware of a newspaper report published in March 2019 that the CAO had retained the same law firm to act for another Alberta county before the CAO joined Rocky View County, and the same lawyer at the firm conducted both matters.

[173] This letter and any response thereto are absent from the Certified Record. I infer that Council were not informed that there were additional aspects of the law firm's relationship with the CAO that the Applicants asked to be addressed, and that these were not addressed notwithstanding the Applicants had expressed their concerns to the Investigator.

[174] However, I decline to find that the Applicants proved, with admissible evidence, a pressing concern that there was reasonable apprehension of bias arising from the circumstances alleged in the June 10, 2019 letter. The newspaper article on which the Applicants relied in this judicial review is hearsay and inadmissible for proof that there possibly was a professional relationship. The Applicants did not take steps in the judicial review to obtain evidence that would sufficiently raise an issue that would have had to be addressed by the Investigator and Council. For example, they did not apply for records production or to examine Mr Hoggan or the Investigator concerning the existence of the alleged retainer. The allegation remains unsubstantiated at this point. These reasons do not preclude the Applicants from pursuing this aspect of the relationship if the proceedings continue.

(d) Effect of reasonable apprehension of bias

[175] Generally, where reasonable apprehension of bias exists, the Court should not speculate whether the outcome would have been different had the apprehension not occurred (***Cardinal v Director of Kent Institution***, [1985] 2 SCR 643 at p 661; ***Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)***, [1992] 1 SCR 623 at 645; ***Quattro*** at para 67). This is subject to the exception where the outcome would have been inevitable (***DL Pollock Professional Corporation v Blicharz***, 2018 ABCA 252 at para 14; ***AB v Alberta (Persons with Developmental Disabilities Central Region)***, 2018 ABQB 181 at para 152). The same principles ought to apply where reasonable apprehension of bias issues were not adequately considered.

[176] The Respondents did not suggest that the resolutions should not be set aside if the Applicants succeeded on their bias allegations, or that the outcome would have been inevitable.

[177] I cannot say that in this case, the outcome of the report was inevitable. The Investigator made choices of the matters on which to report – finding uncontroverted facts from documents, declining to make a recommendation on the issue whether the Applicants did or did not act for personal benefit (the complaint of breach of s 30 of the Code), applying legal interpretations to the meaning of the Code, expressing opinions whether the Applicants breached some provisions of the Code, and declining to offer complete commentary on sanction matters.

[178] The Applicants' arguments concerning the interpretation of the Code were not frivolous. The County voluntarily released the legal opinion, which the Applicants passed to the Applicants' third party lawyer, to each Councillor. It was arguable that this impliedly waived privilege to the extent any individual Councillor genuinely sought legal advice to discharge their duties. The Investigator could have provided Council with that interpretation alternative. It would then be Council's responsibility to decide on the interpretation and, if relevant, to decide the purpose for which the Applicants disclosed the opinion to the Applicants' third party lawyer.

[179] Moreover, the Investigator could have offered additional assistance on sanctions, such as relevant factors for consideration.

[180] Accordingly, the decisions are set aside.

[181] Notwithstanding this conclusion, I will deal with the remaining issues. If I had concluded the Applicants were fairly treated, I would have nevertheless set aside some of the sanctions but rejected other allegations including that other members of Council acted in bad faith.

IX Bad faith

[182] The Applicants submit Council acted in bad faith because its purpose was to silence the Applicants, retaliate against them for performing their duties or retroactively validate inappropriate conduct of the CAO in imposing the communication restrictions on the Applicants.

[183] For the purposes of assessing these allegations, I apply the standard in ***Municipal Parking Corporation v Toronto (City)***, 2009 CanLII 65385 (ONSC):

> [24] The standard to be met in establishing bad faith is high and necessitates evidence to demonstrate the City acted other than in the public interest. Bad faith by a municipality connotes a lack of candor, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest...

See also: ***Edmonton Flying Club v Edmonton (City)***, 2013 ABQB 421 at para 92; ***Gendre*** at para 43.

[184] The Applicants must prove bad faith on the balance of probabilities. A presumption of good faith applies to Council (***Edmonton Flying Club*** at para 91), until the Applicants displace it with evidence which is "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (see ***F.H. v McDougall***, 2008 SCC 53 at paras 40, 46).

[185] The evidence shows that there is a history of disagreement between the Applicants and the other Councillors. The Applicants are often in the minority, and feel that the majority is not giving adequate consideration to their positions.

[186] The incidents relied on to show bad faith include the decision of Council to remove their Notice of Motion from Council's April 30, 2019 meeting agenda and the allegation that Council selectively applied the Code to them in comparison to Councillor Gautreau.

[187] Council has discretion to remove a Notice of Motion from the agenda. The purported reason was that the manner of hiring executives in future would be addressed in another process. There is nothing to indicate in the record that removing the motion did not genuinely reflect a desire to pursue governance issues in a different way or at a different time.

[188] Similarly, the record does not indicate that the Code was selectively applied. The Applicants allege that the Reeve and Deputy Reeve "cooked up" the complaints. That language appears in their affidavits (as improper opinion or advocacy) and their written brief. It is not warranted. The record discloses a valid basis under section 57 of the Code to make complaints against the Applicants.

[189] The complainants were not obliged to include Councillor Gautreau in their complaints. They may have seen his conduct in a different light for honest reasons. Councillor Gautreau claimed he was initially involved with the Applicants in their efforts, but parted company with them and did not authorize disclosure of the County's legal opinion to the Applicants' third party lawyer (para 81 above).

[190] Similarly, the fact Councillor Gautreau's sanction was much less severe does not show bad faith. It only shows that different evidence in a different proceeding can lead to a different outcome. That is not unusual.

[191] The Applicants also rely on the severity of the sanctions. I address the rationality and severity of the sanctions below, where I have found some of the sanctions to be irrational or grossly disproportionate to the circumstances. These errors may suggest Council over-reacted or misconstrued the purpose of sanctions, but are not cogent evidence of the bad faith purposes asserted by the Applicants.

[192] The evidence as a whole does not prove bad faith.

X Whether the sanctions are beyond Council's jurisdiction

[193] The Applicants contend the sanctions prevent the Applicants from fulfilling their legislated duties of a councillor, and are beyond Council's jurisdiction. They rely on section 6 of *The Code of Conduct for Elected Officials Regulation*, which provides that any sanctions imposed under a code of conduct must not prevent a councillor from fulfilling the legislated duties of a councillor.

[194] They submit the communication sanction is unauthorized, because <u>any</u> limitation on communication is unlawful under the *Act* and communication limitations are not mentioned as a sanction in *The Code of Conduct for Elected Officials Regulation*. Further, the communication sanction prevents them from performing their duty under section 153(d) of the *Act* to obtain information from the CAO or a person designated by the CAO. They submit the representation and travel sanctions and the removal sanctions prevent them from performing their duties under section 153(b) of the *Act*, "to participate generally in developing and evaluating the policies and programs of the municipality".

[195] In support of these claims, they point to:

(a) Their removal from the Governance and Priorities Committee. This is a key committee on which all Councillors sit, and which reviews legislative priorities and governance related bylaws, hears presentations from the public, and monitors progress of the County's initiatives.

(b) Their restricted access to information from the CAO. They can only request information at a Council meeting rather than communicating quickly and informally with the CAO.

(c) Their prohibition on attending the 2019 Rural Municipalities of Alberta Fall Convention. Officials from rural municipalities can liaise and share information at this function, which would forward the municipality's duty under section 3(d) of the *Act* to work collaboratively with neighbouring municipalities.

[196] The Respondents submit the sanctions do not prevent the Applicants from performing their legislated duties.

(a) The communication sanction merely regulates how they obtain the information which they may seek as Councillors.

(b) Committee service is discretionary (*Act*, s 146). Travel is discretionary and the Applicants have not identified any provision in a statute, regulation or bylaw that includes representation and travel sanction in their legislated duties. I take the Respondents as saying that these discretionary functions are not necessarily part of the Applicants' legislated duties unless Council in its discretion assigns them the functions.

[197] Questions of jurisdiction are narrowly confined and seldom arise (***Koebisch*** at para 49 and authorities cited therein). It is doubtful that the alleged breach of section 6 of the *Regulation* is an error of jurisdiction as opposed to an error in failing to apply the law in the course of deciding sanctions. After ***Vavilov***, that distinction is often unimportant because the review standard is often the same in both scenarios, and is not correctness (see ***Vavilov*** at para 67). In the context of judicial review constrained by section 539 of the *Act*, it may be that jurisdictional questions are subject to a lower degree of deference on the spectrum of reasonableness than patent unreasonableness or aberrance. However, the Applicants acknowledged in Part IV of their written brief that after ***Vavilov***, the standard of review on jurisdictional issues is, in Council's case, a highly deferential standard of reasonableness or in the alternative, patent unreasonableness. I therefore apply that higher level of deference to this issue.

[198] The presumption of regularity applies (***Lethbridge (City of) v Daisley***, 2000 ABCA 79 at paras 22-23; ***Bergman*** at para 49). The record does not indicate that Council was unaware of or refused to consider the limitation of section 6 on sanctions. It is not an obscure limitation. Section 61(n) of the Code concerning sanction explicitly incorporates it.

[199] Council obviously concluded that section 6 does not preclude all communication restrictions, contrary to the Applicants' interpretation of section 6. Council's outcome on this point is reasonable.

[200] The scope of the sanction provisions of the *Regulation* should be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (***Vavilov*** at para 117).

[201] Section 5 of *Code of Conduct for Elected Officials Regulation* provides that "If a councillor has failed to adhere to the code of conduct, sanctions may be imposed including ...". That language is followed by a list of sanctions.

[202] The Applicants are correct that communication restrictions are not listed in section 5 of the *Regulation*. But the list does not purport to be exclusive. Sanctions on communication may be justified to fulfill the object and purpose of a code of conduct required by the *Act*. For example, if a hypothetical councillor of a municipality had committed ethical breaches related to their interaction with County administration (eg, by disclosing confidential information provided by staff or harassing staff), some degree of communication restriction may be reasonable and appropriate to protect the municipality's interests in confidentiality or maintaining a work environment free of harassment.

[203] Consequently, I cannot conclude that Council's decision to impose some restrictions is unreasonable by any standard. Instead, the question whether a communication sanction violates section 6 of the *Regulation* is a matter of degree. Some limitations may be inconvenient or burdensome, while others might reach the point where a councillor cannot perform their functions in a meaningful way. Only the latter would violate section 6.

[204] The Applicants bear the burden, by showing that Council overlooked or ignored the limitations of section 6 of the *Regulation* (or s 61(n) of the Code) or that the sanction is not justified (or perhaps not justifiable, where the review is necessarily focused on the outcome rather than the reasoning process as contemplated at para 138 of ***Vavilov***) in the context of these limitations.

[205] I generally agree with the Respondents that the substance of the restriction is to regulate the time and manner of communication by the Applicants as opposed to the right to obtain information. Council consists of elected officials who routinely deal with various inquiries from constituents of the County, participate in decision making, and deal with County administration. They would understand a Councillors' information needs and how communication restrictions would impact the Applicants. I presume they were aware of the requirements of section 6 of the *Regulation*. The Applicants have not demonstrated that the limitation Council imposed would effectively prevent the Applicants from discharging their responsibilities, given the deferential review standard and the context of the Certified Record.

[206] In coming to this conclusion, I note that the Applicants have not suggested that this sanction interferes with their right under s 153.1 of the *Act* to receive timely disclosure of information provided by administration to other Councillors, and I do not read it as doing so.

[207] Similarly, I do not see a basis to question whether the removal and representation and travel sanctions prevent the Applicants from fulfilling their functions. I am prepared to assume the Applicants are correct that important County business occurs at the committees, and that interaction with other Alberta municipalities is beneficial in achieving the municipality's duty to collaborate under s 3(d) of the *Act*. However, I agree with the Respondents that assignment of individuals to these functions is discretionary. I would not equate the obligation to "participate generally" under s 153 of the *Act* with participating equally.

[208] Again, elected councillors would understand the impacts of these restrictions on their colleagues sitting on council. I cannot say, given the deferential standard and the context of the Certified Record that the impacts would be so great as to interfere with the Applicants' duty to "participate generally" in the governance of the municipality.

[209] The compensation sanction reflects a reduction in the Applicants' duties. Unless there is a basis to set aside the removal sanction, there is no basis to question the compensation sanction on the deferential standard.

XI Whether the decisions are substantively invalid.

[210] The Applicants submit that the sanctions are overwhelming and aberrant; grossly disproportionate to the Applicants' conduct; and bear no rational relationship to the nature of the Applicants' conduct. They further submit the sanctions were designed as retaliation for the Applicants' efforts to bring better governance to Council, and the Court should be "wary of allowing municipal codes to be weaponized in such a fashion."

[211] The Respondents submit that the Applicants seek to have the Court substitute its discretion for Council's discretion, and that Council is in the best position to assess the Applicants' conduct and determine what action to take. The Respondents pointed out that the Applicants did not apologize, and escalated matters by having their legal counsel send the letter of May 27, 2019 (which the Respondents characterize as "combative") to the Investigator.

[212] The Respondents further emphasized, in oral submissions concerning the substantive validity of the sanctions, several acts of alleged misconduct by some or all of the Applicants described at para 85 above. They also pointed out that the Applicants repeated the contents of the County's legal opinion in their materials filed on the public record in the present judicial review proceeding.

[213] I turn to the validity of Council's findings of misconduct. At the outset, and leaving aside the reasonable apprehension of bias issue, there would be no basis on the deferential standard to question Council's determinations that the Applicants breached the Code.

[214] The investigation report expresses a rational path of reasoning why disclosure of the legal opinion was not permitted; why the letter to the editor breached the Code's requirements of courtesy and respect; and, why Counsellor Kissel's use of the term "infantile" toward the CAO breached the Code. Council largely adopted the report, and its decision to characterize Councillor Kissel's insult as derogatory of the CAO is not unreasonable on the highly deferential standard.

[215] The Applicants submit that the sanctions imposed for the breaches are unreasonable when assessed on the highly deferential standard of review which applies.

[216] The review standard requires a court to defer to the decision-maker. ***Vavilov*** holds that "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (at para 83). A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (at para 85). The reasonableness standard requires that a reviewing court defer to such a decision. If reasons are not required and the record as a whole does not uncover a rationale for the decision, the Court must still examine the decision in light of the relevant constraints on the decision

maker in order to determine whether the decision is reasonable. But the analysis will then focus on the outcome rather than on the decision-maker's reasoning process (***Vavilov*** at paras 137-138).

[217] Two types of fundamental flaws make a decision unreasonable:

> ... The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.
>
> [***Vavilov*** at para 101]

[218] There is ample precedent for the types of factors which disciplinary and regulatory tribunals consider when imposing sanctions in conduct enforcement proceedings. No purpose is served in outlining these, apart from the fundamentals mentioned later in these reasons. I am not permitted to develop my own yardstick, then measure Council's decision against it (***Vavilov*** at para 83).

[219] Instead, ***Vavilov*** identified a number of elements that may constrain a decision-maker in a particular case. The Court stated:

> It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.
>
> [***Vavilov*** at para 106]

[220] I deal with these elements as follows.

<u>The governing scheme</u>

[221] The decision must ultimately comply with the rationale and purview of the statutory scheme under which it is adopted (***Vavilov*** at para 108). Likewise, "a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion" (*ibid*).

[222] The scheme provides for enforcement of ethical standards (Code, s 3) through investigation and adjudication of misconduct complaints. The scheme is directed toward maintaining public confidence in the decision making of municipal governments.

[223] Section 6 of *The Code of Conduct for Elected Officials Regulation* constrains the decision. The Code further constrains decisions, in that they must be "reasonable and appropriate" (Code, s 61(n)).

The parties' submissions

[224] The Applicants' submissions of May 27, 2019 were included with the Investigator's report and provided to Council. These submissions were not explicitly directed at sanction, but made clear that the Applicants' position was that their conduct and the consequences were not at the serious end of the spectrum.

[225] There was no formal prosecutor making the other side of the case during the meetings. As mentioned below, I was not provided a record of any verbal discussions or debates during either in camera or public meetings.

Potential impact on the Applicants

[226] ***Vavilov*** deals with this factor as giving rise to a requirement to explain or provide reasons.

[227] As mentioned, the Applicants did not contend that Council must give reasons. Nevertheless, the Certified Record provides some indication of Council's approach that is helpful in conducting the review.

[228] First, Council largely adopted the Investigator's report with respect to the breaches (para 168 above) and recorded the specific sections of the Code which were breached in the public minutes. The report and minutes inform me of the nature of the breaches and the path of reasoning underlying those conclusions.

[229] Second, the public minutes indicate that Council decided to impose a specific sanction for each specific breach. I infer that Council imposed the sanction they considered reasonable and appropriate to address each specific breach. These minutes allow me to analyse whether the sanction is rationally related to the type of misconduct that Council found.

[230] Gaps remain. The record does not shed light on Council's reasoning concerning the duration of the sanctions or the factors that were considered in deciding duration.

Relevant statutory and common law

[231] Disciplinary schemes are subject to well-known fundamental requirements. First, regulatory sanctions are not intended to be punitive, though specific and general deterrence are usually legitimate considerations. Second, proportionality between wrongdoing (nature of conduct and impact) and penalty is usually required.

[232] In ***Vavilov*** the Court observed (para 107):

> ... For example, a reasonable penalty for professional misconduct in a given case must be justified both with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

A well-known Alberta precedent requiring proportionality in a traditional professional regulation context is ***Litchfield v College of Physicians and Surgeons of Alberta***, 2008 ABCA 164 at para 22.

[233] The present case is not a traditional professional misconduct case, but in my opinion similar considerations apply to the enforcement of ethical standards prescribed under the Code. Imposing crushing or unfit sanctions can undermine public confidence in the institution or its processes and thereby defeat the purpose of the enforcement system, whether in a traditional professional regulatory context or in a wider variety of settings. Proportionality is commonly required of sanctions imposed in a conduct enforcement system. Although counsel did not cite examples, there are many. See, for example: ***Walton v Alberta (Securities Commission)***, 2014 ABCA 273 at para 154 (capital markets regulation); ***Stetler v The Ontario Flue-Cured Tobacco Growers' Marketing Board***, 2009 ONCA 234 at paras 37, 39 (agricultural market regulation).

[234] The proportionality requirement is inherent in the Code's requirement (s 61(n)) that sanctions be reasonable and appropriate. In my opinion, the requirement of proportionality is an additional constraint on Council's decision making when imposing sanctions under the Code.

The remaining elements

[235] The other elements mentioned at para 106 in ***Vavilov*** are not well addressed in the record. Council's hearing took place during the in camera meeting. Neither side provided me any record of the meeting, thus I do not have evidence respecting: any oral evidence or oral submissions provided by the Applicants during the in camera meeting, debates from which I might deduce the reasons for the sanctions, or the past practices and decisions of Council.

[236] These gaps should not insulate a decision-maker from judicial review. There are cases where the record does not shed light on the decision. "This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape" (***Vavilov*** at para 138).

[237] I turn to the analysis of the sanctions in light of these fundamental elements and the highly deferential standard of review. I have divided this analysis into two parts: the type of sanction and the duration of sanction.

[238] With one exception, there is a rational path to the types of sanction imposed on each Applicant for each breach.

[239] First, Council imposed a removal sanction in response to the breach of confidentiality. In some circumstances, committees may receive confidential information. Deliberations are often confidential. Individuals who cannot be trusted to abide by confidentiality requirements may not be suitable for committee work and may require a sanction to deter future breaches of confidence before returning to committee duty. There may be a need for general deterrence of others. A removal sanction is a type of rational remedy for breaching confidentiality.

[240] Second, Council imposed a compensation sanction with the removal sanction. That type of sanction reflects reduced committee work and is therefore rational.

[241] Third, Council imposed a representation and travel sanction in response to the letter to the editor. It would not be advisable to permit individuals who publicly demonstrated profound disrespect of their Council colleagues to represent the County and its governors to other municipalities or to expend funds to permit such persons to interact with them. Again, there is a rational connection between the misconduct and the type of sanction.

[242] Fourth, Council imposed a staff communication sanction on Councillor Kissel for using derogatory language regarding a County employee. It is rational to impose such a sanction on individuals who are not communicating appropriately with or concerning staff.

[243] Fifth, I will deal with the exception which I mentioned. That exception is Council's imposing a staff communication sanction on the Applicants Wright and Hanson for participating in the letter to the editor.

[244] I accept that Council probably regarded the breach as a serious matter. However, there is no justifiable rational connection between the staff communication sanction and the Applicants Hanson and Wright having participated in a letter to the editor accusing their colleagues on Council (not staff) of misconduct for removing the Notice of Motion from a Council meeting agenda.

[245] I am mindful of the Respondents' observation that the Applicants involved a County staff member in drafting the Notice of Motion, thus disclosing the content of the privileged legal opinion to that staff member (para 37(c) of the Respondents' brief). If admissible (and I concluded earlier that it was inadmissible extrinsic evidence), might it lead to conclude the sanction is justifiable on the deferential standard? The complainants did not allege this matter as a breach in the complaint proceedings. Council did not find such a breach in its resolutions, or purport to impose this sanction for any act of disclosure of confidential information. Even if admissible, this cannot be a possible justification for this particular sanction.

[246] This sanction must be set aside. No decision-maker acting reasonably could justify imposing this staff communication sanction in response to an incident of disrespecting Council colleagues in the news media.

[247] In view of my conclusion, all the sanctions against each of Councillors Wright and Hanson for the letter to the editor must be vacated. The collective sanctions for that breach are not severable.

[248] I have also considered the duration of the sanctions.

The removal and compensation sanctions

[249] Council provided two types of duration – a fixed term and a discretionary term – on the removal and compensation sanctions which were imposed for disclosing the County's legal opinion to the Applicants' third party lawyer.

[250] The fixed term might not be an unreasonable outcome on the highly deferential standard. The Certified Record indicates that on December 12, 2018, the Applicants' third party lawyer contacted the office of the Minister of Municipal Affairs to seek statutory remedies against the County. On December 13, 2018 the County provided its legal opinion to all Councillors. The Applicants provided this opinion to the Applicants' third party lawyer shortly after. The record does not suggest that the third party lawyer would or intended to disclose the opinion to the Minister's office. The record does not suggest the third party lawyer would or intended to use it against the County. It may have been provided by the Applicants for the more benign purpose of taking a second opinion in order to discharge their governance responsibilities. Nevertheless, the majority of Council likely concluded that providing the County's legal advice to a lawyer having a retainer that included seeking remedies against the County would be contrary to the County's interests and a serious breach of confidence. Council likely concluded that a substantial degree of

specific or general deterrence was warranted, to protect the confidentiality of its information and the integrity of its governance processes.

[251] Consequently, a sanction was required. The duration of the sanction (within reason on the deferential standard) is for Council. I cannot conclude the lengthy fixed term was outside the range of options on the highly deferential standard.

[252] However, I must also address the discretionary term, which permitted Council to change the term of the sanctions and even extend them throughout the Applicants' elected terms as councillors. No standards or conditions were attached to the exercise of this discretion. The Applicants could not know when this discretion would be exercised, or what the liability to an additional term of sanction required of them. The discretionary term is both arbitrary and indefinite.

[253] Moreover, there is no apparent rational basis for this measure. Council's resolutions made clear that providing a privileged opinion to another lawyer without permission was not permitted. The facts do not rationally disclose a pressing concern for recurrence of the misconduct or a concern that the Applicants would be ungovernable in terms of refusing to abide by confidentiality requirements.

[254] The Respondents sought in the judicial review to characterize the Applicants as ungovernable and dishonest, based on the matters described at paras 85 and 212. Much of the evidence the Respondents submitted in support of their argument was derived from extrinsic evidence rather than the Certified Record. There is nothing to indicate that the instances which are not evidenced in the Certified Record were before Council when it deliberated on sanctions. Indeed, most of the activity took place after Council imposed the sanctions.

[255] I also considered the Respondents' submission that the Applicants did not apologize before the sanctions were imposed. It may be that Council were concerned the Applicants had not apologized or shown remorse for their misconduct. An apology can be mitigating, but a fair system of justice does not regard a failure to apologize as aggravating. Leaving aside frivolous defences (which didn't exist in this case), the Applicants were entitled to defend themselves. Forcing them to apologize on pain of a greater sanction would place them in an impossible position.

[256] The most serious sanction is not necessarily reserved for the most serious misconduct, but given the facts in the Certified Record, the discretionary terms of these sanctions are grossly disproportionate to the misconduct and thus overwhelming. No reasonable body would have imposed such harsh sanctions for disclosing a lawfully obtained legal opinion to another lawyer. The fixed term was intertwined with the discretionary term. It is not severable. The entire removal and compensation sanctions must be vacated.

[257] Staff communication sanction

[258] The staff communication sanction was permanent, ie throughout the entire elected term of the Applicants.

[259] This sanction was imposed on the Applicant Kissel for using derogatory language regarding the CAO by leaving a single voicemail with the Deputy Reeve. Ms Kissel promised to apologize to the CAO for this incident. The fact that she did so, is evidenced in Council's decision, shortly after sanctioning Councillor Kissel, to rescind its apology sanction for the breach of section 24.

[260] Given the lack of any information in the Certified Record indicating any material harm to the CAO or that the misconduct was liable to be repeated, I am unable to discern any coherent rationale for a permanent staff communication sanction. Rather, it is grossly disproportionate to the Councillor Kissel's misconduct in leaving the voice mail, and thus overwhelming. No reasonable body would have imposed such a harsh sanction. This sanction must be set aside.

[261] Council imposed the permanent staff communication sanction on Councillors Wright and Hanson in addition to the representation and travel sanction, for the letter to the editor. Not only was this sanction irrational because it had no connection with the misconduct, it is also grossly disproportionate to the misconduct particularly when considered together with the representation and travel sanction. The piling on of these sanctions for a single letter to the editor constituting incivility and discourtesy indicates that Council went beyond imposing measured sanctions to restore public confidence in the institution and to deter the Applicants and others from committing similar misconduct in future.

Representation and travel sanction

[262] In Councillor Kissel's case, the fixed duration of the representation and travel sanction is relatively lengthy but I would not have interfered with it on that ground alone given the degree of deference owed Council.

[263] As mentioned, I would have set aside the representation and travel sanction against the other Applicants because it was not severable from the staff communication sanction (paras 247 and 261 above). Unlike the other Applicants' cases, Council did not impose the staff communication sanction for Councillor Kissel's participating in the letter to the editor. Consequently, I would not have set aside the representation and travel sanction against Councillor Kissel had I refused relief on the grounds of reasonable apprehension of bias.

[264] I dealt with the question of whether Council acted in bad faith in imposing the sanctions (Part IX, above). I will not repeat those observations, other than to say that my conclusion the sanctions are overwhelming and ones that no reasonable decision-maker could impose does not persuade me that they were designed to retaliate against the Applicants or politically silence them.

XII Conclusion

[265] The application to review the CAO's communication restrictions is struck out.

[266] The portions of the affidavits identified in paras 64 and 66 above are struck out.

[267] The decisions of Council are set aside for failure to adequately address the reasonable apprehension of bias allegation. Neither party sought additional directions in the event I set aside the decisions. If the parties require additional directions, they must request them within 30 days.

[268] If I had not set aside on the apprehension of bias issue, I would have set aside the sanctions other than the representation and travel sanction and the related apology sanction against Councillor Kissel for participating in the letter to the editor.

[269] The parties may address costs, on a timetable they agree to or as directed on application.

Heard on the 22nd day of January, 2020; supplemental written submissions February 3, 2020 and February 12, 2020; and supplemental oral hearing June 9th, 2020.

Dated at the City of Calgary, Alberta this 15th day of July, 2020.

J.T. Eamon
J.C.Q.B.A.

Appearances:

Michael Niven QC and Michael Custer
for the Applicants

Janice Agrios, QC
for the Respondents

Appendix "A" – Extracts from the Rocky View Code of Conduct

BYLAW C-7768-2018

A Bylaw of Rocky View County, in the Province of Alberta, to establish a code of conduct for Councillors.

WHEREAS, pursuant to section 146.1(1) of the Municipal Government Act, Council must, by bylaw, establish a Code of Conduct governing the conduct of Councillors;

AND WHEREAS, pursuant to section 153 of the Municipal Government Act, Councillors have a duty to adhere to the Code of Conduct established by Council;

AND WHEREAS the public is entitled to expect the highest standards of conduct from the elected officials of Rocky View County;

AND WHEREAS the establishment of a Code of Conduct for Councillors is consistent with the principles of transparent and accountable government;

AND WHEREAS a Code of Conduct ensures that Councillors share a common understanding of acceptable conduct extending beyond the legislative provisions governing the conduct of Councillors;

NOW THEREFORE the Council of Rocky View County, in the Province of Alberta, duly assembled, enacts as follows:

…

2 In this Bylaw, words have the same meaning as those set out in the *Municipal Government Act*, except as follows:

(a) "**Act**" means the *Municipal Government Act*, RSA 2000, c M-26, and associated regulations, as amended;

(b) "**Administration**" means the administrative and operational arm of Rocky View County, comprised of the various departments and business units and including all employees who operate under the leadership and supervision of the County Manager;

(c) "**County Manager**" means the Chief Administrative Officer of Rocky View County, or their delegate;

…

(e) "**Investigator**" means the person or persons appointed by Council to investigate and report on complaints made pursuant to this Bylaw.

Purpose and Application

3 The purpose of this Bylaw is to establish standards for the ethical conduct of Rocky View County Councillors relating to their roles and obligations as elected officials, as well as a procedure for the investigation and enforcement of those standards.

…

Respectful Interactions with Councillors, Staff, the Public, and Others

21 Councillors shall act in a manner that demonstrates fairness, respect for individual differences and opinions, and an intention to work together for the common good and in furtherance of the public interest.

22 Councillors shall treat one another, the employees of Rocky View County, and members of the public with courtesy, dignity, and respect and without abuse, bullying, or intimidation.

…

24 No Councillor shall shout at or use indecent, abusive, or insulting words or expressions toward another Councillor, any employee of Rocky View County, or any member of the public.

…

28 Councillors must keep in confidence matters discussed in private at a Council or Council Committee meeting until the matter is discussed at a meeting held in public.

29 In the course of their duties, Councillors may also become privy to confidential information received outside of an in-camera meeting. Councillors must not:

(a) disclose or release by any means to any member of the public, including the media, any confidential information acquired by virtue of their office, unless the disclosure is required by law or authorized by Council; or

(b) access or attempt to gain access to confidential information in the custody or control of Rocky View County unless it is necessary for the performance of the Councillor's duties and is not otherwise prohibited by Council, and only then if the information is acquired through appropriate channels in accordance with applicable Council bylaws and policies.

30 No Councillor shall use confidential information for personal benefit or for the benefit of any other individual organization.

31 Confidential information includes information in the possession of, or received in confidence by, Rocky View County that is prohibited from being disclosed pursuant to legislation, court order, or by contract, or is required to refuse to disclose under FOIP or any other legislation, or any other information that pertains to the business of Rocky View County, and is generally considered to be of a confidential nature, including but not limited to information concerning:

(a) the security of the property of Rocky View County;

(b) a proposed or pending acquisition or disposition of land or other property;

(c) a tender that has or will be issued but has not been awarded;

(d) contract negotiations;

(e) employment and labour relations;

(f) draft documents and legal instruments, including reports, policies, bylaws, and resolutions, that have not been the subject matter of deliberation in a meeting open to the public;

(g) law enforcement matters;

(h) litigation or potential litigation, including matters before administrative tribunals; and

(i) advice that is subject to solicitor-client privilege.

…

Informal Complaint Process

55 Any person who has identified or witnessed conduct by a Councillor that the person reasonably believes, in good faith, is in contravention of this Bylaw may address the prohibited conduct by:

(a) advising the Councillor that the conduct violates this Bylaw and encouraging the Member to stop; and

(b) requesting the Reeve to assist in informal discussion of the alleged complaint with the Councillor in an attempt to resolve the issue. In the event that the Reeve is the subject of, or is implicated in a complaint, the person may request the assistance of the Deputy Reeve.

56 Individuals are encouraged to pursue this informal complaint procedure as the first means of remedying conduct that they believe violates this Bylaw. However, an individual is not required to complete this informal complaint procedure prior to pursuing the formal complaint procedure outlined below.

Formal Complaint Process

57 Any person who has identified or witnessed conduct by a Councillor that they reasonably believe, in good faith, is in contravention of this Bylaw may file a formal complaint in accordance with the following procedure:

(a) All complaints shall be made in writing and shall be dated and signed by an identifiable individual;

(b) All complaints shall be addressed to the Investigator;

(c) The complaint must set out reasonable and probable grounds for the allegation that the Councillor has contravened this Bylaw, including a detailed description of the facts, as they are known, giving rise to the allegation;

(d) The Investigator may request additional information from the complainant in order to determine whether a contravention of this Bylaw has occurred;

(e) If the facts, as reported, include the name of one or more Councillors who are alleged to be responsible for the breach of this Bylaw, the Councillor or Councillors concerned shall receive a copy of the complaint submitted to the Investigator;

(f) Upon receipt of a complaint under this Bylaw, the Investigator shall review the complaint and decide whether to proceed with an investigation into the complaint or not. If the Investigator is of the opinion that

(i) a complaint is frivolous or vexatious,

(ii) a complaint is not made in good faith,

(iii) there are no grounds or insufficient grounds for conducting an investigation, or

(iv) the complaint is not within the authority of the Investigator to investigate, or, if in the opinion of the Investigator, the complaint should be referred to a different body for investigation,

the Investigator may choose not to investigate or, if already commenced, may terminate any investigation, or may dispose of the complaint in a summary manner. In that event, the complainant and Council shall be notified of the Investigator's decision;

(g) If the Investigator decides to investigate the complaint, the Investigator is authorized to take such steps as they may consider appropriate to complete the investigation, which may include seeking legal advice or accessing records held by Rocky View County;

(h) All proceedings of the Investigator regarding the investigation shall be confidential and shall be protected in accordance with the *FOIP Act*;

(i) The Investigator shall, upon conclusion of the investigation, provide Council and the Councillor who is the subject of the complaint with the results of the investigation;

(j) The results of an investigation by the Investigator shall remain confidential and shall be considered by Council in an *in camera* session. The results of an investigation shall be made available to the public only after Council considers the matter and in accordance with the provisions of the *FOIP Act*;

(k) A Councillor who is the subject of an investigation shall be afforded procedural fairness, including an opportunity to respond to the allegations before Council deliberates and makes any decision or imposes any sanctions; and

(l) A Councillor who is the subject of an investigation is entitled to be represented by legal counsel at the Councillor's sole expense. Where the action results in no sanction for the Councillor, Council may consider reimbursing the Councillor for their legal expenses.

Compliance, Enforcement, and Sanctions

58 Councillors shall uphold the letter, the spirit, and the intent of this Bylaw.

59 Councillors are expected to cooperate in every way possible in securing compliance with the application and enforcement of this Bylaw.

60 No Councillor shall:

(a) undertake any act of reprisal or threaten reprisal against a complainant or any other person for providing relevant information to Council, the Investigator, or to any other person;

(b) obstruct Council, the Investigator, or any other person in carrying out the objectives or requirements of this Bylaw.

61 Sanctions may be imposed on a Councillor, by a resolution of Council passed at a meeting held in public at which there is a quorum present, upon a finding that a

Councillor has breached this Bylaw. The sanctions imposed on a Councillor may include any one, or combination of, the following:

(a) a letter of reprimand addressed to the Councillor;

(b) requesting that the Councillor issue a letter of apology;

(c) requesting that the Councillor attend training;

(d) requesting that the Councillor return or reimburse the value of property, equipment, gifts, benefits, or other items, or reimburse the value of services rendered;

(e) restrictions on the travel and representation of the Councillor on behalf of the Municipality;

(f) restrictions on how documents are provided to the Councillor (e.g. no electronic copies of documents or only watermarked copies for tracking purposes);

(g) publication of a letter of reprimand or request for apology and the Councillor's response;

(h) suspension or removal of the appointment of a Councillor as the Chief Elected Official (Reeve) under section 150(2) of the Act;

(i) suspension or removal of the appointment of a Councillor as the Deputy Chief Elected Official (Deputy Reeve) or acting chief elected official under section 152 of the Act;

(j) suspension or removal of the Chief Elected Official's presiding duties under section 154 of the Act;

(k) suspension or removal from some or all Council Committees and bodies to which Council has the right to appoint members;

(l) suspension or removal as the Chair or Vice Chair of a Council Committee or body to which Council has the right to appoint members;

(m) reduction or suspension of remuneration as defined in section 275.1 of the Act corresponding to a reduction in duties, excluding allowances for attendance at Council meetings; or

(n) any other sanction that Council deems reasonable and appropriate in the circumstances provided that the sanction does not prevent a Councillor from fulfilling their legislated duties and that the sanction is not contrary to the Act.

Investigator

62 Council shall appoint a person or persons to act as the Investigator.

63 The following persons are not eligible to act as the Investigator:

(a) a Councillor of Rocky View County, or a family member, friend, or close associate of a Councillor of Rocky View County; or

(b) an employee of Rocky View County.

64 The records in the custody and control of the Investigator are considered property of Rocky View County and are subject to the *FOIP Act* and municipal information governance policies.

…