



John Mascarin
Direct: 416.865.7721
E-mail: jmascarin@airdberlis.com

INTEGRITY COMMISSIONER REPORT ON MCIA APPLICATIONS 2022-01 & 2022-02

THE CORPORATION OF THE CITY OF ST. CATHARINES

John Mascarin

Aird & Berlis LLP

May 31, 2022

**INTEGRITY COMMISSIONER REPORT ON
MCIA APPLICATIONS 2022-01 & 2022-02
FORMER COUNCILLOR MAT SISCOE**

SUMMARY

Two formal applications pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001* (“**MCIA Applications 2022-01** and **2022-02**”) were filed directly with our office in January 5 and 20, 2022 (collectively, the “**Applications**”).

The Applications allege that former Councillor Mat Siscoe (the “**Councillor**”), then a member of the Council of The Corporation of the City of Catharines (the “**City**”), contravened the *Municipal Conflict of Interest Act*¹ by failing to declare a pecuniary interest, participating in discussion and voting on a motion to recommend the Councillor’s appointment to fill a vacancy on the Council of the Regional Municipality of Niagara (“**Regional Council**”).

The Applications deal with the same matter as two complaints filed pursuant to the *Code of Conduct for Members of Council and Local Boards* (the “**Code**”), and which are dealt with in our companion report to this Report.

APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed Integrity Commissioner for the City pursuant to subsection 223.3(1) of the *Municipal Act, 2001*² on January 28, 2019 by By-law No. 2019-13. As the City’s Integrity Commissioner, we have jurisdiction to review complaints of alleged non-compliance with the MCIA made against members of Council.

The Applications were validly filed by “electors” as defined in section 1 of the MCIA and as required by subsection 223.4.1(2) of the *Municipal Act, 2001*. As such, we reviewed them in accordance with our authority as Integrity Commissioner pursuant to the *Municipal Act, 2001* and the Formal Complaint Protocol, being Appendix “B” to the Code.

This Report includes our decision regarding our inquiry into the Applications issued pursuant to subsection 223.4.1(17) of the *Municipal Act, 2001*.

Section 223.4.1 of the *Municipal Act, 2001* provides that the Integrity Commissioner shall decide whether to apply to a judge under section 8 of the MCIA for a determination of whether a member has contravened the MCIA and, possibly, any penalties that should be imposed.

The *Municipal Act, 2001* provides that the Integrity Commissioner shall publish written reasons for the decision. It is our view that this requirement is met by the inclusion of this Report in the agenda materials for an open meeting of Council.

TIMING

¹ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 [“**MCIA**”].

² *Municipal Act, 2001*, S.O. 2001, c. 25.

The Applications were filed within the statutory six-week limitation period set out in subsection 223.4.1(4) of the *Municipal Act, 2001*. The Councillor's alleged contravention occurred at a meeting of Council held on December 13, 2021 (the "**Meeting**"). The Applications were filed on January 5, 2022 and January 20, 2022.

MCIA PROVISIONS AT ISSUE

The Applications allege that the Councillor contravened subsection 5(1) of the MCIA by his actions at the Meeting:

When present at meeting at which matter considered

5 (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,

- (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
- (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
- (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

REVIEW OF MATERIALS & INQUIRY

In order to undertake our inquiry into the Applications and make a determination on the allegations therein, we have undertaken the following steps:

- Review of the initial Applications, and all materials referred to therein;
- Review of the video of the open session of Council's Meeting on December 13, 2021;
- Review of relevant Council and Regional Council documents and materials;
- Email correspondence and a telephone conversation with the Councillor regarding the Applications, and timeline for response; and
- Review of the Councillor's response, dated March 4, 2022.

We have also reviewed, considered and had recourse to such applicable case law and secondary source material, including other integrity commissioner reports that we believe to be pertinent to the issues at hand.

A draft of this Report was provided to the Councillor and the Applicants on May 3, 2022 to allow them to review and comment on the factual accuracy of the Report. We received comments on our report from an Applicant, which have been considered and addressed herein as we deemed necessary before finalization of our Report.

BACKGROUND

The background to the Applications is identical to those matters dealt with in our companion report on Complaints 2021-07 and 2022-01, which is adopted herein, with appropriate modifications.

(a) Introduction

The Councillor is a former member of Council, having resigned from Council effective January 6, 2022. Prior to his resignation from Council, the Councillor was one of two representatives for Ward 4, St. Patrick's Ward, in the central-west portion of the City. The Councillor was first elected to Council in 2010 and was re-elected for the 2014-2018 and 2018-2022 terms of Council.

As will be set out in this Report, the Councillor is currently an appointed member of Regional Council representing St. Catharines, having been appointed by Regional Council on January 6, 2022.

In addition to his role as a member of Regional Council, the Councillor is also a full-time secondary school teacher.

(b) Multi-Tier Local Governance in Niagara

Local government in Niagara is characterized by two autonomous but closely-related levels of government. The City is a "local" or "lower-tier" municipality. Its Council is comprised of twelve (12) members, elected on a ward structure, and one (1) elected head of council (i.e., a mayor).

The Region is the corresponding "upper-tier" municipality, whose geographic area extends beyond that of the City. Regional Council is comprised of thirty-two (32) seats. Of those seats, twelve (12) seats are held *ex officio* by the heads of council of all lower-tier municipalities that comprise the Region, one (1) Regional Chair (i.e., the head of council), and nineteen (19) members of Regional Council.

Members of Regional Council are directly elected at-large by voters to represent the areas of the lower-tier municipalities that comprise the Region. For example, St. Catharines has been allocated six (6) seats on Regional Council. Those representatives are chosen by the electors of the City in an election process which is administered by the City. However, members of Regional Council do not hold a seat on the council of the lower-tier municipality which they represent.

(c) Background to December 13, 2021 Meeting

Former Regional Councillor Sandie Bellows was elected to Regional Council as a representative of St. Catharines in the municipal elections held in 2018. The former Regional Councillor passed away on October 11, 2022. Her passing automatically created a vacancy on Regional Council for the office of member of Regional Council for St. Catharines.³

³ The *Municipal Act, 2001* provides as follows in s. 259(1)(h):

Vacant seat

259(1) The office of a member of council of a municipality becomes vacant if the member,
(h) dies, whether before or after accepting office and making the prescribed declarations.

Pursuant to the *Municipal Act, 2001*, where a member's seat becomes vacant, the municipality is required to take certain steps to fill that vacancy. The council must first declare the member's seat to be vacant, and subsequently decide how the vacancy will be filled.⁴

The *Municipal Act, 2001* provides two options: the municipality may either directly appoint a person to council, or require a by-election to be held in accordance with the *Municipal Elections Act, 1996*.⁵

The municipality is required to act within 60 days of the declaration of vacancy to either fill the vacancy, or pass a by-law requiring the by-election be held.⁶

(i) Regional Council's Actions in Respect of the Vacancy

At its November 18, 2021 meeting, Regional Council passed the following resolution:

10.2.1 CL-C 82-2021

Declaration of Vacant Regional Council Seat

Moved by Councillor Sendzik

Seconded by Councillor Darte

That Correspondence Item CL-C 82-2021, being a memorandum from A.-M. Norio, Regional Clerk, dated November 18, 2021, respecting Declaration of Vacant Regional Council Seat, **BE RECEIVED** and the following recommendations **BE APPROVED**:

1. That, pursuant to Section 262(1) of the *Municipal Act, 2001*, the seat held by Sandie Bellows, Regional Councillor for the City of St. Catharines, **BE DECLARED** vacant; and
2. That Regional Council **REQUESTS** the City of St. Catharines advise of its preferred method of filling the vacancy on Regional Council by December 15, 2021.

Carried

Regional Council's resolution was passed in accordance with its Policy C2-001, which provides that in the event of a vacancy, the Region shall request that the lower-tier municipality advise of its recommended method of filling the vacancy, and that Regional Council approve the recommendation, subject to compliance with the *Municipal Act, 2001* and the *Municipal Elections Act, 1996*. Policy C2-001 is a discretionary policy which is not required to be adopted pursuant to any statute.

While Regional Council requested that the City advise of the preferred method for filling the vacancy, in no way did it abdicate or delegate its statutory decision-making authority to the City. The final decision rested with the Region.

⁴ *Municipal Act, 2001*, s. 262.

⁵ *Municipal Act, 2001*, s. 263(1).

⁶ *Municipal Act, 2001*, s. 263(5) 1.

(ii) City's Council Vacancy Policy

The City has its own discretionary policy (as opposed to a mandatory policy⁷) in respect of filling vacancies, being Policy LCS 2015-9 "Filling a Vacancy on Council" (the "**Policy**").

By way of background, the Policy arose from Council's filling of a vacancy in early 2014. In January 2014, Council established an *ad hoc* committee to develop a process for filling future vacancies. The committee studied the matter and made recommendations that would ultimately inform the Policy.

A report from the City Clerk on the then-draft Policy entitled "Process for Filling a Vacancy on Council," dated April 24, 2014, provided as follows:

The committee recognizes that this process does not bind future Councils' decisions, however, they felt that having a process in place responds to Council's request for one and it represents the discussions that this Council had with respect to filling vacancies on Council.

The Policy was approved by Council on May 12, 2014, and City staff were directed to implement this policy "as a Corporate Policy." During Council's deliberation, former Mayor McMullin stated that the Policy was "not intended to bind future Councils...it was only a guideline." The Policy was later amended in January 2015 to also apply to vacancies on Regional Council.

The Policy provides that if the vacancy occurs within the first three (3) years of the term of Council, the next placed finisher in the election "**may**" be appointed if they received 70% of the votes achieved by the sixth-place finisher on Regional Council. If the vacancy occurs within the last year of the term of Council, the next placed finisher "**shall**" be appointed if they received 70% of the votes achieved by the sixth-place finisher on Regional Council.

(iii) City Staff Report in Respect of the Vacancy

City staff prepared a report titled "Filling a Vacancy on Regional Council – Sandie Bellows," dated November 5, 2021 (the "**Vacancy Report**"), summarizing the options available to Council for filling the vacancy on Regional Council. City staff explained the situation, reviewed the relevant legislation, and set out the options for filling the vacancy in accordance with the Policy.

The Vacancy Report made two recommendations: (i) that Council recommend to Regional Council that the vacancy be filled by appointment, and (ii) that Council recommend that Regional Council appoint the individual who was the next-placed finisher for the office of Regional Councillor in the 2018 Municipal Election (the "**Candidate**"). The Vacancy Report recommended against initiating an at-large appointment process, stating as follows:

Although Council may, staff do not recommend Council appoint an eligible elector from the community. This process involves several steps and could potentially be a failed search, all the while the seat remains vacant and St. Catharines continues to have reduced representation at the Region, while the Region risks being in contravention of their legislated obligation to fill the seat within 60 days.

City Staff's recommendation was based on practical considerations and timing concerns.

⁷ *Municipal Act, 2001*, s. 270(1).

(d) The Meeting

Council considered the Vacancy Report at its meeting held on December 13, 2021.⁸

Council's consideration of this item began with a delegation from one member of the public, who suggested that Council ought to hold a by-election to fill the vacancy.

Following the delegation, several members of Council asked questions of the delegate, which suggested there was some dispute on the interpretation of the Policy due to an ambiguity.

Council considered several other matters at the Meeting before returning to this matter.

Council's consideration of the matter began with a motion to refer the matter to Regional Council requesting information on whether the vacancy needed to be filled. That motion to refer was lost:

Motion to refer to Niagara Region for information on whether the vacancy on Regional Council needs to be filled. If the vacancy does not need to be filled, that the item come back to City Council.

Yeas: Councillors Harris, Phillips, Siscoe, and Townsend

Nays: Councillors Dodge, Garcia, Kushner, Littleton, Miller, Porter, Sorrento, Williamson, and Mayor Sendzik

Motion to Refer Lost

Council then deliberated on the recommendation from City staff in the Vacancy Report. One particular topic of discussion was an ambiguity in the Policy as to whether or not Council was required to appoint the Candidate, based on the timing of when the vacancy occurred.

In addition, Council also discussed the merits of recommending the appointment of the Candidate, who had run in the municipal elections held in 2018 and who had not expressed their views and positions on more recent issues such as public health measures, regional transit, and affordable housing.

During deliberations, the Councillor suggested that if members of Council wished to make comments about an identifiable individual, that it would be more appropriate to consider the matter in closed session. Another member of Council moved a motion to convene in closed session to discuss the matter, specifically as it related to an identifiable individual.

Council met in closed session for approximately one hour, where it considered the matter of the vacancy as it related to information about an identifiable individual, as well as an unrelated litigation matter.

During the closed session, Council discussed matters relating to an identifiable individual. In addition, the Councillor indicated that he would be interested in being appointed to serve on Regional Council.

⁸ Video Recording of City Council Meeting, December 13, 2021:

<https://www.youtube.com/watch?v=hl4raAZL-uE>

Following closed session, Council dealt with one other matter before returning to the matter of the vacancy. Following further discussion, a friendly amendment was moved requesting that City staff work with equity-seeking groups to update the Policy.

City staff's recommendations were put to separate votes on each separate clause. Council first voted unanimously to recommend that Regional Council fill the vacancy by appointment.

Council then considered the second portion of the recommendation, being the recommended appointment of the Candidate. The motion was lost by a vote of six (6) to seven (7). The Councillor voted against the motion.

A member of Council then moved that Council recommend the appointment of the Councillor to Regional Council. The member spoke to the Councillor's experience with matters relating to the Region's jurisdiction (such as regional transit), stating their belief that the Councillor's appointment would be in the best interests of the City.

Members of Council subsequently discussed the proposed motion. Council then passed the following resolution to recommend the appointment of the Councillor to Regional Council:

That Council appoint Councillor Mathew Siscoe to fill the vacant seat of Regional Councillor for the City of St. Catharines; and

That upon the Region of Niagara accepting the City's recommendation that City staff reach out to the third-place candidate for the St. Patrick's Ward from the 2018 Municipal Election (Robin McPherson) to determine their interest in serving as the City Council representative for the St. Patrick's Ward for the remainder of this term of City Council.

Yeas: Councillors Porter, Miller, Harris, Kushner, Littleton, Phillips, Siscoe, Sorrento, Townsend, and Mayor Sendzik

Nays: Councillors Dodge, Garcia, and Williamson

Carried

At no time did the Councillor declare a pecuniary interest in the matter under section 5 of the MCIA. The Councillor participated in Council's consideration of the matter, and voted in favour of recommending his own appointment to Regional Council.

(e) Events Subsequent to the Meeting

On December 24, 2021, the Councillor submitted a letter of conditional resignation to the City Clerk, indicating that if appointed by Regional Council, that he would resign his seat on Council.

On January 6, 2022, Regional Council voted to accept the City's recommendation, and voted to appoint the Councillor to fill the vacant seat. The Councillor immediately swore the Oath of Office (as required by section 232 of the *Municipal Act, 2001*), and assumed his seat on Regional Council.

THE POSITION OF THE PARTIES

(i) Position of the Applicants

The Applicants allege that the Councillor contravened the MCIA by failing to declare a pecuniary interest, participating in discussion, and voting on the matter of his recommended appointment to Regional Council.

The Applicants allege that the Councillor had a direct pecuniary interest in the matter, given that the remuneration paid to a Regional Councillor is approximately \$14,000 more than the remuneration paid to a City Councillor.

The Applicants have also referred us to the exception in clause 4(g) of the MCIA, taking the position that this exception does not apply to excuse the Councillor's obligations. There were two different submissions on this exception.

The first submission is that this exception does not apply to the Councillor because he was not "eligible" to fill the vacancy on Regional Council. This submission relies on subsection 261(1) of the *Municipal Act, 2001*, which provides that no person may hold more than one office governed by the *Municipal Elections Act, 1996* at the same time. The submission is that the Councillor was ineligible for appointment to Regional Council because he was still a member of Council; if the Councillor wanted to be appointed to Regional Council, he should have first resigned from Council.

The second submission is more straightforward: the exception in clause 4(g) does not apply because Council is not "the council" referred to in provision which authorizes an appointment to fill a the vacancy. Rather, Regional Council is. This submission appears to concede the point that Council was not making a final decision to appoint the Councillor.

(ii) Position of the Councillor

The Councillor denies that he contravened the MCIA. The Councillor does not dispute the fact of his participation in discussion or voting on the matter of his recommended appointment to Regional Council. The Councillor has not made any submissions as to whether or not he had a pecuniary interest in the matter of his recommended appointment to Regional Council.

The thrust of the Councillor's submission places reliance on the "long-standing" interpretation of the exception in clause 4(g) of the MCIA, which allows members of Council to vote in favour of themselves for various position which may have an additional stipend or payment associated with them. The Councillor submits that when he voted, he expressly did so based on the "common understanding" of clause 4(g).

The Councillor submits that he was eligible to fill the vacancy on Regional Council because he conditionally resigned his position as member of the Council before being appointed by Regional Council to fill the vacancy.

The Councillor also advises that neither the City Solicitor nor Regional Solicitor took issue with his participation in the vote, and that, in his experience, it is common practice at Council and other municipal councils to allow members of council to vote in favour of themselves for a potential appointment.

Lastly, while the Councillor acknowledges that there is a pay difference between the two positions, the Councillor's own personal circumstances will require him to incur personal expenses in order to fully participate in proceedings of Regional Council. Meetings of Regional Council are ordinarily scheduled to take place during the work day. As such, the Councillor will be required to take unpaid leave from his full-time employment in order to attend meetings, which would result in a financial loss in his job as a teacher.

FINDINGS

We have carefully and fully considered the submissions of the parties and the evidentiary record from our investigation. For the reasons set out below, based on a preponderance of the evidence and on a balance of probabilities, we find that the Councillor has not contravened subsection 5(1) of the MCIA.

A. Pecuniary Interest

The central allegation in the Applications is that the Councillor had a pecuniary interest in the matter of his recommended appointment to Regional Council. In our review of the facts and the binding jurisprudence, we cannot conclude that the matter before Council entailed an immediate financial outcome for the Councillor.

1. Relevant Legal Principles

Despite its central importance to the statute, the MCIA does not define the term "pecuniary interest." It is well-accepted that a "pecuniary interest" is any financial interest related to or involving money.⁹

The jurisprudence has interpreted pecuniary interest to include a monetary benefit that will be received or could be received, either in cash or in an increase in the value of an asset. It can also entail the avoidance of a financial loss. The pertinent question is as follows:

Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor?¹⁰

A member's motive is irrelevant in determining whether there has been a contravention of the MCIA.¹¹

To have a conflict under the MCIA, there must be a pecuniary interest *at the time of the vote*.¹² The member of council must have an immediate, non-deviated or traceable financial or economic impact in the matter before council.¹³ There is no pecuniary interest where the outcome of the vote on a matter before council does not, in and of itself, entail an immediate financial outcome.¹⁴

⁹ *Tuchenhagen v. Mondoux* (2011), 88 M.P.L.R. (4th) 234, at para. 31 (Ont. Div. Ct.).

¹⁰ *Greene v. Borins* (1985), 28 M.P.L.R. 251, at para. 42 (Ont. Div. Ct.).

¹¹ *Moll v. Fisher* (1979), 8 M.P.L.R. 266, at p. 269 (Ont. Div. Ct.).

¹² *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 106, at para. 59 (Ont. S.C.J.).

¹³ *Cooper v. Wiancko* (2018), 73 M.P.L.R. (5th) 212, at para. 63 (Ont. S.C.J.).

¹⁴ See, for example, *Rivett v. Braid et al.* (2018), 73 M.P.L.R. (5th) 249 (Ont. S.C.J.).

Furthermore, where the council has no jurisdiction or control over whether the matter allegedly giving rise to a pecuniary interest will occur or materialize, there is no pecuniary interest in the matter being voted on.¹⁵

2. The Matter Before Council Did Not Give Rise to an Immediate Pecuniary Interest

Based on our consideration of the factual background and relevant legal principles, we cannot conclude on a balance of probabilities that the Councillor had an immediate pecuniary interest in the matter being voted on by Council.

(i) The “Matter” Being Considered by Council

Any analysis of whether a member has a pecuniary interest must begin with an identification of precisely what the “matter” is. In these circumstances, it is undisputed that the “matter” was a vote by Council in relation to the Vacancy Report. In particular, the aspect that is alleged to give rise to the pecuniary interest was the identification of the Councillor as the recommended appointee to Regional Council. We find that this is the only aspect of Council’s consideration which could plausibly have given rise to a pecuniary interest. The language of the resolution is as follows:

That Council appoint Councillor Mathew Siscoe to fill the vacant seat of Regional Councillor for the City of St. Catharines...

The language of this resolution suggests that Council itself was making an appointment. That is not correct. Legally and factually, the only way to understand Council’s vote was as a non-binding recommendation to the Region, and nothing more.

(ii) The Nature of the City’s Vote on the Matter

When Council voted in favour of the Councillor’s appointment to Regional Council, it was making a *recommendation*, not a *binding decision*. Regional Council was still required to take further steps to fill the vacancy. In addition, Regional Council still had authority not to accept the recommendation, and to make a decision contrary to the preference of Council.

It bears repeating that the vacancy to be filled was a seat on Regional Council, ordinarily filled by an election at-large. This position was not a “dual-role” (as is common in other municipalities) where the member had a seat on both the local council (i.e. City Council) and the upper-tier council (i.e. Regional Council). Statutorily, the final decision as to how the vacancy would be filled, and if by appointment, the individual to be appointed, rested solely with Regional Council. Council had no binding authority to make this decision for or on behalf of the Region.

Regional Council, by resolution on November 18, 2021, “requested” Council to advise as to the preferred method for filling the vacancy. In no way did Regional Council sub-delegate to the City its statutory authority to fill the vacancy. Where a municipal council requests another entity to express its views on a matter, that request does not automatically result in the sub-delegation or fettering of that council’s discretion; the municipal council ultimately retains the authority to exercise its discretion.¹⁶

¹⁵ *Yorke et al v. Harris* (2020) 11 M.P.L.R. (6th) 273, at para. 44 (Ont. S.C.J.).

¹⁶ See, for example, *Guzar v. Puslinch (Town)* (2019), 87 M.P.L.R. (5th) 220 at paras. 47-54 (Ont. Div. Ct.).

The Region did have its own vacancy policy, similar to the City's, which provided a process for filling a vacancy on Regional Council. Similar to Council's treatment of the Policy however, the Region could have chosen not to follow its own policy, which in our view cannot be construed as fettering its statutory discretion.¹⁷ This is evidenced by Regional Council's decision on January 6, 2022 to "accept" the recommendation of the City, which was a result of split 23-to-6 vote. If the Region's policy fettered Regional Council's statutory discretion (which it did not), this vote would not have been necessary.

We appreciate that the intent behind both the City's and the Region's policies is ostensibly to "take the politics out of" a decision to fill a vacancy. Inherent in all representative democracies are certain decisions that cannot be de-politicized. Such is the nature of municipal government.

In light of the above, Council's vote on the recommendation to appoint the Councillor to Regional Council did not entail an immediate financial outcome for the Councillor. Jurisdiction and control over the ultimate decision to appoint the Councillor resided with another entity (i.e., Regional Council), not the City. Such matters cannot be said to give rise to a pecuniary interest.¹⁸

In conclusion, we find that the Councillor did not have a pecuniary interest in the matter before Council, and, as such, did not contravene subsection 5(1) of the MCIA.

B. Application of the Exception in Clause 4(g) of the MCIA

Despite our conclusion that the Councillor did not have a pecuniary interest in the matter, we have also considered whether any exceptions could apply. In our view, even if the Councillor did have a pecuniary interest (which we have concluded he did not), it appears that the exception in clause 4(g) of the MCIA could apply, should the question be considered by a judge.

The MCIA recognizes a number of exceptions that serve to make a member's direct, indirect, or deemed pecuniary interests not subject to the requirements of section 5 of the statute. Eleven exceptions are listed in section 4 of the MCIA. While some are considered to be "self-explanatory,"¹⁹ they must be closely scrutinized and considered in order to determine their application. In addition, their interpretation can be subject to debate.

The exception in clause 4(g) of the MCIA provides as follows:

Where ss. 5 and 5.2 do not apply

4 Sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have,

...

¹⁷ We have reviewed the Publicly Released Legal Opinion, dated January 3, 2022, provided to the Region advising on how Regional Council should proceed with the matter. The opinion observes, on the one hand, that the City and the Region are not required by the *Municipal Act, 2001* to develop policies for filling vacancies, and that a local municipality is not required to follow such a policy, while on the other hand, suggests that the Region did not have any independent discretion to fill the vacancy because of its policy. We respectfully disagree with this legal interpretation of the effect of such policies.

¹⁸ *Yorke et al v. Harris, supra* note 15, at para. 44.

¹⁹ M. Rick O'Connor and David White, *Ontario's Municipal Conflict of Interest Act: A Handbook*, (Union, Ontario: Municipal World Inc., 2019), p. 33.

- (g) by reason of the member being eligible for election or appointment to fill a vacancy, office or position in the council or local board when the council or local board is empowered or required by any general or special Act to fill such vacancy, office or position;

Unlike many other exceptions in the MCIA, clause 4(g) has not received judicial consideration.²⁰

The “common sense” purpose of this exception is to allow a member of council to discuss and vote on their potential appointment to fill a vacancy or position. There are several circumstances in which a council will have to select one of its own members to serve on various municipal boards, commissions, agencies or committees. For example, the council of an upper-tier municipality is required to appoint one of its members as the head of council.²¹ In addition, many municipal committees, boards, or municipal services corporations have a certain number of positions set aside for members of council, such representatives being selected by municipal council.

Although these positions entail the exercise of public duties, they may come with some financial benefits, such as regular remuneration or a stipend. The possibility that a member-appointee may receive such a benefit would, in theory, place them in a position of conflict. This would not only be the case of one member of council, but with all members eligible to be selected to fill the role. This exception recognizes the legitimacy of deliberating and voting on which member of council will be selected to serve additional duties for the municipality.

As a threshold question, in order for the exception to apply, the member of council must be “eligible for...appointment.” In our view, the Councillor was eligible for appointment to fill a vacancy on Regional Council. Essentially, the only eligibility requirements are that the person be an “elector”, and that the person not otherwise be disqualified from holding the office.²² There is no reason to suggest the Councillor was otherwise ineligible for the appointment.

We do not accept the Applicants’ submission that the Councillor was *not* eligible to fill the vacancy on account of subsection 261(1) of the *Municipal Act, 2001*. That provision prevents a person from holding more than one municipal office “at the same time.” As mentioned above, the Councillor was not in a position where he was holding both local and regional office “at the same time.” The Councillor did not hold a seat on Regional Council until he took the oath of office for Regional Council.²³ At the time he did, the Councillor had already submitted his conditional resignation from Council. He was not required to first resign from Council in order to be eligible.

Next, we recognize that the express language of the exception in clause 4(g) speaks of filling “a vacancy, office of position in **the** council...”, using the definite article “**the** council” rather than the indefinite article “**a** council”.²⁴ This would suggest the exception applies to a decision by “**the** council” of which the person is a member and for which there is a vacancy.

²⁰ In our research, we have not found a single judicial decision or report by a municipal integrity commissioner directly considering the interpretation or application of s. 4(g) of the MCIA.

²¹ *Municipal Act, 2001*, s. 233.

²² See *Municipal Act, 2001*, s. 257; see also *Municipal Elections Act, 1996*, S.O. 1996, c. 32 Sched., s. 17.

²³ *Municipal Act, 2001*, s. 232.

²⁴ See, in contrast, the language of s. 4(h) of the MCIA, which uses the indefinite article: “...by reason only of the member being a member of a board, commission, or other body as an appointee of **a** council or local board.”

Despite this, we suggest that this clause, not having been judicially considered, could bear a reasonable interpretation which extends to the consideration of filling a vacancy on another council.

The language of the MCIA cannot be interpreted in a vacuum. In *Orangeville (Town) v. Dufferin (County)*, the Court of Appeal noted that it must be recognized that the MCIA is part of a broader legislative scheme which must also be considered in interpreting the statute.²⁵ In that case, the Court of Appeal was faced with a question of whether a member of a local council had a conflict of interest in matters dealing with the upper-tier municipality by virtue of their *ex-officio* position on the upper-tier council.

Notwithstanding the language of the provisions dealing with indirect pecuniary interests,²⁶ the Court of Appeal held that the MCIA should be read harmoniously and together with the provisions of the *Municipal Act, 2001*, the statutes creating the relevant municipal corporations, and in a manner consistent with the two-tier structure (i.e., upper- and lower-tier municipalities) of municipal government.²⁷

We suggest that this reasoning could apply to a court's consideration of clause 4(g) of the MCIA. The legislative framework contemplates circumstances in which a local council will consider and vote on sending one of its members to the upper-tier council. We note, by way of example and comparison, the power in the *Municipal Act, 2001* authorizing a council to appoint a temporary replacement member to an upper-tier council:

Temporary vacancy

267 (1) If a person who is a member of the councils of a local municipality and its upper-tier municipality is unable to act as a member of those councils for a period exceeding one month, the local council may appoint one of its members as an alternate member of the upper-tier council to act in place of the member until the member is able to resume acting as a member of those councils.

A member of the local council selected to fill the temporary vacancy could conceivably have a pecuniary interest in their appointment. Despite this, clause 4(g) would relieve that member from their general obligations under section 5 of the MCIA and enable that member to discuss and vote for their own appointment.

We have already found that the ultimate decision to appoint the Councillor rested with Regional Council, not the Council. However, in our view, it would not be consistent with the scheme of the *Municipal Act, 2001* and two-tier local government structure in the Region of Niagara that this exception would only apply to a temporary appointment, and not to a permanent appointment of a member to another council.

In conclusion, it is our view that the exception in clause 4(g) of the MCIA might well apply to the present circumstances, should the matter be considered by a judge.

²⁵ *Orangeville (Town) v. Dufferin (County)* (2010), 68 M.P.L.R. (4th) 25, at para. 23 (Ont. C.A.).

²⁶ MCIA, s. 2(a)(iii).

²⁷ *Orangeville (Town) v. Dufferin (County)*, *supra* at note 25, at para. 26.

CONCLUSIONS

Subsection 223.4.1 of the *Municipal Act, 2001* provides that, upon completion of an inquiry, the Integrity Commissioner may, if the Integrity Commissioner considers it appropriate, apply to a judge under section 8 of the MCIA for a determination of whether the member has contravened section 5, 5.1 or 5.2 of that Act.

For the reasons set out above, we have determined on a review of the full evidentiary record and the applicable jurisprudence that, on a balance of probabilities,²⁸ the Councillor has not contravened subsection 5(1) of the MCIA as alleged. In the alternative, the exception in clause 4(g) of the MCIA may very well apply to except the Councillor of his general obligations under subsection 5(1). While one Applicant suggested that we seek a judicial determination on clause 4(g) of the MCIA, we are of the view that this would not be an appropriate use of municipal resources.

In light of the foregoing, we will not be making an application to a judge pursuant to subsection 223.4.1(15) of the *Municipal Act, 2001* for a determination of whether the Councillor contravened section 5 of the MCIA.

We have provided notice to the Applicants of our decision as required by subsection 223.4.1(16) of the *Municipal Act, 2001*.

We recommend that a copy of our written reasons in this Report be posted by the City on its website.

Respectfully submitted,

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the City of St. Catharines

Dated this 31st day of May, 2022

48530970.4

²⁸ *Edwards v. Wilson* (1980), 14 M.P.L.R. 128 (Ont. Div. Ct.); *Baillargeon v. Carroll* (2009), 56 M.P.L.R. (4th) 161 (Ont. S.C.J.).