



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

December 30, 2019

Our File No.: 154562

Mr. Brian Tario
Business Advisor
Forensics and Litigation Support Services
MNP LLP
1205 Amber Drive, Suite 210
Thunder Bay, ON
P7B 6M4

Dear Mr. Tario:

**Re: Legal Opinion re Code of Conduct and Municipal Conflict of Interest Act
Integrity Commissioner's Investigation Reports**

You contacted us in your capacity as the Integrity Commissioner duly appointed by The Corporation of the City of Thunder Bay (the "City") to provide a legal opinion with respect to specific questions directed by Council relating to two (2) investigation reports and the application and implications of the City's Code of Conduct (the "Code") and the *Municipal Conflict of Interest Act*.¹

We understand that you filed two investigation reports in accordance with your obligations as Integrity Commissioner under the *Municipal Act, 2001*.²

Determinations were made that certain members of Council had acted, in one case, in contravention of the Code and, in a second case, in breach of the MCIA.

Council has asked for a legal opinion respecting the meaning of specific rules under the Code and when a breach of the Rules occurred. Council also requested a legal opinion regarding specific questions relating to pecuniary interests and whether exceptions under section 4 of the MCIA may apply to certain pecuniary interests.

Issues

Council formally referred back to the Integrity Commissioner two investigation reports that you had submitted to Council. Council's referral directed that the Integrity Commissioner retain legal counsel to provide legal opinions on two matters related to the investigation reports as detailed below.

¹ R.S.O. 1990, c. M.50 (the "MCIA").

² S.O. 2001, c. 25.

At its meeting on December 2, 2019, Council passed the following resolution:

MOVED BY: Councillor Rebecca Johnson

SECONDED BY: Councillor Cody Fraser

With respect to the report 2019.CLS.037 (Legal Services) that Administration proceed as directed;

AND THAT the report wherein a complaint was brought against Councillors McKinnon and Aiello, be referred back to Brian Tario, MNP LLP Integrity Commissioner for the City, to request he retain legal counsel of his choice with sufficient experience and knowledge in the municipal governance and law, to provide a legal opinion of the meaning of Rules 1 and 15 under the Code of Conduct and determine whether in the context of these matters, a breach of the Code of Conduct occurred;

AND THAT wherein a complaint was brought against Councillor Hamilton be referred back to Brian Tario, MNP LLP Integrity Commissioner for the City, to request he retain legal counsel of his choice with sufficient experience and knowledge in municipal governance and law, including the Municipal Conflict of Interest Act to provide a legal opinion on the meaning of pecuniary interest and determine whether in the context of this matter a breach of pecuniary interest exists and if so whether such pecuniary interest is excepted under section 4 of the *Municipal Conflict of Interest Act* particularly sections 4(j) common interest and 4(k) remote or insignificant interest;

AND THAT any necessary by-laws be presented to City Council for ratification.

CARRIED

Materials Reviewed

In order for us to provide our opinion on the two questions as set out by Council, we have reviewed and considered the following materials:

- Integrity Commissioner Investigation Report dated October 14, 2019, re: Councillors Aiello and McKinnon, Alleged Contravention of the Code of Conduct (the “Code Report”)
- Integrity Commissioner Investigation Report dated October 5, 2019, re: Councillor Hamilton, Alleged Contravention of the MCIA (the “MCIA Report”)
- Available Staff Reports, Agendas, Minutes and By-laws

We have also researched and considered such relevant case law, legislation (including the Code and the MCIA) and secondary sources that we considered necessary to support our opinions as set out below.

Analysis

1. Code Report

(a) Factual Background

Our understanding of the factual background of the Code Report is as follows.

Councillor Aiello is the Executive Director of the Boys and Girls Club of Thunder Bay (the “Club”), a charitable organization. On June 20, 2019 Councillors Aiello and McKinnon held a meeting at the Club to discuss a proposed Transitional Housing Project by Ontario Aboriginal Housing Services (“OAHS”) on Junot Avenue (the “Project”), which is adjacent to the Club. City staff and representatives from OAHS were not present at this meeting. This meeting was held as an informational meeting regarding the Project. Council had previously approved the sale of the property on Junot Avenue to OAHS. At the time of the meeting, the Project still required a zoning by-law amendment.³

The Integrity Commissioner determined that this meeting was highly charged due to the topic of OAHS’s proposed transitional housing project, that the Councillors did little to maintain decorum, and that both Councillors took the position at this meeting that they opposed the Project being located adjacent to the Club.

On June 24, 2019, the office of the Integrity Commissioner received a complaint with respect to matters that occurred during this meeting. The complaint makes three allegations, two of which are the subject of this legal opinion:

In the case of Councillor Aiello, I believe Rule 1, avoidance of Conflict of Interest has been violated as I believe Councillor Aiello has a disqualifying interest. I believe that the matter of the OAHS has been discussed in camera since Councillor Aiello came to office, and he has not declared a conflict yet. As well, the proposal was discussed with council more recently.

Rule 15 – Not Undermine, Work Against Council’s Decisions: The meeting held by Councillors McKinnon [*sic*] and Aiello was in direct conflict to the council decision made by the sitting council in October 2018 and further council and planning meetings that have been held on the matter.

The following conclusions with respect to the conduct of Councillors Aiello and McKinnon meeting are set out in the Code Report:

Councillor Aiello is in contravention of Rule #1 as he has a disqualifying interest in the matter by the very definition in the Code of Conduct. Councillor Aiello is also in contravention of Rule 15 by publicly stating he is in opposition to a previous decision made by Council.

Councillor McKinnon is in contravention of Rule 15 by publicly stating that he is in opposition to a previous decision made by Council.

³ We do note, however, that at its meeting held on October 21, 2019, Council approved the zoning amendment for the Project.

The Code Report did not recommend that Council impose penalties on either Councillor Aiello or Councillor McKinnon in accordance with the Code of Conduct Complaint Protocol (the “Complaint Protocol”).

(b) Rule 1 – Avoidance of Conflicts of Interest

A municipal code of conduct is a delegated instrument and should be interpreted in accordance with the rules of statutory interpretation. This current approach is to apply the “modern rule” of statutory interpretation set out as follows by Elmer A. Driedger in *The Construction of Statutes*:

Today there is only one principle or approach, namely, the words of an Act are to 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.⁴

As such, any interpretation of the Code must consider the provisions of an enactment in their entire context and in their ordinary grammatical sense, harmoniously with purpose of the Code, enumerated in Part C “Guiding Principles.”

The first conclusion in the Code Report deals with Rule 1 – Avoidance of Conflicts of Interest. In addition to adopting the provision of the MCI, this Rule also regulates the non-pecuniary interests of council members, which are not covered by the MCI.

Rule 1 sets out a framework for disclosing disqualifying interests and mitigating those interests which are deemed to be a “non-disqualifying interest”.

Germane to the Code Report is Section 2 of Rule 1, which provides as follows:

2. Members of Council shall not participate in the decision-making processes associated with their office when they have a disqualifying interest in a matter.

This provision is a relatively standard conflict of interest provision in a municipal code of conduct. It provides that members have a positive obligation to avoid conflicts of interest.

Subsection 3 b) further informs the above section:

3. For greater certainty:

...

b. Members of Council shall not participate in the decision-making processes associated with their office when they have an interest that though in compliance with the Municipal Conflict of Interest Act, is nevertheless a disqualifying interest by virtue of the nature of the relationship between the Member and other persons or bodies to be affected by the decision.

⁴ Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., (Toronto, Butterworths, 1983) at 87. The modern principle has been frequently applied by the Supreme Court of Canada (see *Rizzo & Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27 at para. 21 and *Bell ExpressVu Limited Partnership v. Rex* [2002] 2 S.C.R. 599, at paras. 26-27).

The term “disqualifying interest” is defined in the Code as follows:

...an interest in a matter that, by virtue of the relationship between the Member of Council and other persons or bodies associated with the matter, is of such a nature that reasonable persons fully informed of the facts would believe that the Member of Council could not participate impartially in the decision-making processes related to the matter.

This provision essentially mirrors the common law with respect to apparent conflicts of interest. Common law principles can thus be a helpful aid in interpreting this provision of the Code.

A good description of conflict of interest (in the general sense) is set out in *Moll v. Fisher*:

All conflict of interest rules are based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired where their personal financial interests are affected.⁵

Notwithstanding the broad statements set out above, the common law does not establish a limitless scope to conflicts of interest. There must be some true, valid or lawful conflict of interest that arises between the public duty of the member and a personal matter that may influence a council member’s judgment or impartiality with respect to the public duty.

An inquiry into whether a member of council has a conflict of interest must take into account the facts surrounding the alleged conflict. As noted by Commissioner J. Douglas Cunningham in the *Report of the Mississauga Judicial Inquiry – Updating the Ethical Infrastructure*:

An apparent conflict of interest arises when a reasonably well-informed person could reasonably conclude, as a result of the surrounding circumstances, that the public official must have known about the connection of his or her involvement with a matter of private interest.⁶

Accordingly, when an allegation of a conflict of interest is put before an Integrity Commissioner, regard must be had for the circumstances surrounding the alleged conflict. The relevant considerations will vary based on the facts of each investigation but will generally relate to how consideration of the matter would affect the council member’s own interest.

Based on the findings of fact, the Code Report concluded that Councillor Aiello had a “disqualifying interest” in relation to the Project. Although not explicitly stated in the report, the considerations taken into account in reaching this conclusion include his position as Executive Director of the Club, the adjacency of the Project to the Club, and his public statements of his position opposing the location of the Project.

⁵ (1979), 8 M.P.L.R. 266, 23 O.R. (2d) 609 (Div. Ct.) at para. 6.

⁶ *Report of the Mississauga Judicial Inquiry – Updating the Ethical Infrastructure* (Mississauga: City of Mississauga, 2011) (The Honourable J. Douglas Cunningham) at 148.

We are of the opinion that the findings support a conclusion that Councillor Aiello could have a “disqualifying interest” within the meaning of the Code with respect to the Project but they could also be supported by further consideration of all the circumstances.

However, the existence of a disqualifying interest alone is not what the Code prohibits. Rather, section 2 of Rule 1 prohibits a member from participating in the decision-making process associated with their office when they have a disqualifying interest. As Justice Cunningham noted in the Mississauga Judicial Inquiry Report, “it is not the existence of a conflict of interest which is the issue but, rather, what the official in a conflict of interest does in the face of that conflict.”⁷

The phrase “decision-making process” is not defined in the Code. The words “decision-making” alone suggests some sort of outcome- or resolution-oriented process. The fact that the Code uses the word “meeting” elsewhere suggests that “decision-making process” should be given a broader meaning than “meeting.” At the very least, this meaning would include all meetings of Council, committees of Council, and local boards on which Councillor Aiello sits.⁸

A contravention of Rule 1 requires that there be some Council-related decision-making process. There does not appear to be one in this matter. In the Code Report, the only mention of a meeting is the informational meeting held at the Club, which, to our knowledge, is not a local board or committee of Council or a municipal services corporation. Furthermore, Councillor Aiello acts as the Executive Director of the Club, and insisted that he was acting in that capacity in holding the meeting. This would not fit within the language of the Code as constituting a “decision-making processes associated with their office”.

The complaint noted that the Project has come before Council on some occasions, and that Councillor Aiello did not declare a conflict with respect to those matters. The complaint did not, however, set out which specific meetings or decisions of Council. It is acknowledged in the Code Report that “Council had previously approved the sale of the property on Junot Avenue to the OAHs subject to zoning bylaw amendments,” but likewise it does not identify which meetings or decisions Councillor Aiello’s actions are alleged to have violated the Code.

Any reasonable interpretation of Rule 1, Section 2 requires that there be some City “decision-making process”. This would require the Code Report to identify the “decision-making process” in which the disqualifying interest arose. Absent such a finding, a contravention of Rule 1 has not been completely made out.

As such, we are of the opinion that Councillor Aiello may have violated Rule 1 of the Code, provided that it can be demonstrated that he has participated in the decision-making process in relation to the Project.

⁷ *Supra*, note 6 at 149.

⁸ This is a principle of statutory interpretation known as the “different words, different meanings” rule - see *Godbout v. Pagé*, 2017 SCC 18 at para. 115: “[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.”

(c) Rule 15 – Not Undermine, Work Against Council’s Decisions

The second conclusion in the Code Report relates to Rule 15 – Not Undermine, Work Against Council’s Decisions. Rule 15 seeks to prevent members from making “collateral attacks” on previous decisions of Council and seeks to promote solidarity amongst members of Council.

The relevant section of Rule 15 to the Code Report is section 1:

1. Members of Council shall not actively undermine the implementation of Council’s decisions.

Although the Code does not define what “actively undermine” means, the commentary on the rule is instructive:

Commentary

The role of elected officials, once a council decision is made, is to support the implementation of that decision, not to work against its implementation, publicly or behind the scenes. Council decisions are arrived at following discussion and debate, reflecting the democratic process. Members are expected to engage in debate with their fellow council members through the democratic process of government. However, once Council has made its decision, Members must recognize that decision as the duly-considered decision of the body of Council. As members of that body of Council, individual members – those who did not agree with the decision - are not to engage in activities that seek to challenge or undermine that decision.

Members can express disagreement with Council’s decisions, but it is contrary to the ethical behaviour of members of Council to actively seek to undermine, challenge or work against Council’s decisions [emphasis added].

From the Commentary, it is our interpretation that “actively undermine” must mean something more than to express disagreement with a decision of Council. The word “undermine” is juxtaposed with “challenge” and “work against.” This must mean some act done with the intention of subverting or preventing a decision of Council from being carried out. Furthermore, as the rule applies to the “*implementation* of Council’s decisions,” it implicitly refers to decisions which have already been made and are awaiting implementation by staff.

Furthermore, the Commentary to Rule 15, section 1 states that “Members can express disagreement with Council’s decision...”⁹ This would lead to an interpretation of section 1 to mean that something other than simply voicing a position of opposition to a Council decision is needed to find a contravention.

It was concluded in the Code Report that both Councillors Aiello and McKinnon violated Rule 15 “by publicly stating that [they are] in opposition to a previous decision of Council.”

⁹ Part B. “Framework and Interpretation”, paragraph 2 of the Code notes that the Commentary in the Code is meant to be illustrative and not exhaustive. As such, the Commentary is a helpful interpretative tool.

There were no other findings in the Code Report that would tend to support the conclusion that Councillors Aiello and McKinnon “actively undermined” the implementation of a Council decision. The meeting was held in advance of Council’s decision on the zoning by-law amendment. At the time of the meeting, the only council decision on the Project was to sell the land to OAHS. It cannot be said that this meeting was held to subvert or prevent Council’s decision on the development approvals for the Project from being implemented.

Had the meeting been held after Council’s approval of the Project and for the purpose of drawing support against the approval, such as an appeal under the *Planning Act*,¹⁰ there could potentially have been a violation of Rule 15. However, there were no findings to suggest that the Councillors did anything other than voice their opposition to the Project, which is not prohibited by the Code. As noted, “undermine” can be equated to “subversion”.

As such, for the reasons stated above, we are of the opinion that the actions of Councillors Aiello and McKinnon have not violated Rule 15 of the Code.

2. Municipal Conflict of Interest Act Report

(a) Background and Findings

On July 10, 2019, an application was made pursuant to section 233.4.1 of the *Municipal Act, 2001*¹¹ regarding Councillor Brian Hamilton’s participation and voting at a June 17, 2019 meeting of Council regarding a designated truck route (“DTR”) in the City. The application alleged that Councillor Hamilton contravened the MCI Act as he had a pecuniary interest in the matter arising from his ownership of a restaurant in the downtown area.

The proposed DTR has been an item before Council in some form or another since 2014, when the Committee of the Whole directed City staff to prepare a report outlining options for applying a weight restriction on certain city roads. In September, 2018, staff presented the proposed DTR for public consultation. The final proposed DTR was presented to Council through Committee of the Whole in October 2018.

The proposed DTR identifies corridors for heavy truck traffic within the City. It sets out a permissive route with several weight restrictions. The purpose of the DTR is to shift heavy truck traffic away from residential streets and directs trucks to more suitable highways. A Staff Report dated October 15, 2018 summarizes the practical effect of the DTR:

Heavy trucks will be able to travel to any delivery destination in the City. Trucks will be required to traverse as far as practical along the new Designated Truck Route during a trip. They are required to use the shortest possible distance on undesignated city streets to their end destination while still adhering to the weight restricted streets.

A draft by-law to implement the DTR was presented to Council on June 17, 2019. However, Council voted against enacting the by-law. There is currently no Council direction to staff as to how to proceed with the DTR.

¹⁰ R.S.O. 1990, c. P.13.

¹¹ S.O. 2001, c. 25.

The findings in the MCIA Report are briefly summarized as follows.

At the June 17, 2019 meeting, Council discussed the effects of the DTR, and received a deputation from the President of the Thunder Bay Chamber of Commerce. In her deputation, the President spoke about the potential costs to local business should Council approve the DTR. The President also indicated that she had previously attended Councillor Hamilton's business to speak to him about the potential costs to his business.

The DTR will have an impact on a number of properties throughout the City, including a number of businesses in the downtown area.

Councillor Hamilton proceeded to consider and vote on the DTR despite being advised by another member of Council of his potential conflict.¹² Councillor Hamilton was of the view that he did not have a conflict of interest. He stated that, in his estimation, the financial impact of the DTR would be minimal because aside for one recurring product delivery, he does almost all of his own purchasing and is not dependent on truck delivery.

We have made the following assumptions in formulating our legal opinion:

- although not specifically mentioned in the MCIA Report, we have assumed the "restaurant" being referred to is the "Bean Fiend Café & Sandwich Bar" located at 194 Algoma Street South in the City (the "Restaurant");
- we have assumed that Councillor Hamilton is the owner of the Restaurant, and operates the Restaurant as either a sole proprietor or through a corporate body of which he is either a shareholder, director or "senior officer" as defined by the MCIA;
- we have assumed that the Restaurant requires, at the very least, one recurring delivery by truck; and
- we have assumed that the DTR will have some impact on delivery truck traffic within the downtown area, including the Restaurant.

We are unaware of the following information which was either not available from previous Staff Reports or was not included in the findings of the MCIA Report:

- the affect the DTR will have on the cost of delivering goods in the downtown area;
- the proportion and volume of product the Restaurant receives from delivery in comparison to direct purchasing by Councillor Hamilton; and
- the types and sizes of vehicles used in delivering products to the Restaurant.

Where our analysis below makes a specific assumption, we have stated that assumption. Where we have indicated that we require further information, we have indicated the relevance of such information to this legal opinion.

¹² As set out in the MCIA Report, the complaint noted that Councillor Hamilton had previously voted in support of the DTR but when it was noted that the DTR would impact businesses, he decided to vote against the DTR.

(b) Member Obligations - Declaration of Pecuniary Interest and Recusal

A member, as defined by the MCIA (which expressly includes a member of Council), is required to comply with the provisions of section 5 of the statute if the member has a direct, indirect or deemed pecuniary interest (which could have either a positive or a negative financial impact) in a matter that arises at a 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.

The intent of section 5 of the MCIA is to prohibit members of municipal councils from participating in decisions that would result in monetary benefits or the prevention of financial losses to themselves, indirectly to specified family members, or, also indirectly, to associates or bodies corporate with which they are sufficiently connected.

The requirements of section 5 are *personal* obligations on a member of council.¹³

(c) Pecuniary Interest

Despite its central importance in the MCIA, the term “pecuniary interest” is not defined in the statute. In general, a pecuniary interest is a financial interest “related to or involving money.”¹⁴

The jurisprudence has interpreted a pecuniary interest of a member of council to mean some sort of monetary or economic benefit that will be received, or could be received, either in cash or an increase in the value of an asset by the member. It can also mean the avoidance of a decrease in the value of the asset or a decrease of cash payments.

The MCIA Report articulates the foregoing and correctly cites the relevant judicial authorities to support the interpretation of pecuniary interest in the MCIA.

¹³ The Declaration of Office under s. 232 of the *Municipal Act, 2001*, S.O. 2001, c. 25, provides, in part, as follows:

3. I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.

¹⁴ *Tuchenhagen v. Mondoux* (2011), 88 M.P.L.R. (4th) 234 (Ont. Div. Ct.) at para. 31. See also *Cauchi v. Marai* (2019), 87 M.P.L.R. (5th) 318 (Ont. S.C.J.); *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 (Ont. Div. Ct.); *Darnley v. Thompson* (2016), 60 M.P.L.R. (5th) 325 (Ont. S.C.J.).

It has been stated that a pecuniary interest must be definable and real with the potential to affect the interests of the member and not simply a hypothetical or speculative interest.¹⁵

Each conflict of interest case will be considered and decided on its own particular facts. The judicial determinations have been largely fact-specific.¹⁶ The question to be answered in determining whether a member of council has a pecuniary interest in a matter was stated as follows in the leading case of *Greene v. Borins*:

Does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?¹⁷

A direct pecuniary interest is a financial interest that is traceable and non-deviated to the member himself. If Councillor Hamilton operates the Restaurant as a sole proprietor, then he would have a direct pecuniary interest under the MCIA because any financial matters would impact him directly.

Section 2 of the MCIA provides that a member may have an indirect pecuniary interest in any matter in which the member, as the case may be, is concerned, as follows:

Indirect pecuniary interest

2 For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

- (a) the member or his or her nominee,
 - (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,
 - (ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or
 - (iii) is a member of a body,that has a pecuniary interest in the matter; or
- (b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter.

Accordingly, a member may have an indirect pecuniary interest under the MCIA by virtue of ownership of shares in a corporation with a pecuniary interest in the matter or be a director or senior officer of the corporation.

¹⁵ *Cauchi v. Marai* (2019), 87 M.P.L.R. (5th) 318 (Ont. S.C.J.) at para. 33. See also *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 107 (Ont. S.C.J.) at para. 59.

¹⁶ *Cooper v. Wiancko* (2018), 73 M.P.L.R. (5th) 212 (Ont. S.C.J.):

What constitutes a sufficient pecuniary interest to trigger s. 5 of the MCIA **will not necessarily be demarcated by a bright line.** (emphasis added)

¹⁷ (1985) 28 M.P.L.R. 251 (Ont. Div. Ct.) at para. 42

It is our opinion that Councillor Hamilton has a pecuniary interest in the matter, whether direct or indirect. For the purpose of this opinion, we have assumed that the Restaurant does receive some deliveries from delivery vehicles of the size restricted by the proposed DTR.

Again, the question to be asked is whether the matter has a potential to affect the financial interests of Councillor Hamilton. This includes avoidance of financial losses. As indicated above, the DTR will restrict truck traffic in the downtown area. This will require businesses to plan their deliveries according to designated route limitations, with the estimation that it will increase delivery costs for these businesses.

The Restaurant is located on Algoma Street South, which is not itself designated as a Weight Restricted Highway in the proposed DTR. However, the Restaurant is in immediate proximity to and served by Red River Road and High Street, both of which are designated as 15,000 kg Weight Restricted Highways in the proposed DTR. This would potentially affect the flow of delivery trucks to the Restaurant. Although the precise economic impact of the DTR on the restaurant's bottom line is unknown, this analysis is focused on potential impact on the financial position of the member.¹⁸ The Restaurant does have a financial interest in potential increases in its operating costs.

This conclusion stands irrespective of the business structure through which the Restaurant is operated. If Councillor Hamilton operates his business as a sole proprietorship, he would have a direct financial interest in the matter. If he operates his business through a corporate body, that corporation would have a financial interest in the matter. Assuming Councillor Hamilton is a shareholder, director or senior officer of that corporation, by virtue of subclause 2(a)(i) of the MCIA, he would have an indirect pecuniary interest in the matter.

(d) Exceptions

In light of our above conclusion, it is necessary to consider whether any of the exceptions in the MCIA apply to Councillor Hamilton.

If an exception under section 4 does apply, Councillor Hamilton would not have been required to declare his interest pursuant to section 5 of the MCIA.

Typically, the application of an exception to section 5 of the MCIA is asserted by the member who is alleged to have voted on a matter while having a pecuniary interest. There is no mention in the MCIA Report of Councillor Hamilton having expressed that he acted pursuant to a valid exception and, therefore, there is no consideration of the exceptions set out in section 4 of the MCIA.

As noted, the MCIA recognizes that there are instances in which a member may have a pecuniary interest in a matter, but it is appropriate for the member to be excused from their declaration and recusal obligations under section 5. To this end, section 4 of the MCIA sets

¹⁸ See *Jafine v. Mortson* (1999), 42 O.R. (3d) 81 (Gen. Div.); rev'd in part (2000), 52 O.R. (3d) 135 (Div. Ct.), where the court held that a mayor had a pecuniary interest in the potential expansion of Highway 404 by the province which could have, but did not necessarily, require the expropriation of his property some 5 miles away from the existing terminus of the highway, despite there being no decision as to whether or not the highway would be extended and along what route

out eleven exceptions to the requirements in section 5 of the statute. The first nine exceptions are specific and the last two are general in application.

The general provisions are set out in clauses 4(j) and (k) as follows:

Where s. 5 does not apply

4 Section 5 does not apply to a pecuniary interest in any matter that a member may have,

...

- (j) by reason of the member having a pecuniary interest which is an interest in common with electors generally; or
- (k) by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

These two exceptions have by far generated the greatest amount of judicial consideration with respect to the MCIA.

(i) Interest in Common with Electors, Generally

An interest in common with electors generally requires that the pecuniary interest of the member be the same in kind as others in the municipality or community: *Greene v. Borins*.¹⁹

Section 1 of the MCIA defines an “interest in common with electors generally” as follows:

...a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part.

This exception is thus taken to apply to an interest where the electors in an area would be generally benefitted (i.e. affected) in the same way.²⁰

The Ontario General Division noted as follows in *Re Ennismore (Township)*:

...Section 4(j) specifically provides, “with electors generally”, thereby qualifying which electors area to be regarded when considering an exemption from disqualification. The word “generally” used in Section 4(j) indicates to me that the electors to be regarded, when applying the section, are to be of a certain class or order. It is apparent to me that the authorities, together with the language and intended purpose of the Municipal Conflict of Interest Act, establish that the class or order must be those electors in the area that are “affected” by the matter. It is those affected electors that are to be regarded when considering the issue if conflict of interest and not necessarily all the electors.

¹⁹ *Supra*, note 17.

²⁰ *Supra*, note 18 at para. 26.

...

It is not the law that a member of council is disqualified from voting simply because he or she, as an elector, is affected by, or has an interest in, a matter common with other electors of the municipality or area.²¹

It is our opinion that this exception would possibly apply to Councillor Hamilton. Other business owners in the downtown area would, in general, be impacted in the same way as the member. In our view, the interests of the electors in the DTR would be similar in nature or kind as that of Councillor Hamilton and the Restaurant. The differentiation is likely only in degree; not in nature or kind.

Councillor Hamilton's pecuniary interest is similar to that in a recent case of the Ontario Superior Court of Justice in *Biffis v. Sainsbury*. In this case, the council member had a pecuniary interest in a matter relating to the provision of water services to a large condominium community where approximately 1,400 other people resided. The councillor had moved a motion at council to explore the facility of providing municipal water supply to the condominium community. The court concluded that the member "has no different pecuniary interests in the water issue and potential levies than do that residents of the other 14000 residences... I find that such pecuniary interest as [the member] has in the issue is an interest in common with a large segment of electors generally. I find she falls within the statutorily defined exemption."²²

Based on the foregoing, it is our view that it is likely that Councillor Hamilton has a direct or an indirect pecuniary interest in the matter of the DTR. It is also likely that his pecuniary interest would be the same in nature and kind as the other business impacted by the implementation of the DTR such that the exception for an interest in common under clause 4(j) would be applicable to Councillor Hamilton.

(ii) Remote or Insignificant Interest

This exception recognizes that some interests may be so inconsequential that a member need not declare them or refrain from voting. This exception may apply to both the quantum of the financial interest involved as well as to the importance of the matter to the member. The exception is disjunctive, meaning that a member may be excepted if their interest is remote **or** it is insignificant; it does not have to be both remote and insignificant.

The applicable test in determining whether a member has an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member is set out in *Whiteley v. Schnurr*, with the question to be asked as follows:

Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the interest of the councillor as likely to influence that councillor's action and decision on the question. In answering the question set out in this test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise, that could

²¹ (1996), 31 M.P.L.R. (2d) 1 (Ont. Gen. Div.) at paras. 16 and 19.

²² *Biffis v. Sainsbury* (2017), 79 M.P.L.R. (5th) 49 (Ont. S.C.J.) at para. 14.

result depending on the manner in which the member disposed of the subject matter before him or her.²³

If Councillor Hamilton's interest is indirect as a result of owning his business through a corporate entity, the clause 4(k) analysis will focus on the proximity and significance of the councillor's own pecuniary interest rather than the interest of the corporation.²⁴

The courts have recently placed an emphasis to the reasonable elector's consideration of *all of the circumstances* concerning the matter.²⁵ In Councillor Hamilton's case, such information would include, but is not limited to, the following:

- the types and sizes of vehicles used in delivering products to the Restaurant, and whether these vehicles can comply with the weight restrictions identified in the proposed DTR;
- the proportion and volume of product the Restaurant receives from delivery in comparison to direct purchasing by Councillor Hamilton;
- whether the types of products delivered by delivery trucks are essential to the Restaurant (e.g. coffee beans, milk, coffee cups);
- the route delivery trucks currently take to deliver products to the Restaurant, and how the proposed DTR would affect these routes; and
- the increase in delivery costs to the Restaurant, if any, associated with the DTR.

We are of the opinion that this exception would not apply in these circumstances.

In your findings, you indicated that Councillor Hamilton has admitted that there would be some financial impact to his business, noting that "as far as financial impact to his restaurant it would be minimal except for one reoccurring requirement for product delivery..." Furthermore, this financial impact would be caused directly by the DTR. The fact that the value of the pecuniary interest is of relatively small monetary amount does not itself relieve the member from compliance with the MCI, or constitute a remote or insignificant interest.²⁶

²³ (1999), 4 M.P.L.R. (3d) 309 (Ont. S.C.J.) at para. 10.

²⁴ *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683 at para. 15.

²⁵ See the expansive application to the applicable test in section 4(k) as set out in the following decisions: *Hazineh v. McCallion* (2013), 11 M.P.L.R. (5th) 18 (Ont. S.C.J.); *Amaral v. Kennedy* (2012), 96 M.P.L.R. (4th) 49 (Ont. Div. Ct.) at paras. 38-44; *Craig v. Ontario (Attorney General)* (2013), 15 M.P.L.R. (5th) 23 (Ont. S.C.J.) at para. 35.

²⁶ See *Mino v. D'Arcey* (1991), 2 O.R. (3d) 678 (Ont. Gen. Div.). In this case, the court determined that the exception for remote or insignificant interests did not apply to a municipal tender award in which the member stood to make a \$300 profit. Although a relatively small amount, the pecuniary interest was not remote as it flowed directly from voting to accept the tender, nor was the interest insignificant when viewed objectively despite being a profit of only \$300.

(e) Conclusions

Based on our review of the matter, it is our opinion that Councillor Hamilton did have a pecuniary interest in the proposed DTR. Whether through his own direct pecuniary interest in the Restaurant or through an indirect interest vis-à-vis a corporate entity, Councillor Hamilton's financial position would be affected by the proposed DTR's increase of delivery costs associated with diversion of truck traffic.

It is our opinion that the exception in clause 4(j) for "interest in common with electors generally" may apply in these circumstances as Councillor Hamilton would be impacted by the DTR in the same way as other business owners in the downtown area would be.

That being said, the exception in clause 4(k) for "remote or insignificant interests" would not apply in these circumstances. The quantitative amount of Councillor Hamilton's interest is irrelevant, and his interest in avoiding the negative financial impact stems directly from voting on the DTR (with the evidence note that he may have switched his support for the DTR when he recognized there would be a negative financial impact on his Restaurant). In our view, Councillor Hamilton's interest is neither remote nor insignificant.

* * *

We would be pleased to respond to or seek to clarify any answers should you have any questions pertaining to our opinion as set out herein.

Yours truly,
AIRD & BERLIS LLP



John Mascarin

JM/jgp/gc

38276891.5