

CITY OF VAUGHAN

EXTRACT FROM COUNCIL MEETING MINUTES OF MAY 27, 2020

Item 23, Report No. 20, of the Committee of the Whole, which was adopted without amendment by the Council of the City of Vaughan on May 27, 2020.

23. FORMAL CODE OF CONDUCT COMPLAINT INVESTIGATION REPORT NO.091819

The Committee of the Whole recommends approval of the recommendation contained in the following report of the Integrity Commissioner and Lobbyist Registrar dated May 20, 2020:

Recommendation

1. That the formal Code of Conduct Complaint Investigation Report No.091819 by the Integrity Commissioner and Lobbyist Registrar be received, for information.

Committee of the Whole (2) Report

DATE: Wednesday, May 20, 2020

WARD(S): ALL

**TITLE: FORMAL CODE OF CONDUCT COMPLAINT INVESTIGATION
REPORT NO.091819**

FROM:

Suzanne Craig, Integrity Commissioner and Lobbyist Registrar

ACTION: FOR INFORMATION

Purpose

To present the findings of the investigation by the Integrity Commissioner and Lobbyist Registrar under the City of Vaughan Code of Ethical Conduct for Members of Council and Local Boards (the “Code”) relating to the conduct of six Members of Council with respect to a complaint under the Code and the Municipal Conflict of Interest Act (MCIA) [as set out in Attachment 1].

Report Highlights

- Pursuant to obligations under sections 10(ii), 11(ii) and 12(iii) of the Code Complaint Protocol, the analysis discusses the investigative process, decisions on jurisdiction, and findings on the allegations related to the Code and the MCIA.

Recommendation

1. That the formal Code of Conduct Complaint Investigation Report No.091819 by the Integrity Commissioner and Lobbyist Registrar be received, for information.

Background

On September 18, 2019, a complaint under the “Code” was received by the Integrity Commissioner and Lobbyist Registrar.

The Complainant made several allegations about violations of the MCIA and the Code. The Complaint alleges that six Members of Council violated the MCIA and the Code by:

1. Retaining Aird & Berlis to act for the City of Vaughan (the “City”) and individual Members of Council with respect to a lawsuit brought against the City and certain Members of Council by Frank Miele (the “Action”), and participating in meetings at which both the City Solicitor and Aird & Berlis gave advice to individual members of Council;
2. Directing and attempting to influence Aird & Berlis and the City Solicitor with respect to the formulating of the City’s defence to the Action;
3. Discussing the Action with Aird & Berlis and other Members of Council not named in the Action; and
4. Using the City’s Indemnification By-law to pay for the defence of individual Members to the Action.

Previous Reports/Authority

Not applicable.

Analysis and Options

The Integrity Commissioner and Lobbyist Registrar reviewed the Complaint and concluded that there was no jurisdiction to review any of the alleged violations of the Rules of Civil Procedure or the Municipal Act (“*The Act*”).

The Complaint Protocol, section 6(3)(e) provides that if the complaint is not within the jurisdiction of the Integrity Commissioner, the Complainant shall be so advised and provided with reasons and referrals as the Integrity Commissioner and Lobbyist Registrar considers appropriate. The Complainant was advised accordingly.

After reviewing several documents submitted by the Complainant, it was determined that there were sufficient grounds to commence an investigation of the allegations under the Code and MCIA.

Financial Impact

There are no financial implications relating to this report.

Broader Regional Impacts/Considerations

There are no regional impacts resultant from this report.

Conclusion

The Integrity Commissioner and Lobbyist Registrar concludes that none of the individual Respondents retained Aird & Berlis and none of them received legal advice from the City Solicitor or Aird & Berlis on the Action. Similarly, they did not direct the City's defence. As a result, there was no obligation to declare a conflict of interest under the MCIA until this matter was brought before Committee of the Whole of the City of Vaughan.

The Integrity Commissioner and Lobbyist Registrar concludes that the six Respondents did not violate Rules 2, 7 or 16 of the Code, or Sections 5, 5.1, or 5.2 of the MCIA.

For more information, please contact: Suzanne Craig, Integrity Commissioner and Lobbyist Registrar, extn. 8301.

Attachment

1. Code of Conduct Complaint Investigation Report No.091819.

Prepared by

Suzanne Craig, Integrity Commissioner & Lobbyist Registrar, 8301

FORMAL CODE OF CONDUCT INVESTIGATION REPORT #091819

Summary

This report presents the findings of my investigation under the City of Vaughan Code of Ethical Conduct (the “Code”) relating to the conduct of six Members of Council (the “Respondents”) in connection to a complaint alleging violations of four acts or rules, in particular:

1. Violations of the *Municipal Conflict of Interest Act* (the “MCIA”);
2. Violations of the Code, sections 1(b)-(d), (g)-(i), 2, 3, 4, 7, 8, 9, 10, 13, 15, 16, 18, 21;
3. Violations under the *Municipal Act, 2001* (the “MA”)¹; and
4. Violations of the Rules of Civil Procedure.

Based on my preliminary review, I decided that the alleged violations of the MCIA and the Code as set out by the Complainant were within my jurisdiction to review. The complainant alleged that the Respondents acted in a pecuniary conflict of interest when they (i) received legal advice from and gave instructions to the City Solicitor and external legal counsel with respect to the City’s defence to a court proceeding in which they were also named defendants (the “Action”)²; (ii) attempted to influence the unconflicted member of council; and (iii) voted to amend the indemnification by-law. In my preliminary classification, I determined that I would investigate the alleged violations of Rules 1, 2, 7, and 16 of the Code, along with the MCIA.

The Complaint alleges that the Respondents discussed and directed the City to purchase insurance that would provide them a benefit and that this is in violation of the MUNICIPAL ACT. The Complaint alleges that s. 424 of the MUNICIPAL ACT is an exemption to the ordinary rules on insurance contained in s. 279 of the MA. Section 279 expressly allows a municipality to pass by-laws to indemnify or obtain insurance for Members for pecuniary losses, expenses, damages and costs awarded against them in proceedings related to acts or omissions of members arising from performance of their duties - including MCIA related proceedings as long as the member is found not to have contravened the MCIA. I find that the alleged violations of the MUNICIPAL ACT and Rules of Civil Procedure fall outside of my jurisdiction. If the complainant alleges that the municipality passed a by-law which it did not have jurisdiction to pass, that complaint may be resolved by the courts. As a result, I decided not to investigate the issues or make findings in regard to those issues.

Pursuant to my obligations under s. 10(ii), 11(ii) and 12(iii) of the Complaint Protocol, in this report, I discuss my investigative process, my decisions on jurisdiction, my findings on the allegations related to the Code and the MCIA, my analysis, and my conclusion.

I concluded that the Respondents did not violate Rules 1, 2, 7, or 16 of the Code. During my investigation, it was confirmed by the City Solicitor and the City’s external legal counsel that they had no discussion on the merits of the Action with the Respondents and that they did not receive any instructions from the

¹ Details of these allegations are set out in Appendix 1

² One member of council who is a defendant in the Action was not named in this Complaint. Another member of council was formerly named in the Action, but the matter was discontinued against the member. That member has not been named in the Complaint.

Respondents. Further, I concluded that the Respondents did declare having a pecuniary interest as required to comply with their MCIA obligations and that they did not attempt to influence other members of council before, during, or after a meeting in relation to a matter in which they had a pecuniary conflict. In accordance with subsection 223.4.1(15) of the MUNICIPAL ACT, I did not consider it appropriate to apply to a judge under section 8 of the MCIA for a determination as to whether the Respondents had contravened section 5, 5.1 or 5.2 of the MCIA, as I determined there are insufficient grounds to make application to the Court.

A. The Complaint

On September 18, 2019, I received a complaint under the City of Vaughan's Code of Conduct for Members of Council (the "Code"). The complaint was submitted on the City's Complaint Form as an affidavit with two appendices, including a statutory declaration.

The Complainant made several allegations about violations of the MCIA and the Code. I interpreted and reformulated the Complaint into four issues which parallels the language used by the complainant in the description of Issue 1 in the Complaint. The Complaint alleges that 6 Members of Council violated the MCIA and the Code by:

1. Retaining Aird & Berlis to act for the City of Vaughan (the "City") and individual Members of Council with respect to a lawsuit brought against the City and certain Members of Council by Frank Miele (the "Action") and participating in meetings at which both the City Solicitor and Aird & Berlis gave advice to individual members of Council;
2. Directing and attempting to influence Aird & Berlis and the City Solicitor with respect to the formulating of the City's defence to the Action;
3. Discussing the Action with Aird & Berlis and other Members of Council not named in the Action; and
4. Using the City's Indemnification By-law to pay for the defence of individual Members to the Action.

I have not detailed the remaining matters in the Complaint because of my preliminary jurisdictional findings, detailed below.

B. Process

Jurisdictional Findings

I first considered my jurisdiction to review the Complaint. I concluded that I did not have jurisdiction to review any of the alleged violations of the Rules of Civil Procedure or the MUNICIPAL ACT (as detailed in Appendix 1). The Complaint Protocol, section 6(3)(e) provides that if the complaint is not within the jurisdiction of the Integrity Commissioner, the complainant shall be so advised and provided with reasons and referrals as the Integrity Commissioner considers appropriate. I advised the Complainant that I would not proceed to investigate those complaints as they were matters within the jurisdiction of the courts.

Discussion of the Alleged Code of Conduct and MCIA Violations with the Complainant

After receiving the complaint, I spoke with the Complainant, who advised that they had information from

sources outside of the City. After reviewing several documents submitted by the Complainant, I determined that there were sufficient grounds for me to commence an investigation of the allegations under the Code and MCIA. The Complaint met the threshold of having some factual and legal basis.

The Respondents' Initial Response to Complaint and Preliminary Objections

The six Respondents provided their responses to the Complaint. The Respondents explained that they met with the City Solicitor and a representative from Aird & Berlis who, together, advised the Respondents of the Action. The Respondents advised that they asked the City's external counsel whether they needed to be separately represented by their own legal counsel to defend the Action. They were advised that each Member had to decide whether they wished to be represented. Each Member elected to retain their own counsel. The Respondents further confirmed that they did not attempt to influence any unconflicted member of council in any manner.

Many of the Respondents asserted that the Complaint is frivolous, vexatious and not made in good faith. Some stated that the Complainant failed to set out the facts upon which the allegations had been made. Others suggested that the matter could only be dealt with by the courts.

I found that the Complaint is neither frivolous nor vexatious, nor was it made in bad faith. The issues raised in the Complaint are important to the public and address the duties owed by the Respondents to make decisions about the management of the city's litigation and the public purse in the public interest and to participate in the decision-making process only where there is no competing private, pecuniary interest.

The fact that the Complainant raises issues that are germane to an ongoing matter before the courts does not insulate the Respondents' conduct from my review to the extent that matters fall within the ambit of the Code or MCIA. The fact that the Complainant submitted a complaint which has elements that are not within the jurisdiction of the Integrity Commissioner does not colour the complaint with bad faith. A complainant is allowed to raise issues that challenge and publicize public decision making. That is one of the reasons for the 2006 amendments to the *Municipal Act* that introduce Part V.1 entitled Accountability and Transparency.

The Alleged Violations

During the course of my investigation and after receiving the responses from the Respondents, I determined that there were grounds to examine the allegations that the Respondents violated Rules 1, 2, 7 and 16 of the Code of Conduct³ and section 5 of the MCIA.

Rules 1, 2, 7, and 16 of the Code state, in relevant part:

Rule 1:

- a) Members shall avoid the improper use of the influence of their office, and conflicts of interest, both apparent and real. Members shall not extend, in their discharge of their Official Duties, preferential treatment to Family Members, organizations or groups in which they or their Family Member have a pecuniary interest, which pecuniary interest is known to the Member.

Commentary

As a result, Members will have a common understanding that they will not participate in activities that grant, or appear to grant, any special consideration, treatment, or advantage to

³ And not the alleged violations of Rules 1(b)-(d), (g)-(i), 3, 4, 8, 9, 10, 13, 15, 18, and 21

an individual which is not available to every other individual. Members recognize that their actions are governed by the *Municipal Conflict of Interest Act*. The Integrity Commissioner will distinguish between a *Code* conflict, which may be both apparent and real and which may be in respect of a Family Member as defined by the *Code*, and a pecuniary interest under the *Municipal Conflict of Interest Act* in respect of sections 1.1, 2 and 3 of the *Municipal Conflict of Interest Act*.

Rule 2 Gifts and Benefits:

1. No Member shall accept a fee, advance, gift, loan, or personal benefit that is connected directly or indirectly with the performance of his or her duties, except as specifically contemplated [...]

[...] Set out below are recognized as exceptions to Rule 2, which apply to Members of Council only:

a. Compensation authorized by law

Rule 7 Improper Use of Influence:

1. No Member shall use the influence of her or his office for any purpose other than for the exercise of her or his Official Duties.

Rule 16 Conduct Respecting Staff:

1. No member shall compel staff to engage in partisan political activities or be subjected to threats or discrimination for refusing to engage in such activities.
2. No Member shall use, or attempt to use, their authority for the purpose of intimidating, threatening, coercing, commanding, or influencing any staff member with the intent of interfering in staff's duties, including the duty to disclose improper activity.
3. Members shall be respectful of the role of staff to advise based on political neutrality and objectivity and without undue influence from any individual member or faction of the Council.

In a 2018 case considering the MCIA, the Court concluded that indemnification for legal fees is a "benefit" under ss. 4(i) of the MCIA.⁴ In considering the allegations with respect to Rule 2, I adopted the court's analysis and conclude that indemnification for legal fees would also fall within the definition of a "personal benefit" under the Code.

The Complaint also alleges violations of Rules 7 and 16 in respect of interactions with staff. The Complainant alleged that the Respondents used their status as a Member of Council to influence the City Solicitor to their private advantage in directing the City to take a certain position in the defense of the Action.

Rule 16 governs Conduct Respecting Staff. The Commentary to Rule 16 provides that "it is inappropriate for a member to attempt to influence staff to circumvent normal processes in a matter...".

Councillors must not attempt to use their influence for the purpose of influencing staff members in the performance of their duties. City staff, under the direction of the City Manager, serve Council as a whole. The Code is clear that an individual Member of Council shall not use their office in any way to attempt to influence any decision or recommendation from staff. This is particularly so where the Member has a

⁴ Furniss v. Nishikawa, 2018 ONSC 3674, 2018 CarswellOnt

pecuniary interest in a matter that is being considered by staff or by a person or body to which the municipality or local board has delegated a duty.

The Complaint also alleges that the Respondents violated section 5.2 of the MCIA because they were involved in directing the City's litigation strategy while named defendants in the same action. Further, the Complaint alleges that the Respondents improperly received compensation under the indemnification by-law.

As Integrity Commissioner, I do not have jurisdiction to make a binding determination about whether the Respondents to a complaint have violated the relevant provisions of the MCIA. Only the courts, on application by the Integrity Commissioner, an elector or a person acting in the public interest, will determine whether a member violated the MCIA and determine the appropriate sanction. The Integrity Commissioner performs a gatekeeper role by reviewing the complaint, conducting an investigation (if appropriate) and determining whether to make an application to a court.

Investigation

I conducted interviews with 11 individuals, from whom I also received documentary evidence. I did not exercise my summons powers under the *Public Inquiries Act* and all information that I received during interviews and/or requests for documents was provided voluntarily under the exercise of the Complaint Protocol Investigations powers. I reviewed public and confidential City documents, the City's Indemnification By-law, emails, and audio recordings of Committee and Council meetings which I obtained pursuant to s. 10 of the Complaint Protocol. In addition, I spoke with the unconflicted Member of Council who confirmed that there was no attempt to influence them in any way.

Based on the responses that were received from the Respondents and the interviews that I conducted pursuant to my authority, it became apparent that I had sufficient information to reach a determination in respect of the investigation of three Respondents ("Respondent 1, 2 and 3"). I notified Respondents 1, 2 and 3 and continued my investigation with respect to Respondents 4, 5, and 6. In particular, I sought additional information about the interactions of staff, external legal counsel, and Respondents 4, 5, and 6.

Written Questions

I posed questions in writing to the City Solicitor and lawyers from Aird & Berlis. In response to my request for information from the City Solicitor, she advised:

I can confirm that I had a conversation with [a Member of Council] in early June to inform [them] of the claim that had been served on the City but that we had also since been served with a Notice of Discontinuance [...], by the Plaintiff's lawyer Robert Karrass on [...]. We did not discuss the substantive issues or merits of the claim. [...] [w]e discussed briefly about [the] pecuniary interest, given the Notice of Discontinuance, and I indicated that I could not provide advice to [the Member] in that regard, but [the Member] could discuss matters relating to MCIA with you, as the City's Integrity Commissioner. [...] In a letter to me , I was informed that [the Member] would like to seek independent legal advice, and [...] inquired whether [the Member] would be indemnified for [...] legal fees under the City's Indemnification Bylaw, to which I had responded. I have not had any conversation with [the Member] on any substantive matter relating to the [...] Claim to date.

For your information, the City's defence was prepared without any interaction with any members of council. Under my direction, staff worked directly with the City's external legal counsel on the review of the claim and the facts, and the preparation of the defence, in accordance with the City's Delegated of Authority Bylaw 144-2018 in which Council delegated authority to the City Solicitor to take all necessary steps to defend any legal proceedings on behalf of the City. After

the defence was finalized, a report was prepared for the Committee of the Whole (Closed Session) Meeting in [...], to inform them of the filing of the defence on the City's behalf.

[...]

At the September Committee of the Whole (Closed Session), this matter did not proceed to discussion. At the outset of the meeting, the City Clerk asked for any declaration of pecuniary interest as he does for all council and committee meetings. With the declarations that were made by all members of council aside from Regional Councillor Linda Jackson, there was no quorum on this matter. As such, the matter was not discussed at all. The members of council subsequently confirmed their declarations of pecuniary interest at the Council meeting [in...] October, as the matter was listed on the agenda. (For your information, as you may be aware, any matter listed on the Committee of the Whole agenda will need to be forwarded to Council for approval. As such, as part of the normal course of business, the matter was listed on the Council agenda despite the lack of quorum in the first instance.)

As a result of the lack of quorum at Council, a further report was brought forward to the Special Committee of the Whole (Closed Session) [later in October], at which time direction was sought to make an application to the Superior Court of Justice under the *Municipal Conflict of Interest Act* for direction as a result of a lack of quorum on this matter. I cannot discuss the contents of the discussion at that meeting, as the meeting was in closed session, but I can confirm for you that at no time was the actual [...] claim discussed, and that the discussion that was held was strictly related to seeking direction to make the application to the Superior Court of Justice.

In response to my request for information from the City's external counsel, he advised:

[That their firm], Aird & Berlis LLP has been retained by the City of Vaughan (the "City") to defend it in an action brought pursuant to section 424 of the *Municipal Act, 2001* (the "Action"). The Respondents have all also been named as defendants in the Action. I have reviewed your letter together with my partner, David Reiter, who is co-counsel with me in the Action. [...]

You have asked us to confirm certain matters, actions and statements. [...]

Interactions with Respondents

Mr. Reiter and I, together with City Solicitor, Wendy Law, spoke to [Respondent 4] initially [...] shortly after we were engaged in the matter by the City. Mr. Reiter, Ms. Law and I personally met with [Respondent 5] that same day. Mr. Reiter and Ms. Law personally met with [Respondent 6]. In each case, the Action was brought to the Respondent's attention and it was indicated that Aird & Berlis LLP had been engaged by the City to represent it.

While [Respondent 5] had advised the City Solicitor shortly after our initial meeting that he would be retaining his own counsel, [in], Wendy Law and I met with [Respondent 4 and Respondent 6] and advised them that they should retain their own legal counsel.

I can confirm that neither David Reiter nor I had any conversations with the Respondents about the Action at any time that would influence its defence, settlement or otherwise. All work that we have performed for the City has been based on instructions received from the City Solicitor and her team, and not from any member of Council. Our discussions with the Respondents were to advise them on administrative matters, to discuss whether they should retain independent legal counsel on the Action and to seek clarification on the City's Indemnification By-law regarding individual councillor reimbursement for legal fees.

[...]

2. No Direction re Action by Respondents

From the time the City was served with the Action until September [...], the Respondents' interaction with us was not in respect to providing direction on the defence or settlement of the Action.

3. Scope of Discussions with Respondents

Any conversations that we had with the Respondents related only to "administrative and logistical matters" (and did not include any conversations about the Action to discuss or influence its defence, settlement or otherwise) and to seek clarification on the City's Indemnification By-law regarding individual councillor reimbursement for legal fees.

[...]

5. No Influence from Respondents

I can confirm that the Respondents at no time attempted to influence us in any way in respect of the Action. As you know, Council authorized us to commence an application to the Ontario Superior Court of Justice for relief under subsection 7(2) of the *Municipal Conflict of Interest Act*. Council was cautioned that it could not discuss any other matter except the potential application and I can confirm that the members of Council focused their discussion solely on that issue.

With these further responses, I completed my investigation.

C. Analysis

Non-MCIA Code Matters

While I have no strict obligation to provide a detailed report when I determine that there was no breach of the Code, given the very serious nature of the allegations of the Complaint, which strike at the very nature of public trust and the Members' adhering to their Oath of Office, I have exercised my discretion to provide a brief explanation in addition to stating that there was no contravention of the Code pursuant to s. 10(ii) and 11(ii) of the Complaint Protocol.

The Complaint made several allegations that the Respondents had discussions with the City Solicitor, external Counsel to the City and the unconflicted Member of Council. This does not accord with the evidence of the Respondents or the persons with whom they allegedly spoke.

It became clear from the interviews that the only discussions that took place between the Respondents and others (staff, unconflicted Member) were administrative and not substantive discussions about the Action. Those discussions dealt with administrative and logistical matters including whether individual Members of Council were required to retain their own legal representatives and receiving confirmation that the deadlines for the delivery of a Statement of Defence on behalf of the City would be met. The Respondents were not involved in instructing legal counsel nor did they receive any legal advice from counsel in respect of their own legal interests. I find that they did not violate Rule 7 or 16 of the Code.

Further, I found that Aird & Berlis was not retained to represent individual Members of Council in the Action. I determined that all of the Respondents to the Action have retained their own independent counsel to defend the Action. There was no evidence to support that their communications with the City Solicitor or Aird & Berlis went beyond a question of whether they were required to retain their own legal counsel. While Aird & Berlis did have a discussion with the Plaintiff's counsel in the Action about the service of a Notice of Intent to Defend for one of the Respondents, the Respondent retained separate counsel. No solicitor-client relationship ever existed.

Pursuant to Rule 2, Members of Council are prohibited from receiving a personal benefit except as set out in the exceptions. One of those exceptions is that they may accept "compensation authorized by law". The City has enacted a by-law which provides indemnification to Members of council in certain circumstances. I was advised by the City Solicitor that Members of Council who wish to seek indemnification do so by requesting indemnification from her. The City Solicitor has the delegated authority to administer any indemnification payments to Members pursuant to the Indemnification By-law. Consistent with her interpretation of the by-law, the City Solicitor provided indemnification where permitted to do so. As a result, I find that there is no violation of Rule 2 of the Code. Rule 1 of the Code states that Members shall avoid the improper use of the influence of their office, and conflicts of interest, both apparent and real. Members shall not extend, in their discharge of their Official Duties, preferential treatment to Family Members, organizations or groups in which they or their Family Member have a pecuniary interest, which pecuniary interest is known to the Member. Where there is a potential conflict, the City Solicitor may recommend that the Member should obtain their own lawyer; speaking with the City Solicitor to ask if they must obtain their own independent counsel is reasonable and not an improper use of the influence of office.

The Complaint alleges that it was improper for the Respondents to participate in any discussion with the City Solicitor about whether they were indemnified under the Indemnification By-law because their pecuniary interest arose out of s. 424 of the MUNICIPAL ACT which relates specifically to personal liability. The Complainant alleges that such discussions with the City Solicitor would be an attempt to improperly influence the City Solicitor in contravention of s.5.2 of the MCIA. However, there is no evidence that staff was improperly influenced. Rather, the Respondents asked for the City's position on whether they were indemnified.

In addition, the Complaint alleges that it is improper from Members named in the Action to participate in a discussion on the content of an indemnification by-law because Members may vote in provisions that favour their interest in a current matter for which they anticipate seeking reimbursement of legal expenses. It is reasonable to enact a by-law that provides for the indemnification of Members of Council if they are sued in relation to carrying out their official duties – indeed, the legislature expressly provides that municipalities may enact such a by-law in s. 279 of the MUNICIPAL ACT. If the actions of a Member are related to their office and are carried out in good faith, the indemnification of legal fees is reasonable because they were acting in furtherance of the best interests of the corporation.

Section 424 of the MUNICIPAL ACT prescribes that members of council may be *personally liable* for improper use of special funds. The Complaint alleges that actions under s. 424 are different than other actions because that section expressly provides for personal liability. In essence, the complaint alleges that the general statutory provisions in s. 279 and others which allow members to be insured do not apply if an action is brought under the specific statutory provision which provides for personal liability. If the Complainant believes that the City's current indemnification by-law was improperly enacted because it violates s. 424 of the MUNICIPAL ACT, the recourse is to the Court. The Integrity Commissioner cannot declare that the Indemnification By-law is *ultra vires*. The court is the arbiter of that matter.

MCIA matters

Pursuant to s. 12(iii) of the Complaint Protocol, upon completion of my investigation, I must publish written reasons explaining my decision on whether to make application to a judge for a determination of a breach under the MCIA.

The relevant provisions of the MCIA state:

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.

Where member to leave closed meeting

(2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration.

Written statement re disclosure

5.1 At a meeting at which a member discloses an interest under section 5, or as soon as possible afterwards, the member shall file a written statement of the interest and its general nature with the clerk of the municipality or the secretary of the committee or local board, as the case may be.

Influence

5.2 (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 that is being considered by an officer or employee of the municipality or local board, or by a person or body to which the municipality or local board has delegated a power or duty, the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter.

As named defendants in the Action, the Respondents determined that they had a pecuniary interest pursuant to the MCIA in respect of any matters related to the Action, and in particular, the City's defence of the Action. The Complaint alleges that each Respondent retained Aird & Berlis to act for the individual Members of Council with respect to the Action despite acting for the City and that there were meetings at which both the City Solicitor and Aird & Berlis gave advice to individual members of Council about their defences. Based on those alleged facts, the Complaint alleged that the Members of Council violated their obligations to declare a pecuniary interest as set out in sections 5, 5.1, and 5.2 of the MCIA. Aird & Berlis was retained by the City Solicitor on behalf of the City to defend the City and to work with the City Solicitor, in the exercise of her delegated authority under By-law No. 144-2018. While I found that the Respondents did speak with the City Solicitor and Aird & Berlis, the substance of the communications were not in respect of the matter relating to the retainer of Aird & Berlis.

As required under s. 5(1) of the MCIA, the Respondents declared a conflict at the Committee of the Whole meeting at which the matter of the Action was to be discussed. At or around the time of the meeting, the Respondents complied with their obligations under s. 5.1. It is as a result of those declarations that the council did not have quorum to instruct legal counsel on behalf of the City. This has necessitated the Quorum Application under s. 7(2) of the MCIA, in which the City seeks court approval to allow the Respondents (and other individual defendants) to vote on matters related to the Action despite their conflict.

In the circumstances of this Complaint, each Respondent who is named in the Action has a potential pecuniary interest, insofar as the personal liability raises interests of a financial nature. As a general rule, under the requirements set out in section 5, 5.1, and 5.2 of the MCIA, at a meeting of Council, each Member named in the claim would have an obligation to **disclose** the interest, **not take part** in the discussion or vote and **not attempt in any way** whether before, during or after the meeting to influence the voting on any such question.

In respect of the matters related to the Action, all but one member of council declared a pecuniary conflict of interest. As a result, there was an insufficient number of Members to reach a quorum of Council, on this matter. Section 7 of the MCIA, entitled Remedy For A Lack of Quorum, provides that:

Quorum deemed constituted

- (1) Where the number of members who, by reason of the provisions of this Act, are disabled from participating in a meeting is such that at that meeting the remaining members are not of sufficient number to constitute a quorum, then, despite any other general or special Act, the remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two. R.S.O. 1990, c. M.50, s. 7 (1).

Application to judge

- (2) Where in the circumstances mentioned in subsection (1), the remaining number of members who are not disabled from participating in the meeting is less than two, the council or local board may apply to a judge without notice for an order authorizing the council or local board, as the case may be, to give consideration to, discuss and vote on the matter out of which the interest arises. R.S.O. 1990, c. M.50, s. 7 (2).

In consideration of the above, I believe that section 7 of the MCIA allows all of Council (including Members who are disabled from voting under section 5 of the MCIA) to authorize an application to a judge for an order to authorize Council (in full complement) to meet and make decisions on the matter subject of the claim. As a practical matter, Members of Council must be able to participate in the decision to apply to the Court under s. 7(2) of the MCIA; otherwise, that provision would be rendered meaningless as no Council which needed to seek such an application could ever proceed with one (unless it had previously delegated to Staff the decision to commence such an application). As a result, I have concluded that the Respondents named in the Action who met at a Committee of the Whole closed meeting on October 7, 2019 to discuss and vote on an application to a judge on this matter, did so properly. Accordingly, I will not make an application to the court to determine whether there was a violation of the MCIA. The City Solicitor confirmed that there was a closed meeting at which time direction was sought to make an application to the Superior Court of Justice under the MCIA for direction as a result of a lack of quorum on this matter. The City Solicitor confirmed that at no time were the merits of the Action discussed. Based on the information received from the witnesses, I have determined that there was no obligation to declare a conflict at this meeting.

There was no evidence that the Members attempted to influence the unconflicted member of council by discussing the Action despite their conflict. Indeed, as a result of the lack of quorum, no meetings have taken place and all discussions of Council are on hold pending determination of the Quorum Application. There is nothing in the Code or MCIA which prohibits those members who have declared a conflict from discussing the Action among themselves.

Finally, Members of Council do not determine whether or not to indemnify each other. Rather, that duty is delegated to the City Solicitor. As a result, there is no "meeting" in s. 5(1) at which to declare a conflict and there is no attempt to influence the one unconflicted member of council about indemnification.

As a result of my findings, I will not make an application to the Court to determine whether there has been a breach of the MCIA. I am satisfied based on the evidence before me that there is insufficient evidence to support this application.

D. Conclusions

I conclude that none of the individual Respondents retained Aird & Berlis and none of them received legal advice from the City Solicitor or Aird & Berlis on the Action. Similarly, they did not direct the City's defence. As a result, there was no obligation to declare a conflict of interest under the MCIA until the matter came before the Committee of the Whole. As explained by the City Solicitor, the Respondents declared a conflict of interest and the matter was not discussed (as there was no quorum). I find that the six Respondents did not violate Rules 7 or 16 of the Code or Sections 5, 5.1, or 5.2 of the MCIA.

I further find that the Respondents did not violate Rule 2 of the Code. The Complainant suggests in the Complaint that it is not proper for the Indemnification By-law to indemnify Members of Council who have been named as defendants in a legal proceeding alleging a violation of s. 424 of the MUNICIPAL ACT.

As Integrity Commissioner, I review matters within my jurisdiction through the lens of the public interest and consider alleged sources of conflict. I may consider the process of adopting an Indemnification By-law including the Members participation in substantive discussions at Council and their interactions with staff. I do not consider whether the resulting Indemnification By-law is *ultra vires*; however, I may consider whether there was benefit to the Members as contemplated by Rule 2 of the Code and section 5 of the MCIA which may have influenced the decision-making process. Here, I concluded that there was no violation of Rule 2 of the Code or s. 5 of the MCIA.

Instead, I conclude that the changes to the Indemnification By-law came about because of changes to the legislation. The legislature made amendments to the MUNICIPAL ACT by the *Modernizing Ontario's Municipal Legislation Act, 2016*. Of particular relevance to this Complaint, were the changes that came into affect in March 2019 to expand the functions of the Integrity Commissioner to include, most notably, commencing proceedings against Members of Council under the MCIA. The City changed the language in the Indemnification By-law in June 2019 to correspond to the new language of the MCIA, clarifying that indemnification would cover not only civil claims but proceedings including MCIA claims. The Complaint suggests that the changes to the Indemnification By-law were because of the Action and not that they were spurred on by the legislative changes. It appears from my vantage point that once municipal Integrity Commissioners were granted expanded powers to receive and investigate MCIA complaints, the City legitimately turned its mind to what, if any, indemnification would be included in the By-law in respect of Code complaints. Through this proceeding, the Complainant has sought a determination on whether Members of Council generally may be indemnified for liability under s.424 of the MUNICIPAL ACT and also if any members of council who are currently facing a code of conduct complaint (including a complaint alleging contraventions of the MCIA) may or would have a conflict of interest if they vote on the proposed amendments to the Indemnification By-law or suggest changes to the current or proposed bylaw. It appears on its face, that any Member of Council that is named in a Code complaint or in the Statement of Claim has a potential or actual pecuniary interest (for example, if that Member has engaged a lawyer to provide legal advice) in matters related to the Indemnification By-law. As a general rule, under the requirements set out in section 5, 5.1 and 5.2 of the MCIA, at a meeting of Council, a Member named in a claim, who has a financial interest in the discussion of the matter (the claim) and would have an obligation to **disclose** the interest, **not take part** in the discussion or vote and **not attempt in any way** whether before, during or after the meeting to influence the voting on any such question. However, based on the information brought forward in this Complaint, it is the position of this Office that participating and voting in the context of a discussion involving indemnification to which a Member generally is, or may have been entitled to, is a benefit and falls within the meaning of s. 4(i) MCIA. In the current complaint, I have investigated the complaint with relevant staff with a view to understanding whether they believed that their professional delegated authority was being undermined or that undue influence was exerted by Members who were acting in their personal interests to seek changes to the Indemnification By-law which were specifically germane to the individual Member in a matter being investigated by this Office or before the courts. I have found that for 6 Members of Council named in this Code complaint, there was no conduct that contravened the Code or the MCIA.

It is within the powers of a municipality to indemnify employees and Members of Council who are sued while carrying out their duty of employment or elected office, in other words, while doing their jobs. There is a carve out in the MUNICIPAL ACT, with respect to special funds and it appears that the legislature intends for a Member to be personally liable if a Member is found to have contravened s. 424. However, a determination on whether a municipality can include a provision in the Indemnification By-law to reimburse Members for s. 424 contraventions, is a decision reserved for the courts.

Appendix 1:

With respect to Issues #3, the Complainant alleged the following violations of the *Municipal Act, 2001*:

- a. Not holding a council or any committee meetings to seek direction and proper authority under the City's Procedural by-law and conflicted Council members indemnify themselves as members of council outside of a council meeting;
- b. Knowingly allowing use of taxpayer money for personal benefit;
- c. Receiving a personal benefit from use of taxpayer paid resources including staff and external council;
- d. Spending unauthorized funds;
- e. Conflicted members of council knowingly direct (or did not stop) staff from acting outside of delegated power by soliciting/receiving advice and direction from staff and external lawyers;
- f. Instructing staff and external lawyers to act under direction of conflicted members of council;
- g. By not seeking direct from non-conflicted members and not instructing the Clerk and/or City Solicitor to hold council meeting on the claim;
- h. And spending outside of the budget without approval from Council and outside of the allowable uses of taxpayer money under the MUNICIPAL ACT; and
- i. Violating by-laws and other provincial Acts.