

The following are my speaking notes from Audit Committee June 24. I have also attached Mr. Mascarins' opinion on the validity of allegations against me.

Thank you for the time to present information to you with respect to the delayed payment of a legal bill incurred while I was a Councillor. This bill has been approved by Audit Committee two times and yet remains unpaid. [Audit Committee approved payment again on June 25, 2019].

I am here today to provide background and share what I believe to be confidential information.

To be clear, I never refused to provide information: what is necessary to make an informed decision is very sensitive as it can lead to others experiencing damage from the conversation and I requested in-camera confidentiality.

Preliminary and necessary information includes my compliance with the guidelines for Councillors: when I was about to enter into employment with Chantlers/Don's, I disclosed the information to then Niagara Region Integrity Commissioner John Mascarin and followed his instructions.

The legal fees being questioned relate to the extortion threat I received by email on December 10, 2018.

After these exchanges, I contacted via telephone CAO D'Angelo to inform him of the issue. He advised me to contact John Mascarin at Aird & Berlis to formalize his opinion on conflict. I spoke with CAO D'Angelo again later that day and forwarded the emails to John Mascarin on December 20 to engage with A&B to provide a background opinion.

As said earlier, Audit Committee has approved payment of this invoice twice before. Staff may cite the expense policy when denying payment of this invoice; however, there are many reasons why that is not valid and that Audit Committee authorized the invoice to be paid. According to Section 4.9 of Regional Council Expense Policy, this invoice qualifies under sections a), c), and d).

Further, I consulted with senior staff immediately, as required under Section 5.1 e). I did what was required and asked. I was one of you and in my capacity as a Councillor, became a victim of coercion and extortion.

As an elected official, it was my responsibility to follow the principles and guidelines and rules laid out for municipal government. Unfortunately, because someone disagreed with how I voted, I was told *"you have a conflict because we don't like the way you vote. But if you change your vote, we won't proceed with any action" [against you and your company]*.

This is an affront to all duly elected officials. No expense policy can speak to such things.

I engaged the solicitor because that is what the CAO requested me to do.

The process of trying to finesse the payment through the approval process was not to avoid transparency and proper review but to prevent my then employer Chantler/Don's from reputation injury as a result of a baseless vendetta.

I have shared very specific details about this file with you and trust you will see your way to release me finally from this burden.

I served in municipal government with dedication for 15 years at the city and region. Any of us who step forward and put our lives and professions on hold to serve deserve to be more than a procedural conversation footnote as happened at the last Council meeting

I ask again that the commitment from the Region to pay this legal fee because it was incurred as a result of instructions I received. Staff has been instructed to pay this bill at least twice and yet it remains unpaid. Please honour the commitment and agreement entered into.

<i>Policy Category</i>	<i>Name of Policy</i>
<i>Regional Council</i>	<i>Regional Council Expense Policy</i>

4.9. Legal Expenses

- a) Legal costs arising from or in any way related to complaints under the Code of Conduct are Eligible Expenses.
- b) Legal costs related to personal conflict of interest opinions are Ineligible Expenses.
- c) Costs involving certain legal proceedings against Members shall be reimbursed in accordance with the current legal indemnification policy and are subject to review by the Audit Committee for recommendation to Council.
- d) Requests for reimbursement of legal costs outside this policy or the legal indemnification policy shall be submitted to the Audit Committee for recommendation to Council.

4.10. Election Year Restrictions

Note: Revision 1.0 - April 12, 2018, section 4.10 subsections (a) and (b) were repealed (see Report GM 5-2018).

Note: Revision 1.0 – April 12, 2018, section 4.10 was amended by adding the following clause (see Report GM 5-2018):

- c) Regional Councillors shall be directed by the *Use of Municipal Resources During the Election Campaign Period* policy.

4.11. Timelines

- a) Members shall submit quarterly expense reports with itemized receipts attached within 30 days after the end of each quarter to allow time for staff to verify and reconcile expenses before posting online; and
- b) Expense report information will be posted online on a quarterly basis and for a rolling period of 7 years plus current year.

5. Roles and Responsibilities**5.1. Members of Council**

- a) Adhere to this policy;
- b) Submit expenses on a regular monthly timeline;
- c) Sign-off on all expenses submitted to or paid by Niagara Region;
- d) Meet all financial, legal and tax obligations; and,
- e) Consult with Regional Administrative staff for guidance with respect to the eligibility of an expense and/or any interpretation on the application of this policy.

5.2. Regional Administrative Staff

- a) Ensure consistent application of this policy;
- b) Process expenses in accordance with this policy;
- c) Ensure the supporting documentation is in place and that expenditures conform to this policy;

AIRD BERLIS

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January 2, 2018

Our File No.: 142092

Paul Grenier
Regional Councillor – Welland
The Regional Municipality of Niagara
1815 Sir Isaac Brock Way
Thorold, ON L2V 4T7

Dear Councillor Grenier:

Re: ***Municipal Conflict of Interest Act***
Don's Portable Toilets

You have asked us to provide you with a legal opinion regarding your obligations under the *Municipal Conflict of Interest Act* (the "MCIA")¹ as they may relate to your employment with respect to Don's Portable Toilets, a company located in Stoney Creek that provides portable sanitation services in the Greater Hamilton area.

Background Facts

You are a Regional Councillor for The Regional Municipality of Niagara ("Niagara Region") having first been elected in 2014. Previously, you had been a three-term member of Welland City Council, first elected in 2003.

You are employed by an entity known as Don's Portable Toilets, a wholly-owned subsidiary of Chantler's Environmental Services Limited ("Chantler"). Your employment commenced on May 8, 2017. You are compensated by way of straight salary – no bonus or commission is payable to you on sales.

Tambro Construction ("Tambro") was awarded a contract, through a competitive tender, to build an affordable housing project at 524 Carlton Street, St. Catharines, for Niagara Regional Housing ("NRH"). The construction project was awarded prior to May 8, 2017. Chantler is the provider of portable toilets to Tambro.

NRH is a not-for-profit corporation established by Niagara Region. NRH is listed as an agency, board and commission of Niagara Region on its website although its precise legal nature is not certain. NRH is the contracted affordable housing administrator for Niagara Region as authorized under s. 17 of the *Housing Services Act, 2011*.² You are on the Board of Directors for NRH.

¹ R.S.O. 1990, c. M. 50 ("MCIA").

² S.O. 2011, c. 6, Sched. 1.

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You disclosed your employment with Don's Portable Toilets and the Tambro contract to us in our capacity as the then appointed Interim Integrity Commissioner for Niagara Region. You did so on May 18, 2017 prior to the start of a meeting of Regional Council in order to seek advice as to your duties and responsibilities to Niagara Region pursuant to the MCIA.

At that time we advised you that you owe certain duties to NRH and it was recommended that you disclose your employment status with Don's Portable Toilets to the NRH Board notwithstanding that there was no current matter pending for consideration by your employer or Chantler before the NRH Board.

We also noted that the mere fact that you were employed by an entity that had an arrangement with a contractor which had (prior to your employment) been awarded a contract by the NRH did not amount to a contravention of the MCIA.

Furthermore, we understand that you took our advice and, that on May 26, 2017, you disclosed your employment with Don's Portable Toilets at an open meeting of the NRH Board. You also, further to our advice, disclosed to the NRH CEO Dan Troke and Niagara Region CAO Carmen D'Angelo that you had sought our advice and had acted in furtherance thereof.

We now understand that your involvement as a Regional Councillor has come into question in so far as you have voted on matters pertaining directly or indirectly to the Niagara Peninsula Conservation Authority (the "NPCA") while under the employment of Don's Portable Toilets. We note that the authority of an upper-tier municipality with respect to a conservation authority under the *Conservation Authorities Act* is very limited and essentially extends only to appointment of persons to the applicable conservation authority's board of directors.³

You are not a member of the board of directors of the NPCA which is comprised of 15 members variously appointed by Niagara Region (12 members), City of Hamilton (2 members) and Haldimand County (1 member). The allegations raised by an elector do not identify a specific matter or matters before Regional Council wherein you failed to comply with your obligations under the MCIA. The elector's concern instead is stated as follows:

My concern is that if you are related to a business that gets any business from the NPCA, as Don's [Portable Toilets] does, then I believe you are in a direct pecuniary conflict of interest when any topic in regards to the NPCA comes up at the Region. I am not certain, but I am determined to find out.

³ R.S.O. 1990, c. C.27, ss. 4, 14. The statute establishes conservation authorities as relatively independent and autonomous bodies that have broad powers to accomplish their objects, including the power to acquire and expropriate lands, to purchase personal property, to construct and erect works and structures, to charge fees, and "generally to do all such acts as are necessary for the due carrying out of any project or as may be desirable to further the objects of the authority." Conservation authorities can also apportion their costs of operation to their participating municipalities.

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I have not finished compiling all of the data but so far I have not been able to find a situation where you recused yourself or declared a conflict, including the recent vote to allow me to address issues on the NPCA budget and the ensuing dialogue.

We have set out below our analysis of the law and have specifically considered the MCIA. We have also, for completeness, commented any possible implications related to Niagara Region's Code of Conduct.

Analysis

1. *Municipal Conflict of Interest Act*

(a) *Member Obligations - Declaration of Pecuniary Interest and Recusal*

A member, as defined by the MCIA (which expressly includes a member of council or of a local board), 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 s. 5 are *personal* obligations on a member of council.⁴

⁴ 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*.

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(b) Financial Interest

Although the term "pecuniary interest" is not defined by the MCIA, it had been held to be a financial interest related to or involving money".⁵

The jurisprudence has interpreted a pecuniary interest of a member of council to mean some sort of monetary 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.

(c) Indirect Pecuniary Interest

A pecuniary interest can take the form of a direct, indirect or deemed interest.

In this case, the elector alleges that you may have an indirect pecuniary interest by virtue of section 2 of the MCIA because you are an employee of Don's Portable Toilets:

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,

...

(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, by virtue of section 2 you would have an indirect pecuniary interest in any financial interest that Don's Portable Toilets may have in any matter before the Regional Council. However, we do not understand that there was any matter involving Don's Portable Toilets before Regional Council for consideration.

The unspecified matter or matters alleged by the elector relate to instances involving the NPCA.

Although you are a member of Regional Council there was no matter directly (or even indirectly) involving Don's Portable Toilets that was before Regional Council for consideration, debate or discussion.⁶

Since you are not a member of the NPCA, any matter involving or relating to Don's Portable Toilets that was before the NPCA does not trigger any obligations you may have under the MCIA.

⁵ *Tuchenhagen v. Mondoux*, (2011), 88 M.P.L.R. (4th) 234 (Ont. Div. Ct.) at para. 31.

⁶ "The pecuniary interest must be definable and real rather than hypothetical": *Lorello v. Meffe*, 2010 ONSC 1976, 99 M.P.L.R. (4th) 107, at para. 59.

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The question to be answered with respect to a potential pecuniary interest was put 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?⁷

There was no matter relating to the NPCA before Regional Council that had the potential to affect your pecuniary interest, either directly or indirectly.

(d) Exemptions

Section 4 of the MCIA recognizes that there are a number of instances in which a member may have a pecuniary interest but that it is not appropriate for the member to have to declare the interest and thereafter to refrain from participating, voting or attempting to influence the voting on the matter. Section 4 sets out eleven enumerated exceptions to the application of the requirements of section 5 (nine specific and two general exemptions).

It is our opinion that the exemption pertaining to an interest in common with electors generally is applicable to your situation as it relates to any consideration by Regional Council or any of its committees with respect to matters generally relating to the NPCA.

We are also of the view that it is likely that the "remote and insignificant" exemption in section 4(k) may also apply with respect to any budget-related or other general matters pertaining to the NPCA that may arise at Regional Council.

Sections 4(j) and (k) of the MCIA provide 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.

If one or both of the above exceptions are applicable, the requirements of section 5 of the MCIA do not apply (in other words, you are not required to declare a pecuniary interest or required to recuse yourself from any participation or voting at Regional Council).

⁷ *Greene v. Borins* (1985), 28 M.P.L.R. 251 at para. 42 (Ont. Div. Ct.).

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Both of these exceptions can be regarded as involving circumstances in which an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the pecuniary interest would not affect the council member's ability to make an impartial decision.⁸

Our opinion relates to the consideration of any matters validly before Regional Council related to the NPCA. Should the matter be considered by Regional Council pertain specifically to grants or allocations to the NPCA involving items related to services or equipment provided by Don's Portable Toilets or by Chantler, further consideration should be given as to whether there is a possible potential pecuniary interest that is not merely speculative in nature. Such a matter before Regional Council might have the potential to constitute a true possible pecuniary interest and should be considered on a case-by-case basis (although, given the NPCA's powers and jurisdiction under the *Conservation Authorities Act*, we do not see such a matter arising at Regional Council).

The exception relating to remote or insignificant interests under section 4(k) does not pertain to the quantum of the financial interest at issue but, rather, it applies to the importance of the matter to the member.⁹

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

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 result depending on the manner in which the member disposed of the subject matter before him or her.¹⁰

The courts have recently given a greater emphasis to the reasonable elector's consideration of *all of the circumstances* concerning the matter.¹¹

Moreover, the Ontario Court of Appeal has indicated that where the remote or insignificant exemption under section 4(k) relates to an indirect or deemed interest, a two stage-test is imposed. As noted in *Ferri v. Ontario (Attorney General)*, it is not appropriate to fix the

⁸ *Gammie v. Turner* (2013), 11 M.P.L.R. (5th) 177 at para. 72 (Ont. S.C.J.).

⁹ *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1 (Ont. S.C.J.).

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

¹¹ See the expansive application to the test in section 4(k) 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; and *Craig v. Ontario (Attorney General)* (2013), 15 M.P.L.R. (5th) 23 (Ont. S.C.J.) at para. 35.

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member with the same level of significance and proximity as that of the entity or body having the interest under section 2 or the family member under section 3.¹² The Court of Appeal wrote as follows with respect to the interest of a member vis-à-vis his child:

The analysis of whether a councillor's pecuniary interest is too remote or insignificant to be reasonably regarded as likely to influence that councillor cannot be premised on the notion that, unless proven otherwise, the councillor is fixed with the same level of proximity and significance as his child. The s. 4(k) analysis must commence afresh and focus on the proximity and significance of the councillor's pecuniary interest in the context of all the circumstances. In my view, the application judge erred in his approach to s. 4(k) by reading in a rebuttable presumption.¹³

In stating that the section 4(k) analysis "must commence afresh and focus on the proximity and significance of the councillor's pecuniary interest in the context of all the circumstances", the Court of Appeal referenced cases involving pecuniary interests under both sections 2 and 3 of the MCIA.

In this case, even if it can be argued that Don's Portable Toilet's or Chantler might have a potential pecuniary interest in a matter involving the appointment of persons to the NPCA board or the apportionment of NPCA costs that is before Regional Council, it would still have to be established that such financial interest was proximate and significant to you as the employee. Given that you are compensated by fixed salary (and not by bonus or commission), it is our view that it would be very unlikely that you would be fixed with the requisite degree of proximity and significance of interest as your employer or even anything close to it. It is our opinion that your interest would likely be exempted under section 4(k) of the MCIA.

2. Code of Conduct for Members of Council

Although no allegations have been made that you contravened Niagara Region's Code of Conduct,¹⁴ we have reviewed same as this document contains provisions related to conflicts of interest.

The Code of Conduct provides that members of Regional Council "shall avoid conflict of interest or unethical behaviour." The document states that it will assist members to identify and handle potential conflicts of interest. The operative section provides as follows:

¹² *Ferri v. Ontario (Attorney General)*, 2015 ONCA 683.

¹³ *Ibid*, at para. 15.

¹⁴ Regional Council enacted By-law No. 06-2013 on January 17, 2013, to amend its procedural by-law by replacing Appendix "A", its former Code of Conduct for Members of Council, with the Code of Conduct in its current substantive form. The Code of Conduct was subsequently amended several times. A new up-to-date code of conduct had been proposed but on December 14, 2017, Regional Council voted to reject a significantly emasculated Code of Conduct. Thus Regional Council left in place the Code of Conduct that was essentially enacted in early 2013.

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Members of Council shall fully comply with the provisions of the *Municipal Conflict of Interest Act*. This Act outlines the procedure to be followed if a party wishes to pursue an alleged contravention of the *Municipal Conflict of Interest Act*. Members of Council shall also avoid conflict of interest or unethical behaviour in the following situations (note conflicts are not limited to the following):

Members of Council shall not use their position within the Region to gain any particular interest personal or family advantage or benefit in utilizing any service provided by the Region or in conducting any business on behalf of the Region.

- (i) Members of Council shall not be involved as an official of the Region in judging, inspecting or making a decision on any matter in which they have a personal or family interest. Any Member of Council involved shall immediately declare a conflict of interest as soon as such conflict is identified.

In summary, the above-noted provisions of the Code of Conduct essentially provide that Regional Councillors shall avoid contravening the MCIA and that they shall not use their position at Niagara Region to gain any particular interest, personal or family advantage or benefit in utilizing any service provided by Niagara Region or in conducting any business on behalf of Niagara Region.

It is our opinion that if you have made any decisions related to the NPCA at Niagara Region, none of these decisions would have contravened the MCIA (for the reasons stated in #1 of this correspondence) nor have they provided you any personal or family advantage or benefit in utilizing any service provided by Niagara Region or in conducting any business on behalf of Niagara Region. Moreover, you fully disclosed your employment status to both Niagara Region's CAO and to NRH's CEO, which goes above and beyond the requirements of the Code of Conduct.

Accordingly, to the extent that it might be submitted that the Code of Conduct broadens the scope of conflicts of interest beyond that regulated under the MCIA, it is our opinion that your actions have not contravened the Code of Conduct in any way.

Conclusions

Based on our review of the matter, it is our opinion that you have not breached the MCIA.

First, your obligations of the MCIA have not been triggered by virtue of any decision, by-law or resolution passed by the NPCA as it might relate to your employer since you are *not* a member of the NPCA.

Second, there was no matter directly involving your employer (or its parent company) that was before Regional Council that required you to declare a pecuniary interest and refrain from voting or participating on.

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Third, any matter before Regional Council related to the NPCA is not a matter that you are precluded from participating in at Regional Council simply by virtue of your employment with Don's Portable Toilets as any pecuniary interest your employer (or its parent company) may have is merely speculative.

Fourth, any financial interest you may have by virtue of your employment by Don's Portable Toilets would be exempted under either sections 4(j) or (k) of the MCIA, unless the matter was tied to or connected with sufficient proximity to the services provided or the goods sold by your employer (or its parent company).

Fifth, even if such a nexus existed, you have only a remote and insignificant proximity and connection to any pecuniary interest arising such that a reasonable elector would not believe that you would be likely to be influenced by such a financial interest in voting one way or the other on any such matter before Regional Council.

Finally, we are also of the view that your actions have not breached Niagara Region's Code of Conduct and any provisions therein related to conflict of interest. You have complied with the requirements of the Code of Conduct and have disclosed your employment status to Niagara Region's CAO. You have avoided any conflict of interest and have not used your position within Niagara Region to gain any particular interest, personal or family advantage or benefit in utilizing any service provided by Niagara Region with the NPCA, all in accordance with the provisions of the Code of Conduct.

Yours truly,

AIRD & BERLIS LLP



John Mascarini

JM/cw

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