

Principles *Integrity*

ADVICE MEMORANDUM

TO: Maria Mavridis
Councillor, Town of Niagara-on-the-Lake

FROM: Principles *Integrity*,
Integrity Commissioner for the Town of Niagara-on-the-Lake

DATED: April 10, 2025

FILE: Advice Request
Participation in Council

This is in response to our telephone conversation and the exchange of email messages we had on April 9, 2025.

Background

Your concern relates to the temporary restaurant patio program brought in by the Town as a COVID response, and the continuation of that program at various times, by Council.

Your father operates a restaurant with an attached enclosure, on Queen Street, the Town's main thoroughfare. You recognize that if your father has a pecuniary interest in a matter before Council, by operation of the *Municipal Conflict of Interest Act* that interest is deemed to be your interest on account of the family relationship.

The patio program enabled restaurants throughout Niagara-on-the-Lake to extend restaurant operations into abutting Town parking spaces, subject to Town approval. You were present at a meeting of Niagara-on-the-Lake Council on November 21, 2023, at which the patio program was discussed, and a further report from staff requested.

Staff provided a report to Council on January 16, 2024, on January 14, 2025, and again on February 25, 2025. You introduced a motion with respect to the program at the February 25, 2025 Council meeting.

Scott Gauld is the operator of a restaurant on Queen Street. Mr. Gauld filed a complaint with the Town's former Integrity Commissioner, Edward McDermott, on the basis that by participating in the discussion and voting on the question of the continuation of permitted patios in parking spots on Queen Street on November 21, 2023, you would be impacting patio competition [for restaurants] on Queen Street and potentially other areas of town, and were therefore in a conflict of interest.

Principles *Integrity*

Mr. McDermott issued his thirteen-page decision on February 10, 2024. He found that no conflict of interest had occurred, principally on the basis that the November 21, 2023 discussion and voting was a matter of 'process', not substance.

Having come to that conclusion Mr. McDermott recognized the potential applicability of the MCIA section 4(j) exception commonly referred to as the 'interest in common' exception, but did not provide detailed analysis on the point. He concluded "Depending on the facts and issues before Council when (and if) this matter comes forward again, the applicability of such an exception may or may not provide relief from the application of section 5 MCIA obligations to the circumstances."

Mr. Gauld, the complainant in the matter decided by Mr. McDermott, has filed an application to the Ontario Superior Court of Justice seeking a declaration that you contravened the MCIA by not declaring an indirect pecuniary interest at the February 25, 2025 meeting. In his notice of application he takes issue with the conclusions of Mr. McDermott respecting the November 2023 meeting, as well.

You have advised that the Lord Mayor is anticipated to bring a motion forward on Tuesday April 15, 2025 dealing with the extension of the patio program (the agenda not yet being available, the specifics of the motion are not confirmed at present).

You anticipate the motion will be in response to Council's unanimous decision (of those present) of March 25, 2025, minuted as follows:

That Council cancel the Temporary Patio Program at the end of December 31, 2025 and direct Staff to report back on budget, timing and boundaries for a Heritage District (Queen Street) Master Secondary Plan.

Councillor Burroughs requested a recorded vote.

Yea (8): Councillor Tim Balasiuk, Councillor Gary Burroughs, Councillor Wendy Cheropita, Councillor Maria Mavridis, Councillor Sandra O'Connor, Councillor Adriana Vizzari, Councillor Erwin Wiens, and Councillor Andrew Niven

We have summarized the Council decisions respecting the patio matter and have excluded from our recitation (for the most part) the central questions and motions at each meeting. If we have made an error in reciting the factual basis for your request however, or if there are other considerations you believe ought to be taken into account, please advise us at your earliest opportunity as this could change the nature of our advice to you.

Advice Sought

You have sought our advice on the question of whether you may participate in Council's anticipated debate on Tuesday April 15, 2025, and to provide general advice with respect to the Gauld Notice of Application.

Principles *Integrity*

Analysis:

Interest in Common Exception:

With respect to Mr. McDermott's decision respecting Mr. Gauld's complaint to him, we find his conclusion to be *reasonable*, which is one of the principal tests that would be applied were his decision to be brought before the Divisional Court on judicial review (the Court would likely also find his adherence to the principles of procedural fairness to be *correct*).

Were we to conduct the analysis ourselves, however, we may well have come to a different basis for a finding that no conflict of interest existed on the facts. Indeed, though Mr. McDermott provided only cursory analysis of the application of the 'interest in common' exception, we likely would have made that exception more central to our findings.

The 'interest in common' exception is indeed central to our advice with respect to your participation at Tuesday's Council meeting on the Lord Mayor's anticipated motion respecting the patio program.

If we assume that your father has a pecuniary interest in the patio program, that interest would become your interest by virtue of section 3 of the MCIA:

Interest of certain persons deemed that of member

3 For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member.

It is not clear to us that your father, merely because he is the operator of a restaurant in the municipality, has a pecuniary interest in the question of whether a restaurant patio program (one which relies on the occupation of parking spaces for patio placement) were to exist. His restaurant, while having a permanent outdoor structure on private lands, does not and intends not to occupy parking spaces for the purposes of patio placement.

While Mr. Gauld contends that the establishment of restaurant patios would have an impact on your father's restaurant business, in effect serving as competition for his outdoor space, the proper analysis is to focus on whether the patio program presents a pecuniary interest for all restaurants on Queen Street, and elsewhere in the municipality where the program is intended to exist. In other words the existence of the permanent outdoor structure is not, in our view, key to the analysis.

Further, the existence of the patio program would have an impact on all retail establishments within the patio program area. The occupation of parking spaces otherwise available for the customers of these establishments; the economic development opportunities created by increasing (or decreasing) restaurant patrons in

Principles *Integrity*

the general area of their establishments; and the noise associated with outdoor patio usage...are some of the reasons why non-restaurant establishments on Queen Street and elsewhere in the municipality could be impacted from the program. If, under a detailed analysis, the patio program has a pecuniary interest for your father's restaurant, it would have a pecuniary interest for a large number of establishments within the patio program area.

This observation leads us directly to the interest in common exception. The interest at hand need not be 'in common' with every resident of the municipality. It is sufficient, for the exception to be applied, to identify the interest to be in common with a substantial community of interest, such as all restaurants within the patio program area, if not all businesses within the area which would be impacted by the loss of parking spaces, increased/decreased clientele traffic, noise or other deleterious effects, etc.

In our view any pecuniary interest your father would have in the patio program being extended is an interest in common with all restaurants and businesses within the program area, and therefor subject to the exception. As a result, you have no obligation to declare an interest and recuse yourself from the debate on Tuesday. If however the debate turns to the lands directly abutting your father's restaurant, you would have a deemed interest in that portion of the debate only.

The Effect of the Application to the Superior Court of Justice:

You have added as a concern that Mr. Gauld's application under the MCIA raises a separate potential risk for you – that being that he might argue that your participation in the matter on Tuesday, even though subject to the exception noted above, creates a direct interest for you as a result of the litigation.

We do not find that that is the case.

The interest of Mr. Gauld's claim is a separate matter from your consideration of the Mayor's motion respecting the patio program. Council's decision in the matter has no impact on the viability of Mr. Gauld's position before the Court. If Council decides, for example, to extend or modify the program, that will have no bearing on Mr. Gauld's arguments respecting your past involvements in the matter giving rise to a conflict of interest under the MCIA.

From a public policy perspective, collateral steps that have the intent of denying an elected official their opportunity to deliberate and vote on a matter should be carefully examined. In this instance, given our view that you may participate in the debate on the patio question, the filing of an application questioning the legitimacy of your past participation on the issue does not automatically exclude you from participating in a similar discussion.

Our conclusion would be otherwise if the matter before Council were in respect of the application itself, such as a question of whether you would be indemnified for your legal

Principles *Integrity*

fees in defending the application. That debate would result in a direct pecuniary interest for you, and you would be obliged to declare the interest and step away from the discussion. If the matter is to be discussed in closed session, you would be obliged to absent yourself from the meeting room.

Recommended Course of Action

Accordingly, we see no impediment to your participation in the matter anticipated to be before Council on Tuesday April 15th. You are of course free to refer to our advice if for some reason your participation is questioned

We would be pleased to discuss our advice with you at your convenience.