

INTEGRITY COMMISSIONER REPORT ON MCIA APPLICATIONS 2020-01 & 2020-02 REGIONAL COUNCILLOR ELIZABETH CLARKE

SUMMARY

Two formal applications pursuant to subsection 223.4.1(2) of the *Municipal Act, 2001* were filed with the Office of the Clerk of The Corporation of the Regional Municipality of Waterloo (the “**Region**”) on December 11, 2020 and December 15, 2020 (the “**Applications**”).

The Applications allege that Regional Councillor Elizabeth Clarke (the “**Councillor**”), a member of Regional Council, contravened the *Municipal Conflict of Interest Act*.¹

The Applications allege that the Councillor contravened the MCIA by failing to disclose a pecuniary interest, participating in discussion, and voting on a matter involving the closure of five Region-operated child care centres.

APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed as Integrity Commissioner for the Region pursuant to subsection 223.3(1) of the *Municipal Act, 2001*² on May 8, 2019 by Motion PDL-CAS-19-05.

The Applications were validly filed. As such, we have reviewed them in accordance with our authority as Integrity Commissioner pursuant to the Region’s Complaint Protocol (forming part of the Regions’ *Code of Conduct for Members of Council*) and the provisions of the *Municipal Act, 2001*.

Given that both Applications dealt with the same subject matter, we exercised our discretion to proceed with the matters jointly and concurrently.

This Report includes our decision regarding our inquiry into the Applications issued pursuant to Section 9.8 of the Complaint Protocol and subsection 223.4.1(17) of the *Municipal Act, 2001*.

Section 223.4.1 of the *Municipal Act, 2001* provides that the Integrity Commissioner shall decide whether to apply to a judge under section 8 of the MCIA for a determination of whether a member has contravened the statute, and shall publish reasons for the decision.

The decision of the Integrity Commissioner is not subject to the approval of Council and does not take the form of a recommendation to Council. Therefore, no Council resolution is required to give effect to the decision.

¹ R.S.O. 1990, c. M.50 (the “**MCIA**”).

² S.O. 2001, c. 25.

TIMING

The Applications were both filed within the statutory six-week limitation period set out in subsection 223.4.1(4) of the *Municipal Act, 2001*. The Councillor's alleged contravention occurred at a special meeting of Regional Council held on December 2, 2020 (the "**Meeting**"). The Applications were filed on December 11, 2020 and December 15, 2020.

MCIA PROVISIONS AT ISSUE

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

When present at meeting at which matter considered

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

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

The allegations in the Applications engage the indirect pecuniary interest provision contained in clause 2(a) of the MCIA, which provides 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;

...

REVIEW OF MATERIALS & INQUIRY

In order to undertake our inquiry into the Applications and make a determination on the alleged contravention of the MCIA, we have undertaken the following steps:

- Review of Applications 2020-01 and 2020-02 and all materials referred to therein;
- Review of the Councillor's response, dated January 15, 2021, and all attachments and materials referred to therein;
- Review of the reply submissions of the Applicants, dated January 18, 2021 and January 20, 2021;
- Review of relevant Council materials, including agendas, minutes, and staff reports and presentations; and
- An interview with one individual (i.e. witness) with knowledge of the subject matter underlying the Applications.

The Councillor and Applicants were fully cooperative and forthright during the course of our inquiry into the matter.

A draft copy of this Report was provided to the Councillor and Applicants on April 26, 2021 for a limited opportunity to review and comment on any errors or omissions. We received confirmation that the Councillor and Applicants had no further comments.

BACKGROUND

The matter underlying the Applications involves the closure of five (5) child care centres directly operated by the Region. We understand this to be a sensitive topic in the community and wish to make note at the outset of our Report that it is not the role of the Integrity Commissioner to question or evaluate the policy decisions of Regional Council. Policy decisions, such as the closure of child care centres, are wholly within the purview of Regional Council. While such decisions are, of course, subject to scrutiny by residents through the democratic process, our role in this matter is limited to determining whether the Councillor contravened the MCIA, as has been alleged. As such, our Report and the comments made herein should not be construed as commenting or providing any opinion on the merits of Regional Council's decision.

(a) Introduction

The Councillor was appointed to Regional Council in 2015, and subsequently re-elected in 2018 for the 2018-2022 term.

In addition to being a Regional Council member, the Councillor is the Chief Executive Officer ("CEO") of the YWCA, Kitchener-Waterloo (the "YW"), where she has worked for eighteen years.

The YW is a non-profit organization that offers a variety of programs and services to the Kitchener and Waterloo community. Among these services are early learning and child care services. The YW is a licensed provider of child care services. We understand that the YW's child care services are not a profit-generating program. Although the YW does collect user fees, the cost of delivering child care services is offset by a combination of fundraising and revenues from other profit-generating programs.

(b) Region's Role in the Child Care System

The Region is a designated “service system manager” for the purpose of the *Child Care and Early Years Act, 2014*.³ Accordingly, the Region is responsible for coordinating the planning and operation of the local child care and early years system, including 14,000 licensed child care spaces operated by 67 licensed operators at 147 locations. The Region also provides formula-based operational funding, grants, and other programs and resources to support the child care system as a whole.

In addition to its role as service system manager, the Region itself is a licensed child care operator. The Region directly operates five (5) child care centres, providing spaces for 207 children. This is a discretionary service provided by the Region, and is not a requirement of its statutory responsibility. In the past, the Region has faced questions as to whether it should directly operate licensed child care facilities in addition to its other statutory responsibilities as service system manager.

Starting in 2015, the Region engaged the consulting firm KMPG to conduct a comprehensive service review aimed at eliminating inefficiencies and enhancing value for taxpayers. This included reviewing the Region's provision of child care services. This aspect of the service review was guided by the Children's Centre Review Steering Committee (the “**Steering Committee**”).

(c) Child Care Centre Service Review

In December 2019, KPMG's “Final Report – Service Review 2019” was presented through Staff Report HRC-ADM-19-08. KPMG's report identified 19 opportunities for the Region's consideration involving services that were either discretionary or involve a comparatively higher cost of service delivery. One such opportunity was reviewing the need for and number of directly operated child care centres. KMPG identified potential savings of \$1,300,000.

At its meeting on January 14, 2020, the Region's Administration and Finance Committee recommended that Regional staff engage a third-party consultant to conduct a review of the Region's operation of child care centres. Regional Council approved this direction on February 19, 2020.

Under the guidance of the Steering Committee, KPMG was retained to conduct a further review of the Region's operation of child care centres. KPMG presented the results of its review in a final report, dated November 2020 (the “**KMPG Report**”).

The KMPG Report outlined five (5) options for the Region's child care services, which included the complete closure of Region-operated child care centres. This option recognized that there would be a potential for reinvestment of provincial funding into the child care sector, along with re-prioritization of levy funding. The KMPG Report suggested alternative uses for the provincial and levy funding. The KMPG Report did not make a recommendation as to which option the Region should pursue.

KPMG presented the KMPG Report in draft to the Steering Committee on October 27, 2020. After assessing the options outlined in the KMPG Report, the Steering Committee recommended that the Region close five child care centres operated by the Region. The Steering Committee cited

³ S.O. 2014, c.11. Sched. 1.

several reasons for selecting this option, including inefficiencies and unnecessarily high costs. For example, the closure of child care centres would allow the Region to focus on its statutory role as service system manager, and fund key priorities in the local early learning and child care system. In addition, the KMPG Report identified that the Region was disproportionately investing funding in regional-operated child care spaces in comparison to other licensed child care spaces across the Region. By reinvesting these funds in the system as a whole, it was estimated that the Region could support between 350 and 791 additional licensed spaces.

The financial implications of a decision to close regional-operated child care centres benefit from further clarification. As a result of closure, the Region's direct cost to operate child care centres (approximately \$7 million per year) would be removed from the Region's Children's Services Budget. As for revenues, the enrollment fees paid by parents (approximately \$2 million) would disappear after closure, as those centres would not generate fees. However, a provincial subsidy (\$4.3 million) and regional property taxes (less than \$1 million) would remain within the Region's Children's Services Budget. The provincial subsidy would eventually be redirected to the broader child care system through the Region's role as service system manager based on budget items yet to be specifically determined, but which generally address priorities of affordability, sustainability, quality, and equity. The regional property taxes would also be redirected as determined by Regional Council at a later time.

For added clarity, the recommendation to close regional-operated child care centres did not entail the immediate transfer of money to any entity. Although it is possible that other licensed child care operators could benefit from grants or increased funding at some future time, that work is to be completed by Regional staff and approved by Regional Council at a later time. In addition, although closure would result in the financial implications identified above, Regional Council's decision alone is not sufficient to determine how the provincial subsidy would be reallocated within the Children's Services Budget, or to which items and based on what criteria this money would flow. Similarly, this work would be completed at a later time.

(d) Public Consultation Meeting

The Region's Committee of the Whole (the "**Committee**") considered the recommendation of the Steering Committee to close regional-operated child care centres at a lengthy virtual meeting held on November 18, 2020. The purpose of this meeting was to receive public input on the recommendations, while a final decision would be deferred to a future meeting. We note that this meeting was overwhelmingly attended by members of the public who spoke in opposition to the proposed closure of child care centres operated by the Region.

The Committee considered Report HRC-PER-20-02 "Region of Waterloo – Plan and Budget Beyond COVID – Service Review 2019 Implementation", dated November 17, 2020 (the "**Report**"). The Report outlined the actions contemplated by the KMPG Report, namely, the closure of the Region's child care centres.

At this meeting, the Region's Director of Children's Services explained the process of KPMG's review, which ultimately led to the recommendation put forth by the Steering Committee. The Director of Children's Services also presented on how the Steering Committee's recommendation to close the Region's child care centres would be implemented.

After hearing from no fewer than 49 delegates, the Committee adjourned its meeting, and deferred a final decision until Regional Council's meeting on December 2, 2020.

(e) The “Matter” Alleged to Give Rise to a Pecuniary Interest

The Meeting to discuss implementation of the service review was held on December 2, 2020 before Regional Council. In particular, Regional Council was to consider the recommendation of the Steering Committee to close regional-operated child care centres at the Meeting.

The sole agenda item before Regional Council was the Report, accompanied by a recommendation drafted by Regional staff (the “**Closure Recommendation**”):

Recommendation:

Whereas the Region of Waterloo recognizes the vital importance of quality licensed child care in our community, particularly at this time, the important role to workforce participation of parents, especially mothers, and the role it plays in the recovery of the local economy. The impact of high quality child care on children’s outcomes is especially important for vulnerable children; and

Whereas COVID-19 has created significant challenges, such as lower enrolment and increased costs for child care providers across Waterloo Region. These challenges are impacting the sustainability of some child care programs. Additional funding, beyond currently committed federal and provincial funding, is now required to maintain child care spaces; and

Whereas approximately 2,000 licensed child care spaces for children ages zero to four years are currently vacant; and

Whereas the Region of Waterloo, as designated the service system manager for licensed early learning and child care by the province, is responsible for overseeing quality, affordable care in approximately 14,000 child care spaces through licensed centre and home child care programs; and

Whereas KPMG has indicated that for the same amount of funding that the Region allocates to operate 200 of its own child care spaces, the Region could support an additional 350 to 791 licensed spaces operated by community programs; and

Whereas the KPMG review confirmed that the current model of child care provision at the Region of Waterloo comes at a significant cost to taxpayers – in particular the Region’s five Children’s Centres provide 1.9% of child care spaces in Waterloo Region for 10.2% of the Children’s Services operating budget; and

Whereas in addition to supporting affected families and staff, Children’s Services will develop a comprehensive funding redistribution plan. The funding redistribution plan will address the priorities of affordability, sustainability, access and quality as identified above and the details will be based on significant engagement and will align with the local service system plan that is currently under redevelopment.

Therefore be it resolved that the Region of Waterloo focus on our role as service system manager, thereby closing or discontinuing the operations of the five Region operated centres, immediately implement a transition plan for the currently enrolled families, and implement the funding redistribution plan to support the entire system more equitably.

The operative portion of the Closure Recommendation provided that the Region would close all five (5) of its child care centres as contemplated by the KMPG Report, institute a transition plan for children registered in these child care centres, and implement a funding redistribution plan. The Closure Recommendation did not entail the immediate redistribution of funds to any entity, and did not identify any funding criteria, qualifications, or specific entities eligible for funding redistribution. It was understood that those details would follow Regional Council's initial decision on the matter of closure.

The Meeting was called to order at 6:22 PM. The minutes of the Meeting indicate that no member of Regional Council declared a pecuniary interest in any matter.

The Meeting began with further delegations on the potential closure of the Region's child care centres. Of note, one delegate raised the issue of the Councillor's perceived conflict of interest in the Closure Recommendation.

The delegate pointed out that the Councillor had not declared a conflict of interest at the Meeting despite having declared a conflict in a similar matter that was before Regional Council in 2015. The delegate posed the question of what had changed from then until now, alleging the YW still stood to gain from the reallocation of funds.

The Councillor spoke in response to the allegations. She noted that when the matter was under consideration in 2015, there was a recommendation that the Region transfer ownership of its child-care centres to non-profit organizations, and that although the YW was not interested in assuming ownership, she felt there was an appearance of a conflict that required her to declare a pecuniary interest. The Councillor contrasted this previous recommendation with the Closure Recommendation, which did not include any reference to divesting properties or facilities, or the immediate transfer of money. The Councillor further noted that the YW would conceivably be eligible for some funding redistribution, but any amount would be insignificant and only benefit the YW as part of a greater class of organizations.

Following the delegations, Regional Council discussed many aspects of the Closure Recommendation and related matters. The Councillor did speak in support of the Closure Resolution.

A recorded vote was called on the Closure Recommendation. The Closure Recommendation was moved by the Councillor, seconded by Regional Councillor Erb, and carried by a vote of 12 to 3. The Councillor voted in favour of the Closure Recommendation.

THE POSITION OF THE PARTIES

(a) Applicants

The Applicants, through separate written submissions, submit that the Councillor contravened subsection 5(1) of the MCIA by failing to declare a pecuniary interest, by participating in the discussion of, and by ultimately voting on the Closure Recommendation.

The Applicants' argument can be summarized as follows. The Councillor, through the YW, stands to benefit financially from the Closure Recommendation. It entails the reallocation of funds to other licensed child care providers in the Region. The YW is one such licensed child care provider.

In addition, the intent of the Closure Recommendation was to reallocate funding such that an additional 350 to 791 licensed child care spaces could be supported. As a direct operator of licensed child care facilities, the YW therefore stands to benefit from additional enrollment.

Furthermore, as a result of the closure of Region-operated child care centres, some 72 children will be transitioned to other licensed child care operators. The YW could potentially be one such child care operator. Of importance, YW's operation is in close geographic proximity to at least one of the Region's child care centres that will be closed.

As such, the Applicants contend that the Councillor had an indirect pecuniary interest in the Closure Recommendation under section 2 of the MCIA, which is more than an "interest in common with electors generally" because of the direct benefits to licensed child care providers.

(b) Councillor

The Councillor submits that she did not contravene the MCIA as she had no indirect pecuniary interest in the Closure Recommendation.

The Councillor explained the progress of KMPG's service review and the various recommendations put forward over the years. As noted, the Councillor previously declared a conflict of interest when consideration was given to transferring regional child care centre assets to private operators; in that outcome, the YW could have potentially been a recipient of those assets. However, as the Closure Recommendation did not follow in line with this previous asset transfer recommendation, the Councillor did not declare a conflict.

The Councillor denies that the YW will derive any sort of a financial benefit from the Closure Recommendation. The Councillor notes that the proposed redistribution of funding must still be worked out in detail by Regional staff. While there is some remote possibility that families with children enrolled in regional-operated child care centres will re-enroll in a centre operated by the YW, that outcome is entirely up to those families and neither the Region nor the YW control these choices.

The Councillor asserts that the allegation that the intention of the Closure Recommendation was to equitably redistribute funds saved by the Region amongst other licensed child care operators is false. She notes that the intention of the Closure Recommendation was to more equitably distribute funding amongst all 14,000 children receiving child care in the Region, not amongst licensed operators. The Closure Recommendation does not provide for the transfer of money to any one particular operator.

In response to the allegation that the YW could be the beneficiary of the "additional 350 to 791 licensed spaces" that might be supported as a result of the closure of the Region's child care centres, the Councillor notes that there is no immediate proposal to expand child care spaces in private operations. The Councillor points out that this is not how new licensed child care spaces or centres are created in Ontario. According to the Councillor, when a new elementary school is built, the Ministry of Education also funds the construction of a child care centre within those schools. The local school board then selects an operator for those centres, and the Ministry of Education provides operational funding.

The Councillor submits that it is highly unlikely that the YW would benefit from and enroll any of the children that must be transitioned from one of the regional-operated child care centres to private operators. 72 children will be required to enroll in a new space following the Region's

closure of its child care centres. Estimates provide for 2,000 licensed child care spaces that are currently vacant. Furthermore, it is a family's own choice where their child will enroll following the closure of the Region's child care centres. In summary, it is very unlikely that the YW will benefit through increased enrollment as a result of the Closure Motion.

The Councillor also provided our office a copy of the YW's Income Statement (dated as of December 31, 2019) to lend support to the conclusion that the YW derives no financial benefit from its child care centres, as it operates that program at a loss.

FINDINGS

For the reasons set out below, on a preponderance of the evidence and on a balance of probabilities we find that the Councillor has not contravened subsection 5(1) of the MCIA.

A. No Indirect Pecuniary Interest

The Councillor does not have an indirect pecuniary interest in the Closure Recommendation.

The MCIA is not concerned with personal "conflicts of interest," as that term is understood colloquially, or with perceived bias. The statute is only concerned with a member's "pecuniary interest," which is a financial interest related to or involving money.⁴ The jurisprudence has interpreted pecuniary interest to include a monetary benefit that will be received or could be received, either in cash or in an increase in the value of an asset. The question is:

Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor?⁵

To have a conflict under the MCIA, there must be a pecuniary interest at the time of the vote. There must be an actual conflict, or a reasonable assumption that a conflict will occur. The pecuniary interest must be definable and real rather than hypothetical. The assessment cannot be based in speculation or possibilities, but grounded in reasonable probabilities.⁶

A political interest in a matter does not, on its own, constitute a pecuniary interest in a matter.⁷

A member may have a pecuniary interest through related entities under section 2 of the MCIA:

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,

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

⁵ *Greene v. Borins* (1985), 28 M.P.L.R. 251 at para. 42 (Ont. Div. Ct.).

⁶ *Lorello v. Meffe* (2010), 99 M.P.L.R. (4th) 107 at para. 59 (Ont. S.C.J.).

⁷ *Cauchi v. Marai* (2019), 87 M.P.L.R. (5th) 318 at para. 50 (Ont. S.C.J.).

- (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. [emphasis added]

There is no doubt that the Councillor, as CEO of the YW, is a senior officer of a corporation that does not offer its securities to the public. The Councillor falls within the scope of subclause 2(a)(i) of the MCIA. As a result, section 2 therefore attributes any pecuniary interest on the part of the YW to the Councillor. The Applications must be evaluated through this lens.

Based on our review of the facts and background of the Closure Recommendation underlying the Applications, the Councillor does not have an indirect pecuniary interest for the reasons described below. In our assessment, the arguments put forth by the Applicants are hypothetical and speculative – this does not qualify as a pecuniary interest under the MCIA.⁸

(i) No Immediate Transfer of Funding

The Closure Recommendation, as adopted by Council, does not in and of itself entail the immediate transfer of funding to any particular entity. It is not the case that the Closure Recommendation directs Regional staff to immediately transfer money to other child care operators, or “equitably” redistribute money saved through a one-time cash payout. Rather, and as indicated in the various staff reports on this matter, what is meant by “equitable redistribution of funding” is best understood in the context of the Region’s child care services budget and can be summarized as follows.

The Region’s five (5) child care centres represent only 1.9% of the total number of child care spaces. However, the direct cost to operate the Region’s child care centres accounts for 10.2% of the Region’s Children’s Services Budget. The Region spends the remaining 89.8% of its Children’s Services Budget on the other 98.1% child care spaces which are not directly operated by the Region. This means, as a proportion of the total Children’s Services Budget, the Region disproportionately spends its money on Region-operated child care spaces. In Regional staff and Regional Council’s assessment, this is an “inequitable” result. Discussion of “reallocation” of funding refers to using funding in a way that equitably benefits all children within the Region’s child care system, not to transfers of funding to other licensed child care operators.

As discussed above, the financial implications of the Closure Recommendation are that provincial and Regional funding will be redistributed within the child care system based on priorities and criteria which are yet to be precisely determined. Whether and how those funding priorities will result in an increased or diminished financial entitlement to the YW remains to be seen, if at all. Until such a time, any allegation of a pecuniary interest is speculative: it is based on a theoretical rather than demonstrable financial benefit to the YW.

⁸ *Yorke et al. v. Harris*, 2020 ONSC 7361 at para. 47.

(ii) No Cash Transfers

Moreover, and to reiterate, no one entity is immediately entitled to a cash transfer as a result of the Closure Recommendation. Rather, the Region must continue to work through the process of identifying priorities for redistributing funding. This is not a question of which operators will receive more cash.

Rather, it is a question of how to establish a framework to handle newly-freed resources in a scarce budget, and how those resources will be redistributed among budget line-items based on the Region's priorities, which have yet to be finalized. In other words, "equitable redistribution of funding" does not mean the Region will immediately cut the YW a cheque.

The Closure Recommendation and the Region's service review may eventually entail some transfer of money to licensed child care operators in the form of grants. However, details on funding criteria, eligibility for funding subsidies, and the precise amount of funding are yet to be determined by Regional staff.

Moreover, these priorities must be presented to Regional Council for further direction and approval. As greater detail is worked out as to where financial resources are to be allocated, it might be possible to link such details to an improved or diminished funding entitlement to the YW. However, until such a time, there is insufficient information to link any traceable, immediate financial interest to the YW. As such, any financial interest is merely speculative.

(iii) No Increase in Enrollment at YW Spaces

In addition, there is no evidence that the Closure Recommendation will increase the YW's enrollment capacity. This argument misunderstands the KMPG Report, and ignores that capacity at licensed child care operators is subject to prescriptive regulation.

As identified in the KPMG Report, the Region's funding, if devoted to budget items other than regional-operated child care, could potentially support an additional 350 to 791 child care space, which the Applicants have argued may accrue to the benefit of the YW. That said, the Closure Recommendation does not authorize or in any way create these new 350 to 791 spaces.

Rather, in KMPG's assessment, by reallocating funding within its Children's Services Budget, the Region could support more child care spaces for the same amount of money (i.e. more value for the taxpayer dollar). The YW is not the immediate beneficiary of increased enrollment in its child care programs as a result of KMPG's assessment. Again, this argument is hypothetical.

(iv) Remote Possibility of Children Transitioning to YW Child Care Centres

The Applicants have also argued that the YW stands to benefit as a result of the transition of children from regional-operated child care centres to other licensed operators. We disagree that the Closure Recommendation gives rise to a pecuniary interest in this manner.

Based on our review of matters related to the Region's transition planning, 72 children will require a transfer to other child care operators. There are approximately 2,000 licensed child care spaces in Waterloo Region that are currently vacant. Although details of the Region's transition plan are forthcoming, Regional staff will support families to ensure their children are enrolled in alternative placements that meet their needs. Ultimately, the decision as to which operator that any particular

family will enroll their children is the family's determination. The Closure Recommendation alone does not make it any more or less likely that a family will enroll with the YW. While it is theoretically possible a child could be transitioned to the YW, the pertinent question under the MCIA is whether the pecuniary interest is probable; anything is "possible", and a pecuniary interest cannot be hypothetical.⁹

In order to trace the Closure Recommendation to increased enrollment at the YW and make a probability assessment, one would need to understand the following information:

- what factors a family will consider in findings an alternative placement that meets their needs;
- what factors would make it more or less likely that a family would transfer to the YW;
- whether those factors are present and for how many families;
- how many families would chose YW over any other operator;
- whether YW has sufficient capacity (i.e. vacant licensed spaces) for these children and is willing to take on addition enrolment; and
- a family would have to apply and be accepted by the YW.

All this information leads one to conclude any potential increase in enrollment in the YW is contingent on a number of other matters occurring. The possibility of future business, through increased enrollment, without any reasonable assumption that these contingencies will come to fruition, is uncertain and does not constitute a pecuniary interest at law.¹⁰

As further details of a transition plan emerge, additional information or criteria could emerge making it more or less likely that children will be transferred to the YW's child care centres. At present however, this information simply does not exist.

(v) Summary

In summary, the Closure Recommendation does not present an immediate, traceable financial benefit to the YW, which would flow through to the Councillor. The "equitable redistribution of funding" as contemplated by the Closure Recommendation can only be properly understood as a budgeting exercise, not as a payout to licensed child care operators. Though the Closure Recommendation contemplates some future monetary grants to licensed child care operators, at the time of the Meeting, any financial benefit was still hypothetical and speculative; there was insufficient information about any grants or other funding to determine whether, under what conditions and for what amounts, the YW may or may not be entitled to. Lastly, the mere possibility that children may be transferred from Region-operated centres to centres operated by the YW depends on several contingencies that amount to speculation. This does not give rise to a pecuniary interest.

⁹ *Lorello v. Meffe*, *supra* note 6, at paras. 59 and 61.

¹⁰ *Ibid*, at para. 61.

B. Any Pecuniary Interest is “Remote and Insignificant”

Even if the Councillor did have an indirect pecuniary interest in the Closure Recommendation (which we have concluded she does not), the Councillor would be entitled to rely on the exemption set out in clause 4(k) of the MCIA.

The MCIA recognizes a number of exceptions that serve to make a member’s direct, indirect, or deemed pecuniary interests not subject to the requirements of section 5 of the statute. Eleven exceptions are listed in section 4 of the MCIA. The second of the general exceptions in clause 4(k) provides as follows:

Where ss. 5 and 5.2 do not apply

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

...

(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.

The exception in clause 4(k) for remote or insignificant pecuniary interests applies to the proximity of the financial interest involved or to the importance of the matter to the member. 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 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?¹¹

The Ontario Court of Appeal has held that the analysis of the application of the exception in clause 4(k) encompasses a two-stage test because 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 the entity having a direct financial interest in the matter.¹²

The Court of Appeal has held that analysis “must commence afresh and focus on the proximity and significance of the councillor’s pecuniary interest in the context of all the circumstances.”¹³ This test requires consideration of *all* the circumstances.¹⁴

¹¹ *Whiteley v. Schnurr* (1999), 4 M.P.L.R. (3d) 309 at para. 10 (Ont. S.C.J.).

¹² *Ferri v. Ontario (Attorney General)* (2015), 40 M.P.L.R. (5th) 223 at para. 15 (Ont. C.A.). Stated otherwise in M. Rick O’Connor and David White, *Ontario Municipal Conflict of Interest Act: A Handbook*, 2019 Edition (Municipal World Inc., 2019), at page 21:

The tests in section 4 would apply to the member’s own situation, not to the party whose financial interest may be attributed to the member.

¹³ *Ibid.*, at para. 15.

¹⁴ *Ibid.*, at para. 17.

In this case, in order to apprise themselves of all the circumstances related to the history and progress of the Region's service review and the Closure Recommendation, a reasonable elector would necessarily need to consider the following information and circumstances:

- The Councillor acted in good faith and her motivation to participate in discussion on these matters was not related to potential financial gain.
- The Councillor's compensation or continued employment with the YW does not depend on enrollment of children in its child care centres, and does not depend on whether the Region closed its child care centres.
- There is a pressing public interest in how the Region allocates scarce resources among items within its Children's Services Budget.
- The Closure Recommendation does not propose any immediate transfer of money or assets to any entity.
- Similarly, the Closure Recommendation in and of itself does not entitle the Councillor or the YW to any additional funding or grant money. Further information may emerge over time that would make the YW more or less likely to receive additional funding. However, this would not entitle the Councillor herself to any money.
- Any additional funding, be it grants or otherwise, that would arise from subsequent matters related to the Closure Recommendation would accrue only to entities that are licensed child care operators. The YW is such an entity, but the Councillor herself is not. As such, any possible financial benefit to the YW would not flow through to the Councillor. This is unlike a situation where the financial benefits of a private business could be transferred to its principals.
- The possibility that a child will be transitioned from a Region-operated centre to a YW centre depends on many contingencies (as detailed above), and is ultimately subject to the decision of that child's family.
- The Closure Recommendation came after months of detailed study by external consultants on the Region's child care services spending, and was not initiated or driven by the Councillor.
- The Closure Recommendation came at the recommendation of the Steering Committee after careful study and consideration of the KPMG Report. The Councillor did not sit on the Steering Committee, and the Steering Committee's recommendation did not originate from the Councillor's political platform.
- The Councillor has been very cognizant in the past of declaring a pecuniary interest on this and related matters. As she explained at the Meeting, the Councillor previously declared a pecuniary interest on account of the possibility of the Region transferring ownership of its child care operations (i.e. an asset) to a non-profit organization such as the YW, whereas the Closure Recommendation does not entail any divestiture or transfer of money.

In our view, a reasonable elector apprised of all the above circumstances would conclude that the Councillor's indirect pecuniary interest (if one existed) would not be likely to influence her participation and voting on the matter before Regional Council. A reasonable elector would conclude that any financial interest of the Councillor, through the YW, would be remote and subject to a number of future contingencies. In light of the circumstances described above, a reasonable elector would conclude that the impact of the Closure Recommendation on the Councillor's financial position is neither predictable nor direct. As such, the Councillor would be entitled to rely on the exemption for remote or insignificant interests as set out in clause 4(k) of the MCIA and as interpreted and applied by the courts.

CONCLUSION

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

For the reasons set out above, we have determined on a balance of probabilities¹⁵ that the Councillor has not contravened subsection 5(1) of the MCIA as alleged.

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

We have provided notice to the Applicants of our decision.

We recommend that a copy of our written reasons in this report are to be posted by Region on its website.

AIRD & BERLIS LLP



John Mascarin

Integrity Commissioner for the Regional Municipality of Waterloo

Dated this 27th day of April, 2021

¹⁵ *Edwards v. Wilson* (1980), 14 M.P.L.R. 128 (Ont. Div. Ct.); *Baillargeon v. Carroll* (2009), 56 M.P.L.R. (4th) 161 (Ont. S.C.J.).