

# Declaration of vacancy of Council member's seat not stayed pending Councillor's appeal

Litigation | Litigation & Dispute Resolution | Political Law

15 December 2021

On November 29, 2021, I wrote a Gardiner Roberts LLP "Keeping Current" article on the decision in *Corporation of the Township of Brudenell, Lyndock and Raglan (Integrity Commissioner) v. Budarick*, 2021 ONSC 7635 (CanLII). In that decision, the court declared the seat of Councillor Andrea Budarick vacant because she had breached the *Municipal Conflict of Interest Act* (the "MCIA").

The Councillor has appealed this decision. Although the appeal is scheduled to be heard on an urgent basis on January 18, 2022, the Councillor also sought a stay of her removal from office. In *Budarick v. Corporation of the Township of Brudenell, Lyndock and Raglan (Integrity Commissioner)*, 2021 ONSC 8034 (CanLII), the Councillor's motion for a stay pending appeal was dismissed.

A motion for stay pending the appeal of a decision is governed by a three-part test. The moving party must establish that (i) there is a serious question to be determined on the appeal; (ii) he or she will suffer irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay. See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334 and *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40, at para. 3.

With respect to whether there was a serious question to be determined on the appeal, the Councillor alleged that the application judge had made six errors in determining that her seat should be declared vacant. Those errors included an assertion that the application judge erred in his interpretation and application of the MCIA.

The Integrity Commissioner submitted that the Councillor's attack on the application judge's decision was connected to factual findings and that she had not identified any palpable or overriding error. On the issue of penalty, the Integrity Commissioner contended that the Councillor had not identified any error of law in the exercise of the application judge's discretion to declare her seat vacant.

The first branch of the three-part test is a low threshold, which the Councillor was able to cross. Since her appeal involved the interpretation and application of the MCIA, including the application of its penalty provisions, her appeal was not frivolous or vexatious.

However, the Councillor was unable to meet the second and third branches of the test.

The Councillor argued that if a stay was not granted, she would suffer irreparable harm because (i) within 60 days of her seat being declared vacant, the Township was required to either appoint a person to fill the vacancy or start the process for a by-election; (ii) with her seat vacant, Council would be required to operate at a reduced capacity; and (iii) if her vacant seat was filled and she succeeded on her appeal, the Township would have two councillors for the same seat, thereby causing uncertainty and ambiguity.

The court rejected all of these arguments. The court explained that s. 259(1) of the *Municipal Act, 2001* contemplated the vacancy of a city council seat, that s. 259(1)(f) gave the court jurisdiction to prohibit the filling of the vacant seat, and that the Township had already agreed to abide by any order of the court and to not take any steps to fill the Councillor's vacancy pending the determination of her appeal.

## Declaration of vacancy of Council member's seat not stayed pending Councillor's appeal

---

Under the third branch of the test, the court was required to consider the balance of convenience as between the parties, including which of them would suffer the greater harm from the stay being granted or refused.

The Councillor argued that the allegations against her were not relatively "severe" and that the Integrity Commissioner took over a year to release her report.

The court placed no weight on the length of time it took to issue a report on the grounds that allegations against the Councillor were serious and related to a serious public issue. The court noted that the application judge had found that the Councillor "intentionally used her position as a member of Council in an effort to obtain a financial advantage for her son" and that "the manner in which [the Councillor had] conducted herself [was] precisely the mischief that the MCIA [was] aimed at preventing."

The Integrity Commissioner argued as well that a stay would effectively reduce the length of the penalty. While the application judge had declared the Councillor's seat vacant, she was not prohibited from seeking re-election in the October 2022 municipal election.

The court found that the public had a right to expect that their elected representatives would discharge their duties with integrity, transparency and accountability and that they comply with the *Municipal Act, 2001* and the MCIA. These factors outweighed any inconvenience the Councillor might suffer in the circumstances.

This case continues to demonstrate the tensions that are sometimes at play in our democracy. Whereas the elected Councillor has maintained that she should not be easily unseated, the courts have relied on duly passed legislation designed to maintain integrity, transparency and accountability in our municipal governments to justify the declaration of vacancy and to refuse a stay of that order. It remains to be seen whether the Councillor's appeal will be successful, and, regardless of whether she wins or losses on appeal, whether she will stand for re-election and let the voters decide on the issue raised by the Integrity Commissioner's report. In our democracy, the voters may still have the last word. A PDF version is available to download [here](#).

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

*(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).*

## Author



**Stephen A. Thiele**

Partner

416.865.6651

[sthiele@grllp.com](mailto:sthiele@grllp.com)



**Bay Adelaide Centre — East Tower**  
22 Adelaide Street West, Suite 3600  
Toronto, ON M5H 4E3

Phone: 416.865.6600  
Fax: 416.865.6636  
[contactGR@grllp.com](mailto:contactGR@grllp.com)