

January 30, 2020

Krista Power  
City Clerk  
City of Thunder Bay  
500 Donald Street East  
Thunder Bay ON. P7E 5V3

Dear Ms. Power:

**Re: Addendums to the Reports dealing with Councillors Aiello, McKinnon & Hamilton**

**Background:**

On October 5, 2019 an Integrity Commissioner's Investigative Report was submitted to the City with respect to a complaint against Councillor Hamilton for a breach of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 ("MCIA"). This complaint alleged that Councillor Hamilton had a pecuniary interest when dealing with the vote on the designated truck route ("DTR") and that he should have declared that pecuniary interest and not participated in the vote.

The basis of the complaint was that Councillor Hamilton was a business owner that would be affected financially should the DTR come into effect.

My investigation concluded that Councillor Hamilton did in fact have a pecuniary interest and I ruled as such. My conclusion in the report provided:

*"Given the fact that during the June 17, 2019 meeting and in particular during the discussion with the President of the Chamber of Commerce, Councillor Hamilton asked if the DTR would affect the cost of his operations. I find that he did have a pecuniary interest and was therefore in a conflict of interest as defined in the legislation and the City of Thunder Bay's Code of Conduct."*

On October 14, 2019 an Integrity Commissioner's Investigative Report was submitted to the City with respect to a citizen complaint against Councillors Aiello and McKinnon for breaching the City's Code of Conduct. This complaint alleged that Councillor Aiello had breached two rules of the Code of Conduct, Rule 1: Avoidance of Conflicts of Interest and Rule 15: Not Undermine, Work Against Council's Decisions. In the case of Councillor McKinnon, the complaint alleged that he contravened Rule #15.

My investigation as Integrity Commissioner concluded that Councillor Aiello did contravene both Rule #1 and Rule #15 and that Councillor McKinnon had contravened Rule #15. My conclusions in the report stated:

*“Councillor Aiello is in contravention of Rule #1 as he has a disqualifying interest in the matter by the very definition in the Code of Conduct. Councillor Aiello is also in contravention of Rule 15 by publicly stating he is in opposition to a previous decision made by Council.*

*Councillor McKinnon is in contravention of Rule 15 by publicly stating that he is in opposition to a previous decision made by Council.”*

**City Council’s Direction:**

At its meeting on December 2, 2019, Council passed the following resolution:

With respect to the report 2019.CLS.037 (Legal Services) that Administration proceed as directed;

AND THAT the report wherein a complaint was brought against Councillors McKinnon and Aiello, be referred back to Brian Tario, MNP LLP Integrity Commissioner for the City, to request he retain legal counsel of his choice with sufficient experience and knowledge in the municipal governance and law, to provide a legal opinion of the meaning of Rules 1 and 15 under the Code of Conduct and determine whether in the context of these matters, a breach of the Code of Conduct occurred;

AND THAT wherein a complaint was brought against Councillor Hamilton be referred back to Brian Tario, MNP LLP Integrity Commissioner for the City, to request he retain legal counsel of his choice with sufficient experience and knowledge in municipal governance and law, including the Municipal Conflict of Interest Act to provide a legal opinion on the meaning of pecuniary interest and determine whether in the context of this matter a breach of pecuniary interest exists and if so whether such pecuniary interest is excepted under section 4 of the Municipal Conflict of Interest Act particularly sections 4 (j) common interest and 4 (k) remote or insignificant interest;

AND THAT any necessary by-laws be presented to City Council for ratification.

CARRIED

As a result of this direction, Mr. John Mascarin, a partner of the law firm Aird & Berlis LLP was retained to review both of the Integrity Commissioner’s Investigative Reports and provide a legal opinion on the conclusions reached as directed by Council. Mr. Mascarin is a Certified Specialist by the Law Society of Ontario in the area of Municipal Law. He has extensively advised, presented, written and taught upon the area of municipal ethics, including the MCIA and codes of conduct. A copy of his legal opinion is appended to this addendum report.

## **Reconsideration of Reports:**

### **A. Investigation Report re Councillor Hamilton – October 5, 2019**

In the case of Councillor Hamilton, the legal opinion concluded that:

“It is our opinion that Councillor Hamilton has a pecuniary interest in the matter, whether direct or indirect. For the purpose of this opinion, we have assumed that the Restaurant does receive some deliveries from delivery vehicles of the size restricted by the proposed DTR.”

The legal opinion also outlined that a pecuniary interest equates to a financial or economic interest of a member with the question being “whether the matter has a potential to affect the financial interests of Councillor Hamilton.” The legal opinion considered noted that the potential pecuniary interest of the member could be direct or indirect.

The key issue in the legal opinion was the effect of the DTR on the delivery on a weekly basis to Councillor Hamilton’s restaurant. As a result of the legal opinion, a second meeting was held with Councillor Hamilton on January 10, 2020 to secure a complete understanding of how deliveries take place at his restaurant.

Based on additional information provided, it is my determination that truck deliveries to Councillor Hamilton’s business location occur on a once-a-week basis and are carried out by a small delivery vehicle that would not be affected by the DTR.

It is noted that Councillor Hamilton reiterated that he did not believe he was in a pecuniary interest situation in voting on the matter of the DTR.

The legal opinion further stated:

“It is our opinion that the exception in clause 4(j) for “interest in common with electors generally” may apply in these circumstances as Councillor Hamilton would be impacted by the DTR in the same way as other business owners in the downtown area would be.”

The opinion noted that s. 1 of the MCIA actually defines “interest in common with electors generally” to apply to an area that may be smaller than the entire municipality. In this case, the class of electors with a common interest including the businesses possibly effected by the DTR would include Councillor Hamilton’s restaurant. Given that the class was sufficiently broad and that the impact on Councillor Hamilton’s business differed only in degree and not in nature or kind, it is my determination that Councillor Hamilton’s pecuniary interest, if any, would be excepted under s. 4(j) of the MCIA as being an “Interest in common with other electors generally”.

The legal opinion concluded that the exception in s. 4(k) for a remote or insignificant interest would not be applicable but the additional evidence provided by Councillor Hamilton clarifies that the minimal number of deliveries by a small truck would likely not create any financial impact. If any, it would also likely be insignificant in terms of the test under the MCIA that a reasonable elector, being apprised of all of the circumstances, would be more likely to not regard Councillor Hamilton’s interest to have influenced his decision on the DTR, despite his apparent change in support for the restrictions.

**B. Investigation Report re Councillors Aiello and McKinnon – October 14, 2019**

**(a) Rule 1 – Avoidance of Conflicts of Interest**

In the case of Councillors Aiello and McKinnon, the legal opinion stressed that “regard must be had for the circumstances surrounding the alleged conflict. ”

The legal opinion then provided:

“We are of the opinion that the findings support a conclusion that Councillor Aiello could have a “disqualifying interest” within the meaning of the Code with respect to the Project but they could also be supported by further consideration of all the circumstances.

However, the existence of a disqualifying interest alone is not what the Code prohibits. Rather, section 2 of Rule 1 prohibits a member from participating in the decision-making process associated with their office when they have a disqualifying interest. As Justice Cunningham noted in the Mississauga Judicial Inquiry Report, “it is not the existence of a conflict of interest which is the issue but, rather, what the official in a conflict of interest does in the face of that conflict.”

The phrase “decision-making process” is not defined in the Code. The words “decision-making” alone suggests some sort of outcome- or resolution-oriented process. The fact that the Code uses the word “meeting” elsewhere suggests that “decision-making process” should be given a broader meaning than “meeting.” At the very least, this meaning would include all meetings of Council, committees of Council, and local boards on which Councillor Aiello sits.

A contravention of Rule 1 requires that there be some Council-related decision-making process. There does not appear to be one in this matter.

Any reasonable interpretation of Rule 1, Section 2 requires that there be some City “decision-making process”. This would require the Code Report to identify the “decision-making process” in which the disqualifying interest arose. Absent such a finding, a contravention of Rule 1 has not been completely made out.

As such, we are of the opinion that Councillor Aiello may have violated Rule 1 of the Code, provided that it can be demonstrated that he has participated in the decision-making process in relation to the Project.”

Based on the foregoing, it is my determination that the complaint failed to identify the specific meetings at which Councillor Aiello participated in the decision-making process in relation to the Project. The decisions with respect to this project were made by a previous council of which councillor Aiello was not a member. As such, there is no finding that Councillor Aiello took part in meetings where the disqualifying interest arose. Therefore, Councillor Aiello has not contravened Rule #1.

In order to get further clarification as to where Councillor Aiello could participate in any future discussions and or votes with respect to the Junot project. Mr. Mascarin was asked to provide his legal opinion on this issue.

Mr. Mascarin's opinion is:

Section 2 of the MCIA 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; 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)

Section 2 attributes a pecuniary interest to a member that arises by virtue of his or her association with a body. If a body in which the member is associated within has a financial interest in a matter, that interest is ascribed to the member because he or she is connected, linked or related to a body.

The term "body" is not defined in the MCIA but the Ontario Court of Appeal held in *Orangeville (Town) v. Dufferin (County)* that it is to be given a broad interpretation. Indirect interests are covered under the MCIA because a member would be more likely than not to have a bias towards an entity with which it is associated with or connected to.

In our view, the development of a housing project next door to the Club could have potential financial implications to the Club, whether positive or negative because of the geographic proximity of the properties. By virtue of the Club having a potential financial interest in the development of its neighbour's housing project, the member is ascribed an indirect interest under s. 2 of the MCIA.

If Councillor Aiello is employed by the Club, the same analysis would apply except that the indirect interest would arise by virtue of s. 2(b) rather than s. 2(a)(iii) of the MCIA.

By virtue of Councillor Aiello's indirect interest in the matter of the housing development, his obligations under s. 5 of the MCIA are triggered which means that he must declare his indirect pecuniary interest and thereafter not participate in, vote on or seek to influence the matter in any way.

Without any further context it is not possible to ascertain whether Councillor Aiello would have the benefit of any exception under s. 4 of the MCIA. The only possible one appears to be s. 4(k), relating to a remote or insignificant interest, which appears to be a difficult one for Councillor Aiello to avail himself of given that the interest is likely not remote and is probably of importance to him as the Executive Director of the Club.

Councillor Aiello should not participate and any discussions and or vote dealing with the Junot project. As Councillor Aiello has in the past he must declare a “indirect pecuniary interest” in any future dealings with this project and this conclusion is supported by the legal opinion provided by Mr. Mascarin.

**(b) Rule 15 – Not Undermine, Work Against Council’s Decisions**

The legal opinion determined that the intent of Rule #15 of the Code of Conduct is to prevent members from making “collateral attacks” on previous decisions of Council and seeks to promote solidarity amongst members of Council.

**Section 1 of Rule 15 provides as follows:**

“1. Members of Council shall not actively undermine the implementation of Council’s decisions.”

The legal opinion note that the Code does not define the term “actively undermine” but cited the commentary on the rule:

“Commentary

The role of elected officials, once a council decision is made, is to support the implementation of that decision, not to work against its implementation, publicly or behind the scenes. Council decisions are arrived at following discussion and debate, reflecting the democratic process. Members are expected to engage in debate with their fellow council members through the democratic process of government. However, once Council has made its decision, Members must recognize that decision as the duly considered decision of the body of Council.

As members of that body of Council, individual members – those who did not agree with the decision - are not to engage in activities that seek to challenge or undermine that decision.

Members can express disagreement with Council’s decisions, but it is contrary to the ethical behaviour of members of Council to actively seek to undermine, challenge or work against Council’s decisions.”

The legal opinion concluded that the term “actively undermine” must mean something more than a member expressing disagreement with a decision of Council.

Based on the legal conclusions in the opinion, it is my determination that the actions of Councillors Aiello and McKinnon have not violated Rule #15 of the Code. Since the Councillors did nothing more than voice their opposition to the Project, which is not prohibited by the Code, they did not breach the provisions of Rule #15 of the Code.

**Conclusions and Recommendations:**

Based on the legal opinion provided by Mr. Mascarin, my reports must align with the legal determinations set out therein as well as the further investigation of and evidence adduced from Councillor Hamilton. Councillor Hamilton does not have a pecuniary interest with respect to the DTR and if he did, he is exempt by virtue of

the interest in common exception in s. 4(j) of the MCIA. As such, he is allowed to participate in discussions and vote(s) on the DTR. His Council record should reflect the same.

Furthermore, also based on Mr. Mascarin's legal opinion, it is determined that Councillor Aiello did not breach Rules #1 and #15 of the Code of Conduct and his Council record should reflect this.


Similarly, Council McKinnon did not breach Rule #15 of the Code of Conduct and his Council record should reflect this.

Councillor Aiello should not participate and any discussions and or vote dealing with the Junot project. As Councillor Aiello has in the past he must declare a "indirect pecuniary interest" in any future dealings with this project and this conclusion is supported by the legal opinion provided by Mr. Mascarin.

Should you have any questions, please feel free to contact the undersigned directly at 807 474-4892.

Yours very truly,

**MNP LLP**

A handwritten signature in dark ink, appearing to read "B. Tario".

**Brian Tario, CFI**

Partner, Forensics and Litigation Support Services