

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

Dear Ms. Power

Re: Complaint of Breach of Ontario's Municipal Conflict of Interest Act.

Introductory Comments:

MNP was appointed the Integrity Commissioner for the City of Thunder Bay in February of 2019. The operating philosophy which guides us in our work is:

The overarching objective in appointing an Integrity Commissioner is to ensure the existence of robust and effective policies, procedures, and methods that enhance the citizen's perception that their Council and Local Boards meet established ethical standards and where they do not, there exists a review process that serves the public interest.

The City of Thunder Bay has as part of its ethical framework a Code of Conduct. It represents the standard of conduct against which all members of Council and Local Boards are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one of which is required by all Ontario municipalities, is a complaints process administered by the Integrity Commissioner.

Members of City Council and Local Boards are also governed by the provisions of the Municipal Conflict of Interest Act.

Integrity Commissioners carry out a range of functions for municipalities and local boards. They assist in the development of ethical framework by suggesting content or commentary on the code of conduct. They conduct education and training for members of council and local boards. They provide advice and guidance to members to help sort out ethical grey issues or to confirm activities that support compliance. They investigate allegations that a person(s) has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in considering the report.

The fundamental of procedural fairness require us to provide reasons for our conclusions and recommendations. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint.

We assess the information fairly, in an independent and neutral manner and provide an opportunity to those involved to respond to the allegations.

The Complaint:

On July 10, 2019 a complaint was filed by Councillor Trevor Giertuga regarding concerns about Councillor Brian Hamilton's participation, on June 17, 2019, in a vote related to the designated truck route (DTR) after a presentation to Council by the President of the Thunder Bay Chamber of Commerce.

The complaint indicated that Councillor Hamilton had previously voted in support of the DTR, however when it was stated that the DTR would have impact on businesses and with Councillor Hamilton being a restaurant owner he changed his vote and voted against the DTR.

Councillor Giertuga alleges that Councillor Hamilton had a pecuniary interest related to his restaurant ownership and therefore breached the Municipal Conflict of Interest Act by participating in the vote.

Process Followed for the Investigation:

Reviewed the complaint to determine whether it was within the scope and jurisdiction to pursue.

Reviewed the City of Thunder Bay Code of Conduct and the Municipality Conflict of Interest Act and conducted legal research on the meaning, definition and application of the term "pecuniary interest".

Watched the video of the June 17, 2019 meeting.

Interviewed Councillor Trevor Giertuga.

Notified Councillor Hamilton of the complaint to set up a meeting to seek his response. It should be noted that due to Councillor Hamilton's schedule and availability he was not interviewed until October 3, 2019.

Findings:

In reviewing the video of the proceedings of the June 17, 2019 meeting discussions about the effects of the DTR were discussed. In her presentation the President of the Thunder Bay Chamber of Commerce spoke about the Chamber's view that there would be costs to local businesses. In fact, there was an exchange between the President and Councillor Hamilton where it was indicated that she had attended his place of business and spoke to him about possible cost to the business community.

In discussions with Councillor Giertuga he stated that during the proceedings he had a discussion with Councillor Hamilton about a possible conflict of interest and advised him he thought he was in a conflict and should not participate, but that it was his decision. When Councillor Hamilton went on to participate in the vote on the Bylaw, he felt it was clearly a conflict of interest and breached the Municipal Conflict of Interest Act. Councillor Giertuga also acknowledged that many of the new councillors clearly do not understand the legislation and their responsibility with respect to declaring a conflict of interest.

In discussions with Councillor Hamilton he takes a different view of the situation and advised that he has had a high degree of uncertainty around his position on the DTR. He does not feel that he was in a conflict of interest during the June 17, 2019 meeting. Councillor Hamilton acknowledged and he has not

read the legislation in detail. He stated that as far as a financial impact to his restaurant it would be minimal except for one reoccurring requirement for product delivery, he for the most part does all his own purchasing.

I then turned to the relative legislation and the City of Thunder Bay's Code of Conduct.

The Municipal Conflict of Interest Act states:

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. R.S.O.

The City of Thunder Bay Code of Conduct under the heading Avoidance of Conflicts of Interest states:

1. Members of Council shall not participate in the decision-making processes associated with their office when prohibited to do so by the Municipal Conflict of Interest Act.
2. Members of Council shall not participate in the decision-making processes associated with their office when they have a disqualifying interest in a matter.
3. For greater certainty:
 - a. Members of Council shall not participate in the decision-making processes associated with their office when they have a direct, indirect or deemed pecuniary interest in a matter, except in compliance with the Municipal Conflict of Interest Act.
 - b. Members of Council shall not participate in the decision-making processes associated with their office when they have an interest that though in compliance with the Municipal Conflict of Interest Act, is nevertheless a disqualifying interest by virtue of the nature of the relationship between the Member and other persons or bodies to be affected by the decision.

The difficulty that I encountered is "pecuniary interest" is not defined in the Municipal Conflict of Interest Act or the City of Thunder Bay's Code of Conduct.

I then turned to reported legal cases involving pecuniary interest decisions in the Province of Ontario. I found one case *Cauchi v. Marai*, 2019 ONSC 497 (CanLII) where at paragraph 33 it states:

The term "pecuniary interest" as used in the MCI Act (and specifically, in s. 5(1)) is not defined in the legislation; however, it has been held that a "pecuniary interest" must be a financial, monetary or economic interest. The pecuniary interest must be definable and real with the potential to affect the interests of the member and not simply a hypothetical or speculative interest. As such, "it is appropriate to strictly interpret the pecuniary interest threshold": *Magder v. Ford*, 2013 ONSC 263 (CanLII), 113 O.R. (3d) 241 (Div. Ct.), leave to appeal to the S.C.C. refused, [2013] S.C.C.A. No. 117, at paras. 6, 42-43;

Darnley v. Thompson, 2016 ONSC 7466 (CanLII), M.P.L.R. (5th) 325, at paras. 59-60; (Ministry of Attorney General), 2015 ONCA 683 (CanLII), 127 O.R. (3d) 613, at paras 9-10

It is my understanding that council has been provided information by City Administration with respect to the costs associated with the DTR and that those costs would be minimal in nature. I am also aware that lobby groups such as the Chamber of Commerce and the Trucking Association have a view that the increase costs could have an impact of business viability. There are however provisions in the proposed DTR that would allow for local delivery options.

Conclusion:

Given the fact that during the June 17, 2019 meeting and in particular during the discuss with the President of the Chamber of Commerce, Councillor Hamilton asked if the DTR would effect 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.

Recommendations:

That Councillor Hamilton be made aware of the outcome of the investigation by Council.

I would recommend that Councillor Hamilton declares a conflict of interest with respect to ongoing discussions with respect to the DTR.

That members of Council have additional training in terms of a clearer understanding of the definition of pecuniary interest in order to prevent any misunderstanding of it meaning in terms of their ability to participate in voting on issues where there is a demonstrated and definable effect on their interest.

The legislation with respect to conflict of interest is very prescriptive and uses the word "shall" and therefore there is no discretion thus a clear understanding of the requirements is extremely important particularly with the new Councillors.

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

Yours very truly,

MNP LLP



Brian Tario, CFI

Partner, Forensics and Litigation Support Services