

Expertise for Municipalities (E4m)

Non-Profit Association

1894 LASALLE BLVD. SUDBURY, ON, P3A 2A4

Integrity Commissioner

for the Prince Township



INQUIRY REPORT/DECISION

**ALLEGATION: CONTRAVENTION OF THE
*MUNICIPAL CONFLICT OF INTEREST ACT***

BY: COUNCILLOR ENZO PALUMBO

I. REQUEST FOR INQUIRY

- [1] On February 12, 2021, E4m as Integrity Commissioner received a request for an inquiry (hereinafter the "Application") with respect to Enzo Palumbo ("Councillor Palumbo"), an elected member of the Township Council ("Council") for Prince Township ("The Township"). The Applicant is an elector under the *Municipal Conflict of Interest Act* (the "MCIA") and was therefore entitled to make an Application for an inquiry under section 223.4.1 of the *Municipal Act*. The Applicant declared that the Application was made within six (6) weeks of the applicant becoming aware of the alleged contravention.
- [2] In the Application, the Applicant alleged that Councillor Palumbo contravened section 5(1) (a)(b)(c) of the *MCIA*, and Section 13 of By-law No. 2018-22 Prince Code of Conduct ("Code of Conduct"), when he requested the Clerk to add a petition (the "Petition"), as an information item to the agenda for the February 9th, 2021, Council meeting.
- [3] More Specifically, Councillor Palumbo requested the Petition promoting the annexation of the former Parke Township ("Parke") by the Township from the City of Sault Ste Marie, be added as correspondence for information purposes only. And that Councillor Palumbo had a conflict with the matter because his son owned property in Parke.

II. FINDINGS/CONCLUSION

- [4] Based on the evidence before us, Councillor Palumbo did not have a prohibited pecuniary interest when he requested that the Petition be added to the February 9, 2021, Council meeting agenda as an information item. Nor did his actions amount to a contravention of the Code of Conduct.
- [5] We will not be making an application to court with respect to this matter.

III. INQUIRY PROCESS

- [6] Upon receipt of the Application, we completed an initial review of the statutory declaration and the accompanying material submitted by the Applicant to determine that the matter had been properly filed. In accordance with the Integrity Commissioner Inquiry Protocol, we conducted a preliminary review.
- [7] Our review determined that there were sufficient grounds to conduct an inquiry into the matter.
- [8] The matter was assigned to Shawn Mahoney (the "Investigator"), an investigator with Investigative Solutions Network ("ISN") who interviewed the Applicant and Councillor Palumbo.

- [9] In addition to interviews conducted, the Investigator reviewed the Council Meeting Agenda and Minutes of February 9, 2021, Audio/Visual Recording of February 9, 2021, the *MCI*A, and By-law No. 2018-22 Prince Code of Conduct.

IV. FINDINGS OF FACTS

- [10] The circumstances that give rise to the request for inquiry are related to Councillor Palumbo proposing that an item be placed on the Township Council meeting agenda for the February 9, 2021, meeting. The item Councillor Palumbo asked the Clerk to add was a petition that had been circulated in the Township to seek support for the annexation of Parke to the Township from the City of Sault Ste Marie.

Reference: The Application

- [11] The Petition was included in the February 9, 2021, Regular Meeting Agenda (the "Agenda") as correspondence item number 11 (c) – Councillor Palumbo – petition concern.

Reference: February 9, 2021, Council Meeting Agenda

- [12] The Applicant alleged that Councillor Palumbo had a pecuniary interest in the Petition and should not have had the matter added to the Council meeting agenda. The Applicant advised that Councillor Palumbo's son owns property in the area described by the Petition and would have his taxes go up or down which would be a conflict of interest.

Reference: Interview of The Applicant

- [13] The Applicant added that another Councillor has a camp in the same area and declared a conflict of interest.

Reference: Interview of The Applicant

- [14] Councillor Palumbo is currently a Councillor for the Township in his second term. Councillor Palumbo stated his overall goal in bringing the Petition to Council was to prevent any Council member from responding before it comes to Council. Councillor Palumbo proposed to bring the Petition to Council in open session, but not for discussion. The Mayor at the outset of the February 9, 2021 meeting expressed his opposition to the matter being on the agenda and moved a resolution to remove the item. Councillor Palumbo did not argue.

Reference: Interview of Councillor Palumbo

- [15] Before attempting to bring the Petition before council, Councillor Palumbo reviewed the MCIA and determined that he did not have a conflict because the only possible pecuniary interest that he would have in his mind would be his son paying less in taxes. This was not a big concern because there was no guarantee that his taxes would be reduced, there is no guarantee his taxes would not be raised, there is no guarantee the Ministry of Municipal Housing and Affairs will even entertain the petition.

Reference: Interview of Councilor Palumbo

- [16] At the Council Meeting on February 9, 2021, when Council considered the approval of the Agenda as it had been presented, item 11(c) related to the Petition was removed from consideration.

Reference: Audio Recording of February 9, 2021, Council Meeting
Council Meeting Minutes of February 9, 2021

- [17] Resolution 2021-22 moved by Mayor Lamming (the “Mayor”) and seconded by Councillor Mathews was passed in a recorded vote. Councillor Palumbo voted against the resolution which stated:

“Be it resolved that item 11 c be removed from the agenda.”

Reference: Audio Recording of February 9, 2021, Council Meeting
Council Meeting Minutes of February 9, 2021

- [18] Councillor Palumbo moved Resolution 2021-23 which was seconded by Councillor Chambers and stated:

“Be it resolved that item 11 c be moved to the closed agenda.”

Reference: Audio Recording of February 9, 2021, Council Meeting
Council Meeting Minutes of February 9, 2021

- [19] Resolution 2021-23 was defeated.

Reference: Audio Recording of February 9, 2021, Council Meeting
Council Meeting Minutes of February 9, 2021

- [20] During the discussion of the removal of item 11(c) from the Agenda, the Mayor said *“Because it has nothing to do with Prince Township, because the petition has not been brought to Prince Township that item should be taken off the agenda and if it is still on there, it could, even though it is information, that could be talked on”* he therefore wanted it removed. Councillor Palumbo responded, *“This is not up for discussion, I just put it there solely for information.”*

Reference: Audio Recording of February 9, 2021, Council Meeting

[21] No members of Council declared a pecuniary interest with Agenda item 11(c). Nor did any member of Council declare a pecuniary interest in any other item on the Agenda.

Reference: Council Meeting Minutes of February 9, 2021

[22] Councillor Palumbo did not seek advice from the Integrity Commissioner.

V. Analysis

- [23] We considered
- a. Whether Councillor Palumbo had a pecuniary interest in the Petition;
 - b. Whether Councillor Palumbo contravened the *MCIA* when requesting the Petition be added to the Council meeting agenda;
 - c. Whether Councillor Palumbo influenced or attempted to influence the voting of Council before, during or after a meeting;
 - d. Whether Councillor Palumbo properly declared his prohibited pecuniary interest;
 - e. Whether the pecuniary interest is excepted under section 4 of the *MCIA*; and
 - f. Whether to make an Application to Court for breach of the *MCIA*.

Pecuniary Interest

- [24] The *MCIA* prohibits Councillors from acting, even from influencing matters where they have a pecuniary interest “*before, during or after*” the meeting¹.
- [25] The Primary issue for analysis is whether Councillor Palumbo had a prohibited pecuniary interest in the Petition.
- [26] “Pecuniary Interest” is not defined in the *MCIA* however, the Courts have interpreted it to mean a financial interest, or an interest related to or involving money. It does not matter whether the financial interest is positive or negative and when considering the existence of a “Pecuniary Interest”, it also does not matter the quantum of the interest.

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¹ *Municipal Conflict of Interest Act*, R.S.O. 1990 C.M.50 s.5(1)(c).

“Pecuniary Interest” is not defined in the [*Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50], but it has been held to be a financial, monetary or economic interest; and is not to be narrowly defined².

A pecuniary Interest [as used in s. 5(1) of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50] is a particular kind of interest. In *Edmonton (City) v. Purves* (1982), [18 M.P.L.R. 221](#)... (Q.B.), at p. 232 [M.P.L.R.] Moshansky J. turns to the Shorter Oxford English Dictionary definition of “pecuniary” as “of, belonging to, or having relation to money.”

- [27] Section 3 of the *MCIA* states that a member is deemed to have a pecuniary interest if the matter Council is considering involves the pecuniary interests of a Councillor’s child.

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.

- [28] The Petition clearly reported that there would be financial benefit for the taxpayers of Parke if they de-amalgamated with the City and amalgamated with the Township. The Petition also outlined the additional services that are currently provided by the Township as compared to those provided by the City.

- [29] Councillor Palumbo’s son owns property in Parke and is a taxpayer who would benefit financially according to the information on the Petition.

- [30] Councillor Palumbo therefore has a deemed pecuniary interest when his son has a pecuniary interest.

- [31] Section 5 of the *MCIA* requires that when a member of Council has a pecuniary interest with a matter that Council is considering that they must disclose not only that they have a pecuniary interest in the matter, but they must also explain the general nature of the interest. Additionally, they are prohibited from taking part in the discussion or any vote on the matter or from influencing the vote.

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,

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² *Mondoux v. Tuchenhagen* (2011), 284 O.A.C. 324, [2001] O.J. No. 4801, 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, 107 O.R. (3d) 675 (Ont. Div. Ct) at para. 31, Lederer J. (Gordon J. concurring).

- (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. 1990, c. M.50, s. 5 (1).

The Matter before Council – the Petition

- [32] For a member of Council to be in contravention of the *MCIA*, they must have a pecuniary interest when Council is debating/considering a matter. In other words, Council must be making a decision related to the matter the Councillor has a pecuniary interest in. In this circumstance, there were three (3) decisions made by Council related to the Petition:
- The first was to remove the item from the Agenda
 - The second was to move the item to a Closed Agenda
 - The third was to adopt the Agenda with the item being removed.
- [33] The question therefore is had Councillor Palumbo's pecuniary interest crystalized when Council made any of the noted decisions?
- [34] Case law shows us that there is a point in time when a pecuniary interest becomes absolute. This means that a matter Council is considering may not be in its entirety a conflict of interest as defined by the *MCIA*. Case Law is also clear that you cannot have a pecuniary interest for something that might happen at a future date.
- [35] Justice Michael Penny in *Lorello v. Meffe* surveyed numerous *MCIA* decisions about future or contingent interests in examining whether a contingent interest constitutes a prohibited pecuniary interest pursuant to the *MCIA* and found:

These authorities seem to establish that, in order to constitute a pecuniary interest, there must be something more than infrequent past business dealings or the possibility of future business. To have a conflict under s. 5 of the MCIA, there must be a pecuniary interest existing at the time of the vote. There must be an actual conflict or a reasonable assumption that the conflict will occur".³

- [36] Additionally, in *Mondoux v. Tuchenhagen*, at paragraph 32,
- [32] We do not agree with counsel for Robert Tuchenhagen that this interest crystallized only when he viewed the property and decided to make an offer. This presumes that any discussion at meetings of City Council or any resolution or by-law passed by City Council involving the sale or potential sale which took place as Robert Tuchenhagen was deciding whether to make an offer could not affect that private determination. This is not correct. Any decision of the members of Council could affect the price or whether the property would be sold at all. "The question that must be asked and answered is 'Does the matter to be voted upon have a*

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³ *Lorello v. Meffe*, 2010 CarswellOnt 11195, 2010 ONSC 1976, 99 M.P.L.R. (4th) 107 (OntSCI) at Para 59.

*potential to affect the pecuniary interest of the municipal councillor?" (emphasis added) (see *Greene v. Borins* (1985), [1985 CanLII 2137 \(ON SC\)](#), 50 O.R. (2d) 513, [1985] O.J. No. 2510, 1985 CarswellOnt 666 (Div. Ct.), at para. 39). **As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest.** The e-mail he sent on July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest.⁴ [emphasis added]*

- [37] In the matter before us Councillor Palumbo introduced the Petition to Council as an agenda item for information purposes [correspondence] and not a matter to be debated or considered by Council. He then participated in the discussion and decisions related to the removal of the Petition from consideration during the meeting.
- [38] Councillor Palumbo believed that if he had a pecuniary interest, it would only be because if the annexation by the Township finally occurred, his son may pay less money in municipal taxes. This is in part accurate. Councillor Palumbo's son does have a pecuniary interest if his municipal taxes were to go up *or* down based on a decision that Council were to make and Councillor Palumbo would have a deemed pecuniary interest in that decision. However, pecuniary interest does not mean only a financial benefit. An individual does not need to gain financially, the interest must affect their finances either positively or negatively. An increase in taxes or a decrease would both be a deemed pecuniary interest.
- [39] While the Petition clearly suggested that a financial benefit would be the result if Parke amalgamated with the Township, the item on the agenda was not for Council to debate the merits of such a proposal. In essence, the Petition was an advertisement or sales pitch that purports a reduction in taxes would be the result at some future date if the proposed amalgamation of Parke with the Township were to occur.
- [40] The Petition itself does not affect the personal finances of Councillor Palumbo or his son. Nor does the receiving of the petition by Council for information purposes, which is what was proposed by Councillor Palumbo.
- [41] The decisions made by Council at the meeting on February 9, 2021, related to the Petition and did not affect the personal finances of Councillor Palumbo or his son. As such a pecuniary interest in receipt of the petition alone did not exist.
- [42] Councillor Palumbo did not have a pecuniary interest and was not prohibited from participating in the discussion and vote related to the Petition.

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⁴ *Mondoux v. Tuchenhagen* (2011), 284 O.A.C. 324, [2001] O.J. No. 4801, 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, 107 O.R. (3d) 675 (Ont. Div. Ct) at para. 32, Lederer J. (Gordon J. concurring).

[43] If we are wrong, in our analysis, and Councillor Palumbo did have a prohibited pecuniary interest, it is our opinion that the pecuniary interest is excepted by sections 4(b) and 4(j).

4. When Sections 5 and 5.2 of the *MCIA* do not Apply

[44] Section 4(b) of the *MCIA* provides that a member does not have to disclose his or her interest where that member has a pecuniary interest 'by reason of the member being entitled to receive on terms common to other persons any service or commodity or any subsidy, loan or other such benefit offered by the municipality or local board'.

[45] This section relates to services that you receive from the municipality that are provided to you with the same terms and conditions as they are provided to other property owners. This does not mean that the services must be provided to all properties (i.e. water and sewer, garbage collection etc.)

[46] Section 4(j) of the *MCIA* provides that a member does not have to disclose his or her interest where that member has a pecuniary interest "which is an interest in common with electors generally".

[47] The *MCIA* does not define electors generally. The Courts have defined it as a subset of electors that would be affected by the matter:

[42] The meaning of the word "generally", as found in the [MCIA](#), has been addressed with greater precision [Ennismore (Township) (Re), [1996] O.J. No. 167, 31 M.P.L.R. (2d) 1 (Gen. Div.)]:

The word "generally" used in [Section 4\(j\)](#) indicates to me that the electors to be regarded, when applying the section, are to be of a certain class or order. It is apparent to me that the authorities, together with the language and intended general purpose of the [Municipal Conflict of Interest Act](#), establish that the class or order must be those electors in the area in question who are "affected" by the matter. It is those affected electors that are to be regarded when considering the issue of conflict of interest and not necessarily all the electors.⁵

[48] In this circumstance, all taxpayers in Parke would have the same pecuniary interest as Councillor Palumbo's son. To be clear, if Councillor Palumbo had a pecuniary interest related to the Petition, it would be excepted by sections 4(b) and 4(j) of the *MCIA*. Councillor Palumbo would not be required to comply with sections 5 and 5.2 of the *MCIA*.

Use of Influence

[49] The Applicant in this matter alleged that Councillor Palumbo's action related to the Petition was a contravention of section 13 of the Code of Conduct.

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⁵ *Mondoux v. Tuchenhagen* (2011), 284 O.A.C. 324, [2001] O.J. No. 4801, 88 M.P.L.R. (4th) 234, 2011 CarswellOnt 11438, 2011 ONSC 5398, 107 O.R. (3d) 675 (Ont. Div. Ct) at para. 32, Lederer J. (Gordon J. concurring).

[50] Members of Council must adhere to the Code of Conduct which requires in section 13 that:

13.1 No Member shall use the influence of his or her office for any purpose other than for the lawful exercise of his or her official duties and for municipal purposes

13.2 No Member shall use his or her office position to influence or attempt to influence the decision of any other person, for the Member's private advantage, the private advantage of the Member's parent, child, spouse, staff member, friend, or associate, business or otherwise or the disadvantage of others. No member shall attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of their constituents as part of their official duties. No Member shall hold out the prospect or promise of future advantage through the Member's supposed influence within Council in return for any action or inaction.

13.3 For the purposes of this provision "private advantage" does not include a matter:

- a) That is an interest in common with electors generally as defined in the Municipal Conflict of Interest Act
- b) that affects a Member, his or her parents/children or spouse, staff, friends or associates, business or otherwise, as one of a broad class of persons; or
- c) that concerns the remuneration or benefits of a Member

[51] In this circumstance, Councillor Palumbo's action [requesting the Petition be put on the Agenda] is within his role as a member of Council. Additionally, it is excepted clearly by section 13.3 (a) and (b) of the Code.

III. SHOULD WE APPLY TO A JUDGE IN THIS CASE?

[52] Upon completion of an inquiry regarding whether a member has contravened the *Municipal Conflict of Interest Act*, the *Municipal Act, 2001* provides the Integrity Commissioner with discretion about whether to apply to a Judge.⁶ The Integrity Commissioner must publish written reasons for the decision whether or not to apply.⁷

[53] The section does not set out clear parameters detailing when it is appropriate to apply to a court and we could not find any judicial analysis of this section. It is our opinion that this discretion is not unfettered and must be exercised in a reasonable manner consistent with the Integrity Commissioner's statutory duty to investigate, enforce and provide advice about the *Municipal Conflict of Interest Act* (MCIA).⁸

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⁶ *Municipal Act, 2001*, S.O. 2001, c.25 as am. s. 223.4.1(15)

⁷ *Ibid*, s. 223.4.1 (17)

⁸ *Ibid*, s. 223.3(1)

[54] Notably, the Integrity Commissioner is not given the authority in either piece of legislation to decide upon, recommend or negotiate a penalty with respect to a Councillor found to have breached the *MCIA* after an inquiry. The final decision about whether there has been a breach of the *MCIA*, and the penalty is the exclusive jurisdiction of a Judge of the Ontario Superior Court of Justice.⁹

[55] This fact is a significant and important factor in how the decision to apply to a judge should be made. That is, because the Integrity Commissioner is given broad powers of investigation but is not vested with the authority to make a final decision, the determination of whether to apply to a judge should usually be contingent on the outcome of the investigation and the conclusions of the Integrity Commissioner. Absent extraordinary circumstances, the conclusion that the *MCIA* has been breached should ordinarily result in a decision to apply to a judge. If a decision is made that there is no conflict, a court application should not be pursued.

[56] This is an appropriate conclusion to reach in light of the direction taken by the legislature in Bill 68 to require the expenditure of municipal funds on investigations of alleged conflicts of interests, as well as a broader range of potential penalties available to be imposed by our courts. In our view, this signals that our legislature believed that there were too many conflicts that were not being pursued due to the fact that costs had to be borne by individual complainants, or that automatic removal from office upon the finding of a breach of the *MCIA* resulted in fewer conflicts being found.

[57] We have reached this conclusion in part by having regard to the “*Principles*” section of the *MCIA* and in part by considering the purpose and intent of the *MCIA* as found by the courts. The *MCIA* has introduced principles which state:

1.1 The Province of Ontario endorses the following principles in relation to the duties of members of councils and of local boards under this Act:

1. The importance of integrity, independence, and accountability in local government decision-making.
2. The importance of certainty in reconciling the public duties and pecuniary interests of members.
3. Members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny.
4. There is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise.

[58] The *MCIA* is designed to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic

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⁹ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, s.8.

interest. There is no need to find corruption on the part of the councillor or any actual loss on the part of the council or board. As articulated by the courts: “So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.”¹⁰

[59] Recently, Integrity Commissioner Giorno examined this question in a reported decision not to proceed with an application to Court after he found there was no breach of the *MCIA*:

3. SHOULD I MAKE AN APPLICATION TO A JUDGE?

51. Whether to make an application to a judge is a decision that the *Municipal Act* leaves to the Integrity Commissioner, based on what the Integrity Commissioner feels is appropriate.

52. If I commenced a Court application then I would bear the onus of proving that Deputy Mayor Meadow breached the *MCIA*.⁷ I have no evidence of a breach.

53. In my view, the Respondent’s disclosure was not subject to the *MCIA*. I will not commence a Court application in which I argue the opposite.

54. I also note the costs of a Court application would be borne by the Township.

55. I do not consider it appropriate for me to apply to a judge for a determination as to whether Deputy Mayor Bob Meadows has contravened the *MCIA*.¹¹

[60] We agree that the foregoing is an appropriate methodology to follow and an example of a situation where an Integrity Commissioner would reasonably decide not to apply to a Judge; where the Integrity Commissioner concludes that on a balance of probabilities there is insufficient evidence of a breach of the *MCIA*. In our view, it would be inappropriate to expend further municipal resources to pursue a judicial determination after a statutory investigation has concluded there is no prohibited pecuniary interest.

[61] We will not be applying to a Judge with respect to the allegation that Councillor Palumbo’s contravened the *MCIA*.

Dated August 13, 2021

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¹⁰ *Moll v. Fisher* (1979), 8 M.P.L.R. 266 (Ont. Div. Ct.).

¹¹ *Anderson, D. v. Meadows*, 2020 ONMIC 2 (Giorno)