

Expertise for Municipalities (E4m)
Non-Profit Association
1894 LASALLE BLVD. SUDBURY, ON, P3A 2A4

Integrity Commissioner
for the Township of Billings



INQUIRY REPORT/DECISION

**ALLEGATION: CONTRAVENTION OF THE
MUNICIPAL CONFLICT OF INTEREST ACT
& THE CODE OF CONDUCT**

BY: COUNCILLOR SHARON ALKENBRACK

I. REQUEST FOR INQUIRY

- [1] On July 27, 2020, E4m as Integrity Commissioner received correspondence directed to Mayor Anderson from a member of the public who alleged that two (2) members of Council were in contravention of the *Municipal Conflict of Interest Act* (the “MCIA”) and the Township of Billings Code of Conduct (“Code of Conduct”). Our office contacted the member of the public and received a formal request for inquiry on September 8, 2020.
- [2] The request for inquiry (hereinafter the “Application”) is with respect to Sharon Alkenbrack (“Councillor Alkenbrack”), an elected member of the Township Council (“Council”) for the Township of Billings (“Township”). The Applicant alleged that Councillor Alkenbrack contravened the *Municipal Conflict of Interest Act* (the “MCIA”) and the Township of Billings Code of Conduct (“Code of Conduct”).
- [3] The Applicant is a member of the public and an elector under the MCIA and was therefore entitled to make an Application for an inquiry under sections 223.4 and 223.4.1 of the *Municipal Act*.
- [4] With respect to the allegation that Councillor Alkenbrack did contravene the MCIA the Applicant declared that the Application was made within six (6) weeks of the Applicant becoming aware of the alleged contravention.
- [5] In the Application, the Applicant, alleged that Councillor Alkenbrack contravened section 5(1) (a) and (b) of the MCIA when she failed to declare a pecuniary interest in a matter considered by Council at their meeting on June 15, 2020, related to the opening of the Kagawong Market (the “Market”).
- [6] And further, the Applicant also alleged that Councillor Alkenbrack contravened section 12 of the Code of Conduct which prohibits the use of municipal resources for personal gain.
- [7] On November 13, 2020, we also received an additional complaint from the Applicant alleging that Councillor Alkenbrack failed to declare a pecuniary interest at a Council meeting and at the EDC related to the “*Christmas in Kagawong*” (Christmas Event):

“Councillor Alkenbrack chairs the EDC committee and has been a township councillor for well over a decade. Moreover, two other members of her EDC committee also were selling merchandise at their vendor tables at the same market event. I have not reported these two people because I believe that they are simply following the bad example set by their Chairperson. EDC is a committee of council but appears to act often in the financial interests of its members by organization and holding events where its members can sell goods. I realize no one is making much money from these endeavours but I also think it important principles are at stake. When a councillor ignores law as and procedures by participating in decisions in which she is weighing community interests against her own financial interests, how can citizens trust that the right decision will be made? How does this happen repeatedly?” (sic)

[8] The Applicant more specifically, alleged that Councillor Alkenbrack participated in the EDC meeting on September 9, 2020, and the Council meeting on September 21, 2020, and did not declare a pecuniary interest at either meeting.

II. FINDINGS/CONCLUSION

[9] Councillor Alkenbrack was not in contravention of the *MCIA* when she participated in the discussion/decision related to the Market at the Council Meeting June 15, 2020.

[10] Councillor Alkenbrack did have a pecuniary interest in the Christmas Event. She was not required to comply with section 5 (1) (a) and (b) as section 4 (j) of the *MCIA* exempted her from having to declare the interest and allowed her to participate in matters related to the Christmas Event.

[11] When the Integrity Commissioner conducts an inquiry into allegations that a Member contravened the *MCIA*, they must publish reasons if they will not be taking the Member to Court. Our reasons are that Councillor Alkenbrack did not contravene the *MCIA*, and while the Integrity Commissioner does not have the authority to make such a determination it is our view that it would be foolhardy for the Municipality to spend public resources on this matter where the Applicant can, if they feel it is appropriate, seek the desired redress before the courts. It is in our view that it is not appropriate that any such challenge be publicly funded.

[12] Additionally, Councillor Alkenbrack did not contravene section 12 of the Code of Conduct.

[13] While we have not made findings against Councillor Alkenbrack, we do find it prudent to make recommendations to Council and provide the following:

- a. Council adopt a formal complaint policy that outlines the process that will be used by the Township when considering non-Integrity Commissioner complaints;
- b. Council adopt an Expected Behaviour Policy that explains to residents Council's expectations regarding their behaviour; and
- c. Council update their Code of Conduct to, at a minimum:
 - i. Explain how complaints will be made to the Integrity Commissioner;
 - ii. Include a process the Integrity Commissioner must follow when conducting an inquiry under the Code of Conduct;
 - iii. Require that all complaints to the Integrity Commissioner are subject to an initial review and can be dismissed after such a review;
 - iv. Define frivolous and vexatious complaints; and
 - v. Improve readability by simplifying the language.
- d. Council review and then revise the Terms of Reference for the EDC. All committees created by Council are advisory bodies and ought not to be doing the work of Township employees/volunteers. The EDC should be providing Council with advice on economic development matters. They should not be running

events, collecting money and/or making decisions. We encourage Council to assign the task of planning, organizing, and operating the Christmas Event (as well as any other event traditionally organized by the EDC) to the Economic Development Officer. The Economic Development Officer can then seek advice as required. This does not mean that the current members could not participate as volunteers working under the direction of the Economic Development Officer.

III. INQUIRY PROCESS

- [14] Upon receipt of the Application, we completed an initial review of the statutory declaration and the accompanying material submitted by the Applicant and determined that there were sufficient grounds to conduct an inquiry into the matter.
- [15] The first matter was assigned to Jane Martynuk (the “Investigator”), an investigator with Investigative Solutions Network (“ISN”) as an agent of the Integrity Commissioner who did:
- review the Applicant’s letter to Mayor Anderson, the formal submission to the Integrity Commissioner and the statutory declaration;
 - review the materials submitted by the Applicant which included minutes from the June 15, 2020, Council Meeting;
 - listened to the audio recording of the June 15, 2020, Council Meeting;
 - reviewed the Agenda, the Agenda package and specifically the staff report (Memorandum) dated June 12, 2020, drafted by the Deputy Clerk;
 - reviewed the EDC Committee Meeting Minutes from 2019;
 - interviewed:
 - the Applicant, on September 27, 2020
 - the CAO/Clerk, Kathy McDonald, on October 1, 2020
 - the Deputy Clerk Megan Bonenfant, on December 14, 2020
 - the Mayor, Ian Anderson, on January 18, 2021
 - Councillor Bryan Barker, on January 18, 2021
 - Kagawong Market Coordinator (volunteer) Ms. Ethel Newburn, on October 8, 2020
 - Mr. Todd Gordon, Township employee assigned to the EDC Committee on January 18, 2021
 - Councillor Sharon Alkenbrack, on December 3, 2020
 - the Respondent, Councillor Alkenbrack, on December 3, 2020
- [16] The second matter was assigned to Matt Willet (the “Investigator”), an investigator with Investigative Solutions Network (“ISN”) as an agent of the Integrity Commissioner who did:
- review the Applicant’s formal submission dated November 13, 2020, to the Integrity Commissioner and the statutory declaration dated November 12, 2020;

- review the materials submitted by the Applicant which included minutes from the September 9, 2020, Economic Development Committee meeting and the September 21, 2020 Council Meeting;
- interviewed:
 - the Applicant, on February 22, 2021
 - the CAO/Clerk, Kathy McDonald, on December 22, 2020
 - the Deputy Clerk Megan Bonenfant, on December 22, 2020
 - the Mayor, Ian Anderson, on December 22, 2020
 - Councillor Bryan Barker, on February 18, 2021
 - Mr. Todd Gordon, Township employee assigned to the EDC Committee on February 22, 2021
 - A Witness who is a volunteer, on February 22, 2021
 - the Respondent, Councillor Alkenbrack, on March 25, 2021

[17] The conclusions we arrived at with respect to these matters are based upon the standard of a balance of probabilities. Balance of probabilities is a civil burden of proof, meaning that there is evidence to support the allegation that the comments or conduct "more likely than not" [50.1%] took place, and that the behaviour is a breach of the Township's Code of Conduct. As required, assessments of credibility have been made. These assessments are based on:

- Whether or not the individual has firsthand knowledge of the situation
- Whether or not the individual had an opportunity to observe the events
- Whether or not the individual may have bias or other motive
- The individual's ability to clearly describe events
- Consistency within the story
- The attitude of the individual as they are participating
- Any admission of dishonesty¹

[18] The Investigators found the witnesses and Councillor Alkenbrack to be credible. They participated in the investigation, provided supporting evidence, and cooperated with requests for additional information.

[19] Ms. Martynuck reported that the Applicant was found to be somewhat credible. The Investigator noted that the Applicant's complaint seemed to be more than just a citizen genuinely concerned that a member of Council contravened the *MCI*A. The Investigator considered the allegations with some caution.

[20] Mr. Willet did not make assessments of credibility. It was unnecessary as the allegations/evidence were similar to those considered by Ms. Martynuck. The investigation by Mr. Willet was concluded after the interviews as no additional evidence

¹ *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at Para 10, 11. *Alberta (Department of Children and Youth Services) v. A.U.P.A.* (2009), 185 LAC (4th) 176 (Alta.Arb.)

was found to support the allegation that Councillor Alkenbrack had a pecuniary interest in the Christmas Market.

IV. FINDINGS OF FACT

[21] The circumstances that give rise to the request for inquiry are related to the participation of Councillor Alkenbrack in a decision made by Council regarding the Kagawong Market.

[22] More specifically, on June 15, 2020, Council considered and passed a resolution related to the Kagawong Market.

Reference: Resolution 2020-201
Council Meeting Agenda June 15, 2020
Council Meeting Minutes June 15, 2020

[23] Resolution 2020-201 was moved by Councillor Barker and seconded by Councillor Hunt. And stated as follows:

*BE IT RESOLVED that Council directs staff to proceed with planning for the 2020 Kagawong Market at the Old Church on the Hill/Dog Park Area.
Carried*

Reference: Council Meeting Minutes June 15, 2020

[24] The Applicant attested that on the morning of July 1, 2020, they attended the “*Billings Township/Kagawong Market at the Old Church on the Hill in Kagawong*” further that they were “*greeted by Kathy McDonald who was encouraging visitors to use hand sanitizer as a precaution before entering the market..... in merchant area, I became aware that Billings Township councillor Sharon Alkenbrack was selling loose leaf teas. Sharon Alkenbrack sells loose leaf teas under the business name Manitoulin Tea Company*”.

Reference: Applicant’s Statutory Declaration dated September 8, 2020

[25] Then the Applicant reported attending the July 7, 2020, Council meeting electronically (Zoom) at which time the Applicant became aware that no declarations of pecuniary interest were made at the June 15, 2020, Council meeting.

Reference: Applicant’s Statutory Declaration dated September 8, 2020
Interview of Applicant September 27, 2020

[26] On July 24, 2021, the Applicant wrote to Mayor Anderson expressing concern that two (2) members of Council had potentially violated the *MCIA* when at the June 15, 2020, Council meeting they participated in the vote on decision to run the Kagawong Market. The Applicant alleged that Councillor Alkenbrack was at the Kagawong Market on July 1, 2020, on behalf of her business Manitoulin Tea Company. The Applicant wrote:

“Let me say first of all, these are both legitimate businesses so, of course, I have no objection to councillors running private businesses. However, the Municipal Conflict of Interest Act, R.S.O. 1990, cM.50 Section 5.1 outlines a clear expectation that pecuniary interest will be disclosed using a specific procedure if a councillor has a direct interest in a council decision. So, I have questions: Why was pecuniary interest not declared by councillors and why didn’t councillors remove themselves from decision-making?”

Secondly, in Billings By-Law 2018-41, the council Code of Conduct, Section 12 speaks about prohibiting the use of municipal resources for anything except municipal business. Again, I have a question or two. Why have councillors used municipal resources for private business? Why didn’t councillors book themselves to participate in either of the two market spaces provided by business owners this year and avoid the pecuniary interest situation altogether?” (sic)

Reference: Applicant’s Statutory Declaration dated September 8, 2020
Applicant’s correspondence dated July 24, 2020, addressed to Mayor Anderson
Applicant’s response letter to the Integrity Commissioner dated September 8, 2020

[27] In response to our request for clarification, the Applicant submitted a more detailed summary of the allegations along with the statutory declaration on September 8, 2020.

[28] In the letter addressed to Mayor Anderson, the Applicant questioned why the Councillors chose to participate in the Market and not in the outdoor markets hosted by two (2) private businesses. The Applicant advised that Council picked the same day to open the Market as these two (2) businesses.

“I was referring to the fact that two business owners in the township decided to host outdoor markets at their businesses after they were told early in the summer that there would be no Kagawong market held by the township. Councillors had every opportunity to sell at these alternate sites for comparable space rental rates as the Kagawong market. Instead, they chose to initiate a township market that competed with private business markets and chose to situate their selling tables on township property rather than take the opportunity to support other businesses in town. If they had decided to set up tables at the other markets in town, they would never have bumped up against Municipal Conflict of Interest problems when approving the start of the Kagawong market”.

Reference: Applicant’s response letter to the Integrity Commissioner dated September 8, 2020

[29] In addition to what was in the original complaint, the Applicant reported: *“I have a general concern that similar failures to declare pecuniary interest in previous council motions on other separate occasions have happened during this term of council”.* The Applicant

advised that Councillor Alkenbrack was a member of the EDC, that the EDC *is responsible for planning and coordinating an annual Christmas in Kagawong vendor event*, “*none of the EDC minutes contained any declaration of pecuniary interest*” and that on November 16, 2019 at the Christmas Event Councillor Alkenbrack was selling her tea.

Reference: Applicant’s response letter to the Integrity Commissioner dated September 8, 2020

Opening of the Kagawong Market

- [30] The Council Agenda for the June 15, 2020, Council meeting identified “*Kagawong Market*” as the first item under new business.

Reference: Council Meeting Agenda June 15, 2020

- [31] The corresponding minutes confirm that the matter was debated, and a decision was made by Council with respect to the opening of the Kagawong Market and further that Councillor Alkenbrack attended the meeting. The meeting minutes reported that no Member declared a pecuniary interest with any of the topics to be discussed at the meeting.

Reference: Council Meeting Minutes June 15, 2020

- [32] When interviewed the Applicant expressed confusion as to why the opening of the Market would have been considered at a Council meeting. The Market is the responsibility of the Township and has been run for the past five (5) to six (6) years by Ethel Newburn (“Ms. Newburn”). Ms. Newburn is not an employee of the Township.

Reference: Interview of Applicant September 27, 2020
Interview of CAO/Clerk October 1, 2020
Interview of Ms. Newburn October 8, 2020

- [33] The CAO/Clerk and Mayor Anderson advised that the matter was considered by Council more as a courtesy due to the restrictions in place related to COVID-19 and because the Municipal Emergency Group had decided for public safety that the Market could not open at the usual site due to construction, so an alternative site was needed if the Market was to open. It was the recommendation of the Municipal Emergency Group that the Old Church on the Hill/Dog Park area be the preferred site.

Reference: Interview of Mayor Anderson January 18, 2021
Interview of CAO/Clerk October 1, 2020
Interview of Deputy Clerk December 14, 2020

- [34] In the Agenda Package, the staff report related to the Market stated:

“The Kagawong market has been run by volunteers for the township for the past 15+ summers. As with most things, COVID-19 forced the ‘pause’ button on this market. Guidance from the province on exactly what markets are permitted to operate is somewhat lacking. Initially, only food vendors were permitted to operate, however, Farmers Markets Ontario has reportedly received confirmation from the Ontario Ministry of Agriculture and Rural Affairs that artisan and craft vendors may now operate provided that the majority of vendors are selling food products. Regardless of the products being sold, markets are subject to stringent guidelines with respect to physical distancing and hygiene (see attached). In order to adhere to these guidelines, and in light of the planned construction at the Small Craft Harbour, the Kagawong Market will need to relocate for the 2020 season. The Old Church on the Hill/Dog Park area has been identified as a suitable alternative location. The market coordinator is in the process of reaching out to market vendors to determine if they are interested in participating for the 2020 season; some have indicated that they will not be participating in any market this season, but would be back in 2021.

In the meantime, two local businesses have announced their intentions to host markets. At least one of these markets was initiated because the proprietors were erroneously informed that the Kagawong Market had been cancelled. They have reported positive response from prospective vendors and customers”.

Reference: Staff Report (Memorandum) from Deputy Clerk Megan Bonnefant dated June 12, 2020, and included in the Council Meeting Agenda Package for the June 15, 2020, Council Meeting

- [35] Council debated the matter and gave staff direction to proceed with planning for the Market. Council did not confirm that the Market would be opened just that the planning could start. A decision to open would be made closer to the July 1, date and would be dependent on COVID-19 restrictions in place at the time.

Reference: Interview of Mayor Anderson January 18, 2021
Interview of CAO/Clerk October 1, 2020
Interview of Deputy Clerk December 14, 2020
Council Meeting Minutes June 15, 2020

- [36] The Market took place on July 1, 2020. The CAO/Clerk was present and advised that it was not a usual practice for her to be in attendance. Due to the COVID-19 restrictions, she attended opening day (July 1, 2020) to ensure that people went the right way and to ensure that hand sanitizer was used.

Reference: Applicant’s Statutory Declaration dated September 8, 2020
Applicant’s correspondence dated July 24, 2020, addressed to Mayor Anderson
Interview of CAO/Clerk October 1, 2020

[37] The Applicant stated that attending the Market on several occasions, Councillor Alkenbrack participated at the Market on July 1, 2020 as well as at other dates during the Market season.

Reference: Applicant's Statutory Declaration dated September 8, 2020
Applicant's correspondence dated July 24, 2020, addressed to Mayor Anderson
Interview of CAO/Clerk October 1, 2020

[38] The Market operates once a week for the months of July and August.

Reference: Interview of CAO/Clerk October 1, 2020

[39] Councillor Alkenbrack is a fifth (5th) term Councillor and is aware of her obligations under the *MCIA*.

Reference: Interview of Councillor Alkenbrack December 3, 2020

[40] The Investigator confirmed that Councillor Alkenbrack did declare a pecuniary interest in matters before Council six (6) times between December 2018 and November 16, 2020

Reference: Township Registry of Declarations of Pecuniary Interest

[41] Councillor Alkenbrack did not believe that she had a pecuniary interest with respect to the Market and as such did not make a declaration during the meeting. Councillor Alkenbrack advised the investigator she had no intention of putting in booth in the Market because she had already contacted the farmers market in Little Current and had a booth with them. She does not normally put a booth in the Market because she rents a cabana from the Township. During the last week of June, she contacted the Market Coordinator after she and a friend discussed having a booth.

Reference: Interview of Councillor Alkenbrack December 3, 2020

[42] Ms. Newburn confirmed that Councillor Alkenbrack contacted a week or more after the June 15, 2020 Council meeting and requested a booth.

Reference: Interview of Ethel Newburn October 8, 2020

[43] Ms. Newburn reported that Councillor Alkenbrack had not been a part of the Kagawong Market in the past years. On June 23, Ms. Newburn received a text message from a friend of Councillor Alkenbrack asking if Ms. Newburn had a booth that would be shared with Councillor Alkenbrack. Councillor Alkenbrack was at the booth every Wednesday except for July 22.

Reference: Interview of Ethel Newburn October 8, 2020

Christmas in Kagawong 2019

[44] The Applicant alleged that Councillor Alkenbrack as the Chair of the EDC had a pecuniary interest in the Christmas in Kagawong 2019 event (“Christmas Event”) because her business Manitoulin Tea Company had a booth at the Christmas Event. The Applicant advised that a review of the 2019 EDC minutes had been conducted and that Councillor Alkenbrack had not declared a pecuniary interest at any of the meetings she attended.

Reference: Applicant’s Statutory Declaration dated September 8, 2020
Applicant’s correspondence dated July 24, 2020, addressed to Mayor Anderson
Applicant’s response letter to the Integrity Commissioner dated September 8, 2020
Interview of Applicant September 27, 2020

[45] Councillor Alkenbrack, the Chair of the EDC advised the Investigator that:

“The event [Christmas Event] is organized by the EDC, which is a Committee of Council. There are 7 members, 6 who vote. The committee organizes the event, does the decorating and whatever is necessary to make it a success. The event brings in anywhere from 1000 to 2000 people to the community in November, at a time when our community is not very busy, so this event brings people here for the event and then people go to other shops in our village. This event is a big fundraiser for the church in the community and the museum and our library who all benefit from the event.” From what she could recall of her training with the Integrity Commissioner, a conflict was not a conflict if the benefits to all were the same. *“In our committee 6 people vote on the decision, 5 of the voting people are vendors in our market as they are business people in our village. I am not the only person voting and making those decisions. What it the alternate? Do we close this event that has been part of the community for 15 years?”*

[46] The EDC minutes from the August 24, 2019, meeting recorded that the Christmas Event would be held November 15-17, 2019, and that Councillor Alkenbrack was present at the meeting.

Reference: EDC Meeting Minutes dated August 24, 2019.

[47] In reviewing the EDC Meeting Minutes from 2019, with the exception of a request to Council for \$400 budget for the purpose of purchasing supplies [October 10, 2019], the Committee did not make financial decisions. To be clear, the EDC did not establish vendor rates for the Christmas Event nor did they make recommendations to Council related to fees and charges related to the Christmas Event.

[48] The Applicant's November 13, 2020, complaint alleged that Councillor Alkenbrack as the Chair of the EDC contravened the *MCIA*.

Reference: Applicants written submission to the Integrity Commissioner
Applicant's Statutory Declaration November 13, 2020

[49] The Applicant made similar allegations November 13, 2020, related to Councillor Alkenbrack and her role as the Chair of the EDC as well as being a business owner who participated in the Christmas event.

[50] Evidence collected by Mr. Willet did not yield different facts or new information that would alter our opinion in this matter, and we have not included the details of witness statements herein.

V. ANALYSIS

[51] We considered:

- a. Whether Councillor Alkenbrack had a direct, indirect or deemed pecuniary interest when she participated in the discussion at the June 15, 2020, Council meeting regarding the relocation and potential opening of the Kagawong Market (Resolution 2020-201);
- b. Whether Councillor Alkenbrack complied with the *MCIA* [related to the Market];
- c. Whether Councillor Alkenbrack had a direct, indirect or deemed pecuniary interest when she participated in discussions at EDC meetings related to the Christmas event;
- d. Whether Councillor Alkenbrack complied with the *MCIA* [related to the Christmas Event];
- e. Whether to make an Application to Court for breach of the *MCIA*.
- f. Whether Councillor Alkenbrack contravened section 12 of the Code of Conduct.

Pecuniary Interest

[52] The *MCIA* prohibits Councillors from acting, even from influencing matters where they have a pecuniary interest "*before, during or after*" the meeting².

[53] The primary issue for analysis is whether Councillor Alkenbrack had a prohibited pecuniary interest in the relocation and/or opening of the Kagawong Market.

[54] "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

² *Municipal Conflict of Interest Act*, R.S.O. 1990 C.M.50 s.5(1)(c).

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.

“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 defined³.

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.”

[55] A Member may have a **Direct Pecuniary Interest** where the matter being considered by Council affects the Member’s own finances. A Member may have an **Indirect Pecuniary Interest** where they are a shareholder of a private corporation or have a controlling interest in a public corporation (i.e., director, significant shareholder) or is a “member of a body” that has a pecuniary interest in the matter being considered by Council or 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. A Member may have a **Deemed Pecuniary Interest** where a matter being considered affects the finances of a Member’s parent, spouse or child [as defined by the *MCIA*].

[56] 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 spouse.

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.

[57] 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

³ *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).

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

[58] Section 5.1 of the *MCIA* requires a member to file a written statement of conflict when he has a prohibited pecuniary interest.

Kagawong Market

[59] Councillor Alkenbrack did not declare a pecuniary interest with respect to the Market [Agenda item 8(a)] either before, or during the June 15, 2020, Council meeting.

[60] Councillor Alkenbrack reported that she did not believe she had a prohibited pecuniary interest at the time. The decision before Council was to direct "*staff to proceed with the planning for the 2020 Kagawong Market at the Old Church on the Hill/Dog Park area*". While the resolution does not expressly state that the Market will be held, the resolution indirectly authorizes the event.

[61] Approximately, one week after the June 15, 2020, Council Meeting, Councillor Alkenbrack contacted Ms. Newburn to inquire if she could have a booth at the July 1, 2020, Market.

[62] The Market has been hosted by the Township for over fifteen (15) years on a Wednesday from July 1 to August 30 in any given year. Councillor Alkenbrack had not previously participated in this Market.

[63] The question therefore is when did Councillor Alkenbrack's pecuniary interest crystalize?

[64] 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.

[65] 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”.*⁴

[66] 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 potential to affect the pecuniary interest of the municipal councillor?'" (emphasis added) (see *Greene v. Borins* (1985), 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 2011 ONSC 5398 (CanLII) 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.**⁵ (emphasis added)*

[67] In the matter before us, Councillor Alkenbrack did not decide to participate in the Market until approximately one week after the June 15, 2020, Council Meeting. She did not have a past practice of participating in the Market. Her pecuniary interest crystalized on June 23, 2020, when a friend of Councillor Alkenbrack’s contacted Ms. Newburn and asked if there was space that she and Councillor Alkenbrack could have a booth.

[68] We also considered section 4 of the *MCIA*. Section 4 describes circumstances when a Member having a pecuniary interest is “excepted” from having to disclose the interest. More specifically, we considered section 4 (j) which states:

By reason of the member having a pecuniary interest which is an interest in common with electors generally;

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

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

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).

[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.⁶

- [70] In this circumstance, all potential vendors at the Market would have the same pecuniary interest as Councillor Alkenbrack.
- [71] To be clear, if Councillor Alkenbrack had a pecuniary interest related to the discussion/decision about the Market, it would be excepted by section 4(j) of the *MCIA*. Councillor Alkenbrack would not be required to comply with section 5 of the *MCIA*.

Christmas In Kagawong Event

- [72] The Christmas Event is planned and organized by the EDC.
- [73] Councillor Alkenbrack is the Chair of the EDC. She has been appointed by Council to the EDC and participates as a member of the public.
- [74] The Applicant has not cited a specific incident and instead has made a generalized allegation that Councillor Alkenbrack had a pecuniary interest in in the Christmas Event because she had a booth at the event in 2019 and in 2020.
- [75] The Applicant advised that a review of the 2019 EDC minutes had been conducted and that Councillor Alkenbrack had not declared a pecuniary interest at any of the meetings she attended.
- [76] The *Municipal Act* requires that for the Integrity Commissioner to consider a matter under the *MCIA*, the individual applying must attest to the fact that they became aware of the situation in the previous six (6) weeks. The Applicant was aware in November of 2019 that Councillor Alkenbrack had been a vendor at the Christmas Event. An application was not submitted to our office at that time.
- [77] This matter has been analyzed in accordance with the *MCIA*, applicable case law and the Code of Conduct.

⁶ *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).

- [78] Members of the EDC who also sit on Council have a pecuniary interest in matters that the EDC has a pecuniary interest in⁷. Additionally, individual Members may also have a pecuniary interest in matters before the EDC.
- [79] We are aware from the EDC meeting minutes that on October 10, 2019, the Committee resolved to request a \$400 budget from Council for supplies needed for the Christmas Event. We did not review Council meeting minutes from 2019 to determine if Council considered the request.
- [80] Councillor Alkenbrack as a vendor at the Christmas Event has a pecuniary interest in the Christmas Event because her business is represented at the event.
- [81] Our investigation revealed that on August 24, 2019, the EDC set the date for the Christmas event. The EDC minutes of October 10, 2019, report that twenty-five (25) vendors had been confirmed.
- [82] While Councillor Alkenbrack would have a prohibited pecuniary interest in the EDC decision on August 24, 2019, and other decisions related to the running of the Christmas Market, her interest would be accepted as an interest in common as per 4(j) of the *MCIA*.
- [83] The Applicant swore a statutory declaration on November 12, 2020, alleging that Councillor Alkenbrack had a pecuniary interest when she participated in the EDC meeting on September 9, 2020, and the Council meeting of September 21, 2020. The Applicant stated that on October 11, 2020, they accessed the Township website and reviewed the EDC minutes.
- [84] The Applicant alleged becoming aware of the contravention on October 11, 2020 and the declaration is within the six (6) week requirement outlined in the *Municipal Act*. However, there was no additional information to substantiate as opinion other than Councillor Alkenbrack would have a prohibited pecuniary interest in the EDC decision on August 24, 2019, and other decisions related to the running of the Christmas Market, her interest would be accepted as an interest in common as per 4(j) of the *MCIA*.

Use of Municipal Resources

- [85] The Applicant alleged that Councillor Alkenbrack contravened section 12 of the Code of Conduct.
- [86] Section 12 of the Code of Conduct requires Members to not use municipal resources for personal gain. It specifically states:

⁷ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, s.2(a)(iii).

“No Member shall use or permit the employment of municipal land, facilities, equipment, suppliers, services, municipal employees or other resources for purposes or activities other than the furtherance of the business of the municipality.”

- [87] This section of the Code of Conduct prohibits Members from using or permitting the use of Township owned infrastructure for their private benefit. Councillor Alkenbrack by participating at events that have been hosted by the Township does not trigger a contravention of this section of the Code of Conduct.

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

- [88] 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.⁸ The Integrity Commissioner must publish written reasons for the decision whether or not to apply.⁹
- [89] 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)*.¹⁰
- [90] 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.¹¹
- [91] 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.
- [92] We will not be applying to a Judge with respect to the allegations that Councillor Alkenbrack contravened the *MCIA*.

⁸ *Municipal Act, 2001*, S.O. 2001, c.25 as am. s. 223.4.1(15)

⁹ *Ibid*, s. 223.4.1 (17)

¹⁰ *Ibid*, s. 223.3(1)

¹¹ *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, s.8.

- a. At the June 15, 2020, Councillor Alkenbrack did not have a pecuniary interest in the decision to relocate and plan for the Market. Further that if she did, she would not need to declare it pursuant to section 4 (j) of the *MCIA*.
- b. Councillor Alkenbrack did not contravene the *MCIA* with respect to her participation as a Member of the EDC. While Councillor Alkenbrack did have a pecuniary interest in the Christmas Market, she would not need to declare it pursuant to section 4 (j) of the *MCIA*.

DATED: July 19, 2021