

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

CITY OF ELLIOT LAKE
(INTEGRITY COMMISSIONER)

Applicant
(Respondent)

-and-

CHRIS PATRIE

Respondent
(Appellant)

AMENDED NOTICE OF APPEAL

THE APPELLANT, CHRIS PATRIE, APPEALS to the Divisional Court from the Judgment of the Honourable Justice J. Rasaiah dated January 9, 2023 made at the City of Ste. Sault Marie, Ontario.

THE APPELLANT ASKS that the Judgment be set aside and judgment be granted as follows:

1. that the Application of the Respondent, Town of Elliot Lake (Integrity Commissioner), be dismissed;
2. in the alternative, that the Judgment be varied and that the penalty imposed be a reprimand;
3. that the Appellant's costs be awarded on this Appeal and the Application in the Court below;
4. such further or other relief as the Appellant may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

1. The Application Judge erred in law in concluding that the Applicant, City of Elliot Lake (Integrity Commissioner), could be validly appointed retroactively by By-law. In this regard, the Application Judge misdirected herself with respect to her treatment of, and reliance upon, section 273 of the *Municipal Act*, 2001, S.O. 2001, c.25.
2. The Application Judge misdirected herself on both the law and the facts in holding that the Applicant possessed standing and/or jurisdiction under the *Municipal Act*, 2001, S.O. 2001, c.25 (the "*Municipal Act*") and/or the *Municipal Conflict of the Interest Act*, R.S.O. 1990, c. M.50 ("MCIA") to commence the application that is the subject of this appeal.
3. The Application Judge erred in law by failing to rule that an improperly appointed Integrity Commissioner ("IC") and/or an IC appointed in a manner not specifically provided for under the relevant and paramount provincial statutes lacked the authority (or any authority) to proceed with or commence any investigation and/or proceed with or commence any application, including the Application under appeal; the lack of authority of the IC was and is incurable.
4. The Application Judge's decision with respect to the standing and jurisdiction of the Applicant resulted in a contravention of the relevant statutory regime and therefore a reversible error. The Applicant was not lawfully appointed according to Section 223.3(7)1.1 of the *Municipal Act*, 2001.
5. Further, the Application Judge's decision with respect to the standing and jurisdiction of the Applicant resulted in a denial of procedural fairness and a denial of natural justice.
6. The Application Judge erred in law and in fact in determining or concluding that the location of the ski hill and the location of Oakland Boulevard were interchangeable or proximate and thereby fundamentally misdirected herself in concluding that the Appellant had a conflict of interest. In this

regard, the Application Judge misdirected herself and/or misunderstood the geographic context of the City of Elliot Lake and the various potential locations of the “Hub” facility under consideration by Council. This error constitutes a palpable and overriding error which affected the decision as a whole, as well as numerous discreet findings made by the Application Judge, and which warrants the intervention of this Court.

7. The Application Judge’s errors in findings of fact with respect to the relevant geography of Elliot Lake and her treatment of the various Hub sites under consideration include the following:
 - (i) the failure to properly consider that the City of Elliot Lake is a small northern Ontario town;
 - (ii) the failure to properly consider that within the geographic context of Elliot Lake, all of the possible Hub locations were proximate to each other; and
 - (iii) the treatment of the “ski hill” and the “ski hill location” throughout the decision as the same as Oakland Boulevard or the intersection of Oakland Boulevard and Ski Hill Road. The two locations are not same and the Application Judge’s error with respect to distinguishing between these two locations is repeated and relied upon throughout her decision. The ski hill is at least 0.7 kilometres distant from the Appellant/Respondent’s business.
8. The Application Judge’s errors of fact and mixed law and fact were propounded by a series of inferences drawn by the Application Judge regarding the conduct, motives or intentions of the Respondent which were wrongly or improperly weighed or treated as evidence of misconduct and, further, used to support her finding of a conflict of interest. These errors amount to a failure to apply the correct legal test, an objective test, for determining a direct or indirect pecuniary interest under the MCIA and therefore a reversible error of law requiring the intervention of this Court.

9. The Application Judge misdirected herself with respect to the application of the correct legal test. The correct legal test for determining a direct or indirect pecuniary interest under the MCIA is an objective test. In this case, the question properly before the Application Judge should have been a narrow determination of whether the proximity between the Respondent's property/business and one of the proposed locations for the Hub was sufficient to give rise to a potential conflict of interest. All other considerations, including as acknowledged by the Application Judge, the intentions of the impugned party, are not relevant to the proper application of the objective test required under the MCIA and/or at common law.
10. The Application Judge's finding of a conflict of interest was tainted by her improper inclusion of an assessment of the Respondent's conduct and/or the Respondent's "thinking" or "thoughts," , including with respect to the following findings, as part of her determination of a conflict of interest:
- (i) that the Respondent bullied another Councillor;
 - (ii) that the Respondent continued to meet with the Mayor, the City's CAO or others to sponsor the ski hill location for the Hub;
 - (iii) that the Respondent was disruptive at a subsequent Council meeting; and
 - (iv) the finding at paragraph 215 that the Respondent "was clearly thinking about the Skill [sic] Hill location as a potential location for the Hub."
11. None of these findings are relevant to the determination of a conflict of interest in this context. Each of these findings was improperly relied upon by the Application Judge.
12. The Application Judge erred in law in failing to consider the proper temporal context for the evolution, discussions, and deliberations of the plan to develop a large recreational complex for the City of Elliot

Lake, including the failure to properly contextualize the previous discussions which had taken place regarding a proposal for the development of the ski hill location.

13. The Application Judge erred in law by proceeding to evaluate the various proposed sites for the development of a Hub complex. As noted above, the Respondent's alleged conflict of interest only appertains to one proposed location for the Hub that was under consideration at various times by Council, and which site was incorrectly identified and described in the decision of the Application Judge.
14. The Application Judge erred in law by adopting a test with no discernible criteria or standard for assessing pecuniary interest or benefit including the following considerations:
 - (i) how much benefit is too much benefit?
 - (ii) how close is too close, including the Application Judge's adoption and application of the concept of the "zone of convenience," which was propounded by an expert called by the Applicant and which, as detailed further below, the Respondent contends was improperly admitted as evidence and weighed as evidence;
 - (iii) the location of the Respondent's business in Elliot Lake including its position as an entry point to the City and part of the City's small commercial centre.
15. The Application Judge erred in law and fact by failing to properly consider and weigh the following:
 - (i) was the Respondent precluded from participating in, voting upon or supporting any location or only some locations?
 - (ii) was the Respondent precluded from participating in, voting upon or opposing a site that was not publicly owned?

- (iii) was the Respondent precluded from participating in, voting upon or opposing the re-opening of the Hub location debate after Council voted for the Centennial Arena as the Hub site?

16. The Application Judge erred in law by failing to properly consider or weigh the credibility of witnesses whose interests were adverse and in opposition to the concerns raised by the Respondent.

17. The Application Judge misdirected herself, erred in law, and gave undue and inappropriate weight to the expert report of Jason Naccarato, including with respect to the following issues:

- (i) Mr. Naccarato was not a properly qualified expert;
- (ii) Mr. Naccarato failed in his analysis to distinguish between the Oakland Boulevard "Site" and the ski hill location;
- (iii) Mr. Naccarato failed to consider whether the location of a complex at Oakland Boulevard or the ski hill would benefit all owners of like interest in the same vicinity or, in other words, result in an interest in common with electors generally for that area of Elliot Lake;
- (iv) Mr. Naccarato wrongfully evaluated the Hub sites;
- (v) Mr. Naccarato failed to ask the proper questions; would any of the Hub sites result in a benefit to the Respondent, the Respondent's area of business or any resident of Elliot Lake?
- (vi) Mr. Naccarato purported to answer the ultimate issue before the Court; he exceeded his function as an expert under Rule 53;
- (vii) the Application Judge misdirected herself with respect to the weight that should be accorded to the Naccarato report relying upon the fact that a contrary expert's report was not served and relied upon by the Respondent..

18. The Application Judge erred in law in failing to properly analyze and consider whether the Respondent had an interest in common with electors generally or an interest in common with electors, including adjacent business owners, in the business area along Highway 108 pursuant to the provisions of the *MClA*. The Application Judge's failure to adequately consider one of the main arguments advanced by the Respondent amounts to an error of law.
19. The Application Judge erred in law in failing to take into consideration and balance the properly understood leadership role of a municipal councillor, who holds an elected political office and whose civic function, legislative role, and public responsibility, absent a conflict of interest, includes to sponsor, advocate for, lobby and pursue the interests of the Councillor's constituents and the public interest, generally.
20. The Application Judge erred in law by giving inappropriate weight and credibility to hearsay evidence and evidence proffered contrary to Rule 39.01(5).
21. The Application Judge erred in law by failing to properly contextualize the underlying circumstances relating to the Hub location debate in Elliot Lake including the following:
 - (i) the conduct of the then Mayor and Councillor Cyr;
 - (ii) whether a conflict existed and adversely affected the Respondent in respect to legal counsel (Wishart Law Firm) for the City of Elliot Lake and legal counsel for E4M (Wishart Law Firm), both of which had been previously retained or acted on behalf of Elliot Lake.
22. The Application and the delay in the determination of the Application has resulted in procedural unfairness, including with respect to the following:

- (i) the Application was argued on August 12 and August 13, 2021; however, no decision was rendered by the Application Judge until January 9, 2023, almost seventeen months after the close of the hearing of the Application;
- (ii) there has been another municipal election since the Application was commenced and argued and the Respondent was elected Mayor (Head of Council) in that election;
- (iii) the penalty imposed by the Application Judge disqualifies the Respondent from being a “member” for a period of two years without addressing the fact that the Respondent was at the time that the Application Judge released her decision the Mayor or Head of Council of the City of Elliot Lake;
- (iv) the Application Judge disqualified the Respondent for being a member for a period of two years, which time period will expire before the next municipal election thereby leaving uncertain the Respondent’s ability to resume his seat at the end of the two year period penalty;
- (v) the penalty imposed was improper and punitive in all of the circumstances. If there was a conflict of interest, which the Respondent denies, the appropriate penalty in these circumstances was a reprimand.

23. The Application Judge erred in law by developing and applying a test that at base improperly imposed a reverse onus on the Respondent to disprove a conflict of interest as a result of the Respondent owning a business property in the City of Elliot Lake.

24. The Appellant appeals the decision on costs of the Honourable Justice Rasaiah dated February 24, 2023 on the following grounds:

(a) Justice Rasaiah erred in law in determining that notwithstanding the provisions of section 223.4.1(18) of the *Municipal Act*, this section does not preclude the Commissioner from receiving a costs award to offset its legal fees. This was an error in law;

(b) The Honourable Justice Rasaiah erred in her determination that “The respondent ostensibly forced new counsel to be retained in Toronto.” This was an error of fact and an error of mixed fact and law.

25. Such further and other grounds of appeal as the Appellant may advise and the Divisional Court may permit.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

1. Section 11(1) of the Municipal Conflict of Interest Act, R.S.O. 1990, c.M.50;
2. Rule 61.04 of the Rules of Civil Procedure;
3. Section 123(5) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43;
4. the Judgment of the Honourable Justice J. Rasaiah dated January 9, 2023 is final; and
5. leave to Appeal is not required.

The appellant requests that this appeal be heard at Sudbury.

TAKE NOTICE: THIS APPEAL WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of appeal was filed with the court, unless otherwise ordered by the court.

February 7, 2023

March 3, 2023

**DUXBURY LAW
PROFESSIONAL CORPORATION**

Barristers and Solicitors
500 – 1 King Street West
Hamilton, ON L8P 1A4

Brian Duxbury (LSO #23341M)
brian@duxburylaw.ca

Joshua Perell (LSO 69858W)
joshua@duxburylaw.ca

T. 905-570-1242
F. 905-570-1955

Lawyers for the Respondent/Appellant

TO: **CASSELS BROCK & BLACKWELL LLP**

Barristers and Solicitors
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Raivo Uukkivi (LSO #49932L)
ruukkivi@cassles.com
T. 416-860-6613

Jeremy Martin (LSO #61610K)
jmartin@cassels.com
T. 416-860-2929

F. 416-640-3188

Lawyers for the Applicant, Respondent

CITY OF ELLIOT LAKE (INTEGRITY COMMISSIONER)

and

CHRIS PATRIE

Applicant (Respondent)

Respondent (Appellant)

Court file no. 28237/19
Divisional Court File No. DC-23-00002189-000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Sudbury

AMENDED NOTICE OF APPEAL

DUXBURY LAW
PROFESSIONAL CORPORATION
Barrister & Solicitor
1 King Street West, Suite 500
Hamilton, Ontario L8P 1A4

Brian Duxbury (LSO #23341M)
brian@duxburylaw.ca
Joshua Perell (LSO #69858W)
joshua@duxburylaw.ca

Tel: (905) 570-1242
Fax: (905) 570-1955

Lawyers for the Respondent / Appellant