

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

CONFLICT OF INTEREST COMPLAINT RE:

COUNCILLOR PEARCE



***Office of the Integrity
Commissioner***

Prepared By:

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PREAMBLE

Expertise for Municipalities (“E4m”) was appointed as the Integrity Commissioner for the Corporation of the City of Elliot (the “City”) by resolution on February 11, 2019.

As the Integrity Commissioner, E4m is a statutory officer of the City. The Integrity Commissioner reports to Council and is responsible for independently performing functions assigned to them by the City. Pursuant to section 223.3(6), the City must indemnify and save harmless the Integrity Commissioner or any person under their instructions for costs reasonably incurred by either in connection with the defence of certain proceedings.

E4m has been appointed by the City as the Integrity Commissioner for all functions set out in section 223.3(1) of the *Municipal Act, 2001*. E4m is responsible for conducting inquiries into whether a member has contravened the Code of Conduct pursuant to section 223.4(1) or contravened sections 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* pursuant to section 223.4.1 (1).

The *Municipal Act, 2001*, awards the Integrity Commissioner several powers that the Integrity Commissioner can exercise while conducting Code of Conduct and *Municipal Conflict of Interest Act* inquiries. Specifically, subsections 223.4 (3) and 223.4.1(10) provide that “the municipality and its local boards shall give the [Integrity] Commissioner such information as the [Integrity] Commissioner believes to be necessary for an inquiry.” Moreover, subsection 223.4(4) and 223.4.1(11) provide that the Integrity Commissioner is “entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality or a local board that the Commissioner believes to be necessary for an inquiry.”

In addition to the statutory requirements for an inquiry under the *Municipal Act, 2001*, Integrity Commissioner inquiries are governed by the Integrity Commissioner Inquiry Protocol which was adopted by Council. Pursuant to section 3.4 of the Integrity Commissioner Inquiry Protocol, in performing his or her duties, the Integrity Commissioner may engage outside assistance or consult with the City’s legal counsel.

The City’s legal counsel is retained by the City. The *Rules of Professional Conduct* provide that notwithstanding the fact that instructions may be received from an agent for an organization, when the lawyer is employed by an organization, including a corporation, in exercising the lawyer’s duties and providing professional services, the lawyer shall act for the organization. An incorporated organization has a legal personality distinct from its members, agents, councillors or employees. As such, when the Integrity Commissioner consults with the City’s legal counsel pursuant to section 3.4 of the Integrity Commissioner’s Protocol, the Integrity Commissioner is providing instructions as a statutory officer of the City and the City’s legal counsel is acting to ensure that the City’s interests are served and protected.

I. EXECUTIVE SUMMARY

- [1] These reasons relate to an inquiry pursuant to section 223.4.1 of the *Municipal Act, 2001*, (the “*Municipal Act*”) into conduct of Councillor Ed Pearce (“Councillor Pearce”), an elected member of the City Council (“Council”) for the Corporation of the City of Elliot Lake (the “City”).
- [2] The Applicant alleged that Councillor Pearce contravened sections 5.1 and 5.2 of the *Municipal Conflict of Interest Act* (the “*MCOIA*”) by participating in the May 13, 2019, meeting of Council whereat Council considered whether to reimburse ELNOS for funds expended by ELNOS on behalf of the City.
- [3] The results of our inquiry reveal that Councillor Pearce did contravene sections 5.1 and 5.2 of the *MCOIA*. We find that Councillor Pearce is a member of a body that had a pecuniary interest in the matter. Specifically, Councillor Pearce sits on the Board of ELNOS. ELNOS had a pecuniary interest in the matter before Council regarding whether to reimburse ELNOS for payments ELNOS made on the City’s behalf.
- [4] Because we have found that Councillor Pearce contravened the *MCOIA*, we will be applying to a Judge of the Ontario Superior Court of Justice under section 8 of the *MCOIA* for a determination of whether Councillor Pearce contravened the *MCOIA* and, if so, a decision as to the penalty to be imposed.

II. LEGISLATIVE FRAMEWORK

- [5] Under section 223.4.1(2) of the *Municipal Act*, an elector or a person demonstrably acting in the public interest may apply in writing to the Integrity Commissioner for an inquiry to be carried out concerning an alleged contravention of section 5, 5.1, 5.2 of the *MCOIA* by a member of council or a member of a local board.
- [6] Sections 5, 5.1 and 5.2 of the *MCOIA* provide as follows:

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

...

Written statement re disclosure

5.1 At a meeting at which a member discloses an interest under section 5, or as soon as possible afterwards, the member shall file a written statement of the interest and its general nature with the clerk of the municipality or the secretary of the committee or local board, as the case may be. 2017, c. 10, Sched. 3, s. 4.

Influence

5.2 (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 that is being considered by an officer or employee of the municipality or local board, or by a person or body to which the municipality or local board has delegated a power or duty, the member shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter. 2017, c. 10, Sched. 3, s. 4.

- [7] When an application is submitted alleging that a member of council has contravened sections 5, 5.1, or 5.2 of the *MCOIA*, we may then conduct an inquiry. Upon completion of the inquiry, we may apply to a judge under section 8 of the *MCOIA* for a determination as to whether the member has contravened section 5, 5.1, and/or 5.2 of the *MCOIA*. We must publish reasons as to whether we intend to apply to a judge under section 8 of the *MCOIA*. These are those reasons.

III. THE APPLICATION

- [8] On May 14, 2019, E4m received an application for inquiry (hereinafter the "Application") with respect to Councillor Pearce. The Applicant is an elector under the *Municipal Elections Act* and was therefore entitled to make an application for an inquiry pursuant to 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.
- [9] The Applicant alleges that Councillor Pearce contravened sections 5.1 and 5.2 of the *MCOIA* when, during a closed session of Council on May 13, 2019, Councillor Pearce took part in the discussion regarding the City reimbursing ELNOS for money spent by ELNOS on behalf of the City. The Applicant alleges that as a board member of ELNOS, Councillor Pearce was a member of a body that has a pecuniary interest in the matter.

IV. THE INQUIRY PROCESS

- [10] Upon receipt of the Application, we followed the inquiry process as set out in the Integrity Commissioner Inquiry Protocol adopted by City Council. We completed an initial review of the complaint and determined that there were sufficient grounds to conduct an inquiry into the matter.

[11] During the inquiry, an E4m investigator interviewed Councillor Chris Patrie, Chief Administrative Officer Mr. Dan Gagnon and Councillor Pearce.

V. THE FACTS

[12] The basis for the Application is that on May 13th, 2019, Council held a closed session whereat they discussed reimbursing ELNOS for a payment that ELNOS made on the City's behalf.

[13] According to its website, ELNOS is a full-service business development corporation established to stimulate economic growth in the ELNOS Region through new business development and investment. The City falls within the ELNOS Region.

[14] The Board of Directors of ELNOS is made up of appointed board members from the different participating communities and members at large. Councillor Pearce is a member of the ELNOS Board of Directors. Councillor Pearce was not appointed to the ELNOS Board of Directors by Council. Council's appointee to the ELNOS Board is Councillor Norman Mann.

[15] ELNOS paid a debt on the City's behalf. With respect to the details of this payment, section 223.5(1) of the *Municipal Act* provides that the Commissioner shall preserve secrecy with respect to all matters that come to our knowledge in the course of our duties. Although, pursuant to subsection 2.3(c), we may disclose such information in our reasons as is necessary, we have determined that the details of the payment are not necessary for the purpose of these reasons. It is enough to state that ELNOS paid a debt on the City's behalf.

[16] On May 13, 2019, Council held a closed session whereat they discussed reimbursing ELNOS for the payment. At this meeting, Councillor Pearce did not declare a conflict and participated in the discussion on the matter, advocating for ELNOS.

[17] Council, including Councillor Pearce, were given training on the *MCOIA* and specifically direct, indirect and deemed pecuniary interest.

[18] We do not find that that Councillor Pearce realized any personal financial gain from this breach. He was trying to assist all involved albeit in contravention of the *Act*.

VI. THE ISSUE

[19] We considered:

- a. Whether Councillor Pearce was a member of a body with a pecuniary interest in the matter of the May 13, 2019, closed session; and,
- b. If Councillor Pearce was a member of a body with a pecuniary interest in the matter of May 13, 2019, did Councillor Pearce contravene sections 5.1 and 5.2 of the *MCOIA* by participating in the closed session and failing to declare a conflict?

VII. THE OPINION

[20] The *MCOIA* prohibits Councillors who have a pecuniary interest from attempting in any way whether before, during or after the meeting [from influencing] the voting on any such question.

[21] The first issue we analyzed was whether Councillor Pearce had a “pecuniary interest” in the question before Council. “Pecuniary Interest” is not defined in the *MCOIA*, 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.

[22] In essence, the Courts look at whether a financial interest exists and whether it is direct (personal to Councillor Pearce), deemed or indirect.

[23] The matter before Council was whether Council should reimburse ELNOS for the payment that ELNOS made on the City’s behalf. ELNOS therefore had a pecuniary interest in the matter. As a member of the Board of ELNOS, Councillor Pearce had an indirect pecuniary interest in the matter.

[24] Councillor Pearce was not a member of ELNOS as an appointee of Council. As such, the exception to sections 5 and 5.2 contained in subsection 4(h) of the *MCOIA* does not apply.

[25] We have found that prior to the consideration of the matter at the May 13, 2019, meeting, Councillor Pearce did not disclose his interest or complete a disclosure statement. Councillor Pearce took part in the discussion in respect of the matter and during the meeting advocated for ELNOS. Accordingly, we find that Councillor Pearce did contravene the *MCOIA*.

VIII. CONCLUSION

[26] It is our opinion that Councillor Pearce was a member of a body that had a pecuniary interest in the matter discussed at the May 13, 2019 closed session of Council. We have found that Councillor Pearce did contravene the *MCOIA* when he failed to disclose such interest, failed to complete a written statement of disclosure, participated in the meeting and advocated for ELNOS during the meeting. We will be applying to a Judge of the Ontario Superior Court of Justice under section 8 of the *MCOIA* for a determination of whether Councillor Pearce contravened the *MCOIA* and, if so, a decision as to the penalty to be imposed.

DATED September 16, 2019