

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

CONFLICT OF INTEREST COMPLAINT RE:

COUNCILLOR CYR



*Office of the Integrity
Commissioner*

Prepared By:

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PREAMBLE

Expertise 4 Municipalities (“E4M”) was appointed as the Integrity Commissioner for the Corporation of the City of Elliot (the “City”) by resolution and confirmed by confirmatory by-law number.

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*, and E4M 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 a number of 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 use 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 employed 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 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 a request by Councillor Chris Patrie of the City of Elliot Lake Council (hereinafter referred to as “Councillor Patrie”), for an inquiry under section 223.4.1 of the *Municipal Act, 2001*, (the “*Municipal Act*”) about Luc Cyr (“Councillor Cyr”), an elected member of the City Council for the Corporation of the City of Elliot Lake (the “City”).
- [2] I believe it is necessary to publish the name of the applicant in this matter pursuant to subsection 223.5(2.3)(c) of the *Municipal Act* in order to properly identify the application which these reasons address. I have become aware of many complaints about the circumstances of this application, however, Councillor Patrie’s complaint is the only complaint which meets the content requirements as set out in subsection 223.4.1(6) of the *Municipal Act*. Councillor Patrie was the only applicant who was willing to sign the statutory declaration required by section 223.4.1(6). As such, although I have the jurisdiction to deal with the circumstances of the other complaints, because the statutory requirements were not met by other applicants, I am not investigating those complaints.
- [3] The basis of this application was that Councillor Cyr failed to declare a conflict during the negotiations of the purchase of the property at 151 Ontario Avenue, in Elliot Lake, Ontario (the “Property”) at the March 6, 2019, meeting of council despite having declared a conflict on a similar matter at a December 19, 2018 council meeting.
- [4] I find that Councillor Cyr did not have a pecuniary interest in the consideration of the purchase of the Property necessitating a declaration of a conflict of interest under section 5.1 of the *Municipal Conflict of Interest Act* (hereinafter the “*MCIA*”) at the time of the March 6, 2019 meeting. In the alternative, if I am wrong on that finding, I find that because there were multiple unpredictable events that would have to occur before Councillor Cyr had any interest in the finances of the City and/or the Vendor, that the interest would be excepted by section 4(k) of the *MCIA*. Accordingly, I find that Councillor Cyr did not breach section 5.1 of the *MCIA* when he participated in the March 6, 2019 meeting regarding the purchase of the Property. Because my inquiry indicates that Councillor Cyr did not breach section 5.1 of the *MCIA*, I will not be applying to a judge under section 8 of the *MCIA* for a determination as to whether Councillor Cyr has contravened section 5.1 of the *MCIA*.

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 *MCIA* by a member of council or a member of a local board.

[6] Sections 5 and 5.1 of the *MCI*A 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.

[7] When a matter is referred to me, I may then conduct an inquiry and, upon completion of the inquiry, I may, apply to a judge under section 8 of the *MCI*A for a determination as to whether the member has contravened section 5, 5.1, or 5.2 of the *MCI*A. I must publish reasons as to whether I intend to apply to a judge under section 8 of the *MCI*A. These are those reasons.

III. THE REQUEST

[8] On March 15, 2019, I received an application for inquiry from Councillor Patrie (hereinafter the "Application"). Councillor Patrie is an elector under the *MCI*A and is therefore entitled to make an application for an inquiry under section 223.4.1 of the *Municipal Act*. Councillor Patrie has declared that the application has been made within six weeks of Councillor Patrie becoming aware of the alleged contravention (indeed it was made seven (7) days after the event).

[9] The Application alleges that Councillor Cyr has contravened section 5.1 of the *MCI*A when he declared a conflict at the December 19, 2018, council meeting regarding the purchase of the Property but did not declare the same conflict at the March 6, 2019, meeting considering the negotiations for the Property.

IV. THE INQUIRY PROCESS

- [10] The responsibilities of the Integrity Commissioner are set out in section 223.3(1) of the *Municipal Act*. On March 1, 2019, section 223.3(1) of the *Municipal Act* was amended, and the responsibilities of the Integrity Commissioner were expanded. Under this expanded role, the Integrity Commissioner is now responsible for “requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*”.
- [11] On March 6, 2019, after the amended section 223.3(1) came into force, Councillor Cyr provided a written request for advice regarding the application of the *MCIA* to the City’s purchase of the Property. Given that Councillor Cyr’s request for advice required a legal analysis on the application of the *MCIA*, I requested the assistance of the City’s legal counsel, Wishart Law Firm LLP, pursuant to section 3.4 of the Integrity Commissioner Inquiry Protocol which was adopted by Council. After I received the opinion from Wishart Law Firm LLP, I provided Councillor Cyr written advice on the application of the *MCIA* to the City’s purchase of the Property. Although this written advice, including the legal opinion, is confidential pursuant to section 223.5 of the *Municipal Act*, my advice to Councillor Cyr informs part of my reasons under this Application.
- [12] After receiving Councillor Patrie’s Application, I followed the inquiry process as set out in the Integrity Commissioner Inquiry Protocol. I did an initial review of the complaint. After the initial review, I interviewed Councillor Patrie on March 13, 2019. I then interviewed Councillor Cyr on April 18, 2019 to confirm that the facts were correct as relayed to me in his request for advice and to provide Councillor Cyr an opportunity to respond to the Application.

V. THE FACTS

- [13] The basis for the Application is the City’s purchase of the Property. The Property was the former location of the Algo Centre Mall, which collapsed on June 23, 2012. On February 13, 2014, Justice Belobaba certified a class action based in negligence with respect to the collapse. Councillor Cyr is a member of the plaintiff class in the litigation (the “Class Action”). In his reasons, Justice Belobaba noted that “hundreds of people lost their jobs” as a result of the mall collapse, and that “the class action would be brought on behalf of about 300 potential members”. Councillor Cyr, therefore, is one of about 300 plaintiffs in the action.
- [14] The defendants in the action are Eastwood Mall Inc. (the corporate owner of the Algo Centre Mall and the current owner of the Property whereon the mall was built), Bob Nazarian (the personal owner of Eastwood Mall Inc.), the Corporation of the City of Elliot Lake, M.R. Wright & Associates Co. Ltd., R.G.H. Wood, G.J. Saunders, Her Majesty the Queen in Right of Ontario, Algoma Central Properties Inc., Coreslab Structures (Ont) Inc., John Kadlec, James Keywan, Non-Profit Retirement Residences of Elliot Lake Inc. (carrying on business as Retirement Living), and 1425164 Ontario Ltd. Inc. (carrying on business as Nordev).

[15] Eastwood Mall Inc and the City are two of thirteen (13) defendants, while Councillor Cyr is one of approximately 300 plaintiffs in the Class Action.

[16] The Class Action has not been settled and at present the issues of both liability and quantum of damages are being litigated.

The Proposed Transaction

[17] The Property currently lays empty. The Council of the City of Elliot Lake is interested in purchasing the Property or part of the Property to develop it for municipal purposes, specifically, for the construction of a Community Hub. Various efforts to fulfill this transaction have been taking place.

[18] On December 19, 2018, after the terms of a potential agreement of purchase and sale were negotiated, Council defeated by-law which contemplated the City purchasing the Property for the sum of Nine-Hundred and Fifty Thousand Dollars (\$950,000.00). Councillor Cyr declared that he had a pecuniary interest in this transaction and did not participate in the vote. (I note that my inquiry is not bound by Councillor Cyr's previous declaration of a conflict).

[19] On March 6, 2019, a special meeting was held where Council considered the purchase of a portion of the Property from Eastwood Mall Inc., via the use of a third-party developer. At the March 6, 2019, Councillor Cyr did not declare that he had a pecuniary interest in the matter and participated in the vote. Councillor Patrie alleges that Councillor Cyr breached section 5.1 of the *MCIA* when he did not declare a conflict and complete a written disclosure statement.

[20] Under section 5.1 of the *MCIA*, 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.

[21] Councillor Cyr did not disclose an interest at the March 6, 2019 under section 5 of the *MCIA*. As such, Councillor Cyr was not required to file a written statement of interest under section 5.1. Nevertheless, the true question to be considered is whether Councillor Cyr ought to have disclosed an interest under section 5 of the *MCIA* whereby the failure to do so resulted in the breach of section 5.1 of the *MCIA*.

VI. THE ISSUE

[22] I considered whether Councillor Cyr had a pecuniary interest in the March 6, 2019, meeting whereat Council considered the purchase of a portion of the Property from Eastwood Mall Inc., via the use of a third-party developer.

VII. THE OPINION

- [23] The *MCIA* 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.
- [24] The primary issue I analyzed was whether Councillor Cyr had a “pecuniary interest” in the question before Council. “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.
- [25] The Courts have provided the following guidance with respect to what constitutes a “pecuniary interest”:
- Pecuniary interest is not defined by the *MCIA*. Generally, it is a financial interest, an interest related to or involving money. A decision to buy, or offer to buy, property is demonstrative of a pecuniary interest.
- Pecuniary interest is not defined in the *MCIA*, but it has been held to be a financial, monetary or economic interest; and it is not to be narrowly defined.
- A pecuniary interest is a particular kind of interest. In *Edmonton (City) v Purves*, Moshansky J. turns to the Shorter Oxford English Dictionary definition of “pecuniary” as “of, belonging to, or having relation to money”.
- [26] In essence the Courts look at whether a financial interest exists and whether it is direct (personal to Councillor Cyr), deemed or indirect.
- [27] The only financial connection that I am aware of with respect to Councillor Cyr and the purchase of the Property is that Councillor Cyr is currently suing the vendor (Eastwood Mall Inc.) and the purchaser (the City) of the Property in the Class Action. As a result of this, he stands, at some point in the future, to *possibly* have a judgment against both parties to the transaction.
- [28] I found no evidence that Councillor Cyr stood to make any money, lose any money or sustain any personal financial gain or loss at the time of the vote. Councillor Cyr’s claim in the Class Action is for damages suffered by loss of his employment after the mall collapse. This claim is subject to Councillor Cyr’s obligation to mitigate, which he has done to some extent and continues to do. His claim of damages had not crystallized at the time of the March 6, 2019, meeting and Councillor did not have an active or immediate interest in the transaction.
- [29] For Councillor Cyr to have any pecuniary interest in a matter before Council on March 6, 2019, he would have had to have a current judgment specifically against the City and/or

the Vendor at the time of the meeting. He did not. At the time of the meeting, Councillor Cyr did not stand to make any money, lose any money or sustain any personal financial gain or loss. Councillor Cyr may have a pecuniary interest against Eastwood Mall and/or the City in the future, he may not. But at the time of the March 6, 2019, meeting, Councillor Cyr did not have a pecuniary interest.

[30] Additionally, even if Councillor Cyr did obtain a judgment against all, or some of the Defendants, pursuant to section 1 of the *Negligence Act*, he could collect his judgment from any one of the 13 Defendants (assuming he was successful against all of them which remains to be seen). In other words, for Councillor Cyr to really have a pecuniary interest in the finances of the Vendor and/or the City in this matter, all of the other Defendants would have to have insufficient assets to satisfy the judgment. That is both unlikely and unforeseeable, or at least was, on March 6, 2019. In fact, there are many other unpredictable events that would have to line up in order to truly crystallize the pecuniary interest. I do not need to discuss all the eventualities in these reasons, the foregoing suffices to demonstrate the remoteness and unpredictability of Councillor Cyr's potential future interest.

Moreover, in the alternative, if Councillor Cyr did have pecuniary interest in the transaction, Councillor Cyr did not breach his obligations under the *MCIA* by reason that his interest was not separate and distinct from that of electors generally.

Section 4(j) of the *MCIA* provides that sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have by reason of the member having a pecuniary interest which is an interest in common with electors generally.

The case law states that "electors generally" indicates not all electors, but suggests it includes a significant number of them". In the present case, Councillor Cyr is one of 300 plaintiffs in the Class Action. As such, even if Councillor Cyr did have a pecuniary interest, I find that he was exempted from sections 5 and 5.2 by virtue of section 4(j).

VIII. CONCLUSION

[31] It is my opinion that Councillor Cyr did not have a pecuniary interest in the matter before Council on March 6, 2019 and was not required to complete a disclosure statement under section 5.1. of the *MCIA*. As such, I will not be applying to a judge under section 8 of the *MCIA* for a determination as to whether Councillor Cyr has contravened section 5.1 of the *MCIA*.

DATED July 31, 2019