

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

CONFLICT OF INTEREST COMPLAINT RE:

MAYOR MARCHISELLA

MADE BY COUNCILLOR CHRIS PATRIE



***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.

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 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*, invests the Integrity Commissioner with a number of powers that may be exercised 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 in the City 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 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] Complaints regarding breaches of the *Municipal Conflict of Interest Act* (“*MCIA*”) are to be filed with the Integrity Commissioner as a request for inquiry pursuant to section 223.4.1 of the *Municipal Act, 2001*, (the “*Municipal Act*”). Section 223.4.1(6) requires that an application for such an inquiry be accompanied by a Statutory Declaration indicating that the Complainant became aware of the breach within the previous six weeks. In this present matter, the complaint application was not accompanied by a Statutory Declaration, in fact the complaint was filed as a breach of the City of Elliot Lake’s Code of Conduct. However, there are extenuating circumstances and we deemed it prudent to treat this matter as if it had been properly filed as an alleged breach of the *MCIA*.
- [2] Furthermore, we wanted to ensure a fair and transparent process in light of comments the Honourable Paul Belanger, Inquiry Commissioner, made in his report on the collapse of the Algo Centre Mall regarding administrative secrecy and his notation that it is not sufficient to rely on the strict rule of a complaint system.
- [3] Persistent complaints were made by Chris Patrie (“Councillor Patrie”) wherein he alleged Dan Marchisella (“Mayor Marchisella) breached the *MCIA* to the point that it became apparent the matter would not be resolved in the mind of the Complainant unless it was addressed as an alleged breach of the *MCIA* and investigated and reported on as such.
- [4] This has been done in order to provide closure to these allegations and to advise the residents of Elliot Lake about the conduct of their elected officials.
- [5] As stated in paragraph [1], the complaint made does not conform in part to what has been set out in the *Municipal Act* regarding complaints of this nature. The complaint filed by Councillor Patrie was filed under the auspice of a Code of Conduct complaint against Mayor Marchisella. Councillor Patrie has properly filed other complaints with the Integrity Commissioner regarding breaches of the *MCIA* so he is aware of the requirement for the Statutory Declaration. We are not clear as to why he did not follow the required application process. Unfortunately, over the course of our investigation, Councillor Patrie has not been a willing participant (which in and of itself is a breach of the City’s code of conduct and the *Municipal Act, 2001*).
- [6] The results of the Code of Conduct complaint are not reported herein and will be the subject of another report at a later date in conjunction with several other matters presently before the Integrity Commissioner.
- [7] The basis of the application is that Mayor Marchisella on a number of occasions promoted at meetings of Council a private sector company, one which had made a campaign contribution to his 2018 election campaign. Furthermore, that Mayor Marchisella provided preferential access to City resources for the purposes of benefitting the private sector company, AstroRabbit and its owner Mr. Cory McKenzie. It is Councillor Patrie’s contention that this is a conflict of interest contrary to the *MCIA*. The investigators conducted an in-depth investigation into the allegations surrounding Mayor Marchisella’s relationship with Mr. McKenzie and AstroRabbit. They determined that

Mayor Marchisella does not have a relationship with Mr. McKenzie as defined by section 3 of the *MCIA* that would place him in a position of having a deemed pecuniary interest. Nor were there any findings supporting a relationship with either Mr. McKenzie or the private sector entity operating as AstroRabbit that would constitute an indirect pecuniary interest as defined in section 2 of the *MCIA*.

- [8] Mayor Marchisella did receive an “in-kind” campaign contribution which was duly noted on the campaign financial return submitted to the City Clerk.
- [9] We find that Mayor Marchisella did not have a pecuniary interest in his relationship with Mr. McKenzie or the private business known as AstroRabbit. Therefore, a declaration of a conflict of interest under section 5.1 of the *MCIA* regarding these allegations was not required and there has been no breach of the *MCIA*. To be clear, Mayor Marchisella did not breach section 5.1 of the *MCIA* when he participated in a variety of meetings and sessions of Council wherein he discussed Mr. McKenzie or AstroRabbit. We will not be applying to a judge under section 8 of the *MCIA* for a determination as to whether Mayor Marchisella has contravened section 5.1 of the *MCIA*.
- [10] The Code of Conduct allegation surrounding Mayor Marchisella’s activities with Mr. McKenzie and AstroRabbit are not analyzed in this report.

II. LEGISLATIVE FRAMEWORK

- [11] 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.
- [12] Sections 5 and 5.1 of the *MCIA* 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.

- [13] When a matter is referred to E4m as Integrity Commissioner, We may then conduct an inquiry and, upon completion of the inquiry, We 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. We must publish reasons as to whether We intend to apply to a judge under section 8 of the *MCI*A. These are those reasons.

III. THE REQUEST

- [14] Councillor Patrie alleged that Mayor Marchisella was in a conflict of interest but failed to properly file his application as a breach of the *MCI*A. The complaint was not on the proper form and was not submitted with the signed Statutory Declaration denoting that Councillor Patrie had become aware of the breach within the previous six weeks. We chose to review the matter as a Conflict of Interest allegation as it is in the public interest to do so based on the persistent and repeated complaints made by Councilor Patrie about this issue.
- [15] Councillor Patrie filed his original complaint with the Integrity Commissioner on March 15th, 2019. The initial allegations were;

“It has been brought to my attention that Corey from AstroRabbit has been using the Mayor’s computer as well as the Mayor is working on his computer to establish an event by AstroRabbit a separate corporation from the City.”

It was this statement by Councillor Patrie that caused the initial investigation. During subsequent interviews, Councilor Patrie raised the issue that this was a Conflict of Interest as Mr. McKenzie was a listed donor to Mayor Marchisella’s 2018 election campaign.

IV. THE INQUIRY PROCESS

- [16] After receiving Councillor Patrie’s complaint, the inquiry process as set out in the Integrity Commissioner Inquiry Protocol was followed. An initial review of the complaint that included interviewing Councilor Patrie on March 13, 2019, was conducted and we concluded that a full investigation was warranted. Investigators Sean Sparling and Mike Kenopic were assigned to the file. The investigators also interviewed Mayor Marchisella on May 31st, 2019.
- [17] Witnesses were interviewed and documentary evidence was gathered and reviewed.

V. THE FACTS

- [18] Mayor Marchisella and Mr. McKenzie have known each other for several years. Their relationship dates back to primary school. They are not close friends but more akin to long term acquaintances from the same community. There is no fiduciary relationship between Mayor Marchisella and Mr. McKenzie nor AstroRabbit.
- [19] During the 2018 election campaign, Mayor Marchisella hosted an “All Candidates” night at the Moose Family Centre. He enlisted AstroRabbit to provide entertainment at the event. The event also included a barbeque and an opportunity for various election candidates to speak. Several candidates attended and some took the opportunity to speak as well. By Mayor Marchisella’s estimate, about eight candidates in all attended the event with four who took the opportunity to address the audience.
- [20] Mayor Marchisella reported that at the end of the evening, he wanted to pay Mr. McKenzie and Moose Family Centre for their services. Both declined. Mr. McKenzie reportedly told the Mayor that he was already booked to perform at the Moose Family Centre that evening and the Moose Family Centre declined payment indicating that they had made money from the event.
- [21] Mayor Marchisella also reported the fact that Mr. McKenzie and the Moose Family Centre did not accept his payment as a “contribution in goods or services” on his 2018 Financial Statement for his election campaign. He stated on the report that “C. McKenzie Astro-Rabbit Ent” provided his campaign with \$100.00 in entertainment on October 6th, 2019. He also indicated that on the same date that the “Moose Lodge” provided him with the use of the lodge valued at \$100.00.
- [22] Mayor Marchisella was not the only candidate running in the 2018 Municipal Election to have participated in the event. Norman Mann (“Councillor Mann”) and Thomas Turner (“Councillor Turner”) also were in attendance and benefited from the event as well as the donations made by Mr. McKenzie and the Moose Family Centre. Of note, both Councillors Mann and Turner have actively voted on matters at Council meetings involving Mr. McKenzie and AstroRabbit as did Mayor Marchisella. Councillor Patrie did not allege that these other two Councillors breached the *MCIA*. Incidentally, the review of Councillor Mann’s and Councillor Turner’s financial statements did not find this event listed on their disclosure filed with the Clerk.
- [23] Councillor Patrie’s financial statements from his own election campaign were also reviewed in an attempt to determine his motivations for his filing of this complaint. Councillor Patrie became less cooperative with the investigation as time went on and it became apparent that there may be underlying strategic factors that led to the complaint being made regarding Mayor Marchisella and not the other two Councillors. Unfortunately, Councilor Patrie’s financial statement contained very limited detail, no comparable entry and in the end was not enlightening.
- [24] For purposes of public record, it is important to explain what exactly Mayor Marchisella did in assisting Mr. McKenzie and AstroRabbit.

- [25] Mayor Marchisella admitted that he has assisted Mr. McKenzie and AstroRabbit. He agreed with Councillor Patrie's description of his activities but disputed that these activities were misconduct.
- [26] Mayor Marchisella reviewed and edited Mr. McKenzie's business plan for an upcoming concert, facilitated documents/information being brought before Council in support of the event for their approval, he met with officials and community members to assist in establishing the event and so on. Mayor Marchisella was very open about the fact that he assisted Mr. McKenzie in hosting an event that by all accounts would benefit the community and create revenues for charity. It is also very apparent that he has done this in the past with other organizations.
- [27] Mayor Marchisella was asked why he involves himself to such a degree in efforts that would normally be undertaken by staff members. He indicated that he sees economic development as one of his core responsibilities. He agreed that normally these activities would be done by staff, however the staff members responsible for these activities have been unavailable. For these reasons he took on the added responsibility to assist Mr. McKenzie establish the event.
- [28] It was clear to us that Mayor Marchisella's actions in regard to this matter were not for any nefarious purpose and appear to have been done by him with good intention and for the benefit of the community.

VI. THE ISSUE

- [29] As stated previously, the sole issue before us is whether or not there is a pecuniary interest between Mayor Marchisella, Mr. McKenzie and/or AstroRabbit. Our opinion on this issue is based upon the following analysis;

VII. THE OPINION

- [30] 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.
- [31] The primary issue we analyzed was whether Mayor Marchisella had a "pecuniary interest" in relationship with Mr. McKenzie or AstroRabbit when he brought matters before Council and assisted him generally with this event. "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.

[32] 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”.

[33] In essence the Courts look at whether a financial interest exists and whether it is direct (personal to Mayor Marchisella), deemed or indirect (per sections 2 and 3 *MCIA*).

[34] Mr. McKenzie through his business AstroRabbit made an in-kind contribution of his services to Mayor Marchisella’s for a “Candidates Night” on October 6, 2019, which was reported as part of Mayor Marchisella’s 2018 election campaign expenses. In the case report *Trunchenhagen v. Mondoux* (2011) it was noted **“the fact that a councillor received a campaign contribution was not enough to demonstrate a pecuniary interest when matters benefitting the donor came before council (see *King v. Nanaimo (City)*, [2001] B.C.J. No. 2107, 2001 BCCA 610 (CanLII))”**

[35] Mayor Marchisella is not related to Mr. McKenzie as defined in section 3 of the *MCIA*. Therefore, he has no deemed pecuniary interest in any Matter that Mr. McKenzie has before Council.

[36] Mayor Marchisella is not a shareholder or otherwise in partnership with Mr. McKenzie’s business AstroRabbit, nor is he employed by Mr. McKenzie or AstroRabbit. He, at the time of the investigation, was not a third party having a contract for services with either Mr. McKenzie or AstroRabbit. Mayor Marchisella therefore has no indirect conflict as defined by section 2 of the *MCIA*. In fact, there is no financial or economic relationship wherein Mayor Marchisella would be found to have a pecuniary interest with respect to Mr. McKenzie or AstroRabbit.

[37] We found no evidence that Mayor Marchisella stood to make any money, lose any money or sustain any personal financial gain or loss at any time when this matter was before Council.

VIII. CONCLUSION

[38] It is our opinion that Mayor Marchisella did not have a pecuniary interest in the events surrounding his activities when he assisted Mr. McKenzie or the private business AstroRabbit. Mayor Marchisella was not required to complete a disclosure statement under section 5.1. of the *MCIA*. As such, we will not be applying to a judge under section 8 of the *MCIA* for a determination as to whether Mayor Marchisella has contravened section 5.1 of the *MCIA*.

DATED August 11, 2019