

# CAMBRIDGE LLP

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SENT VIA EMAIL TO [dgagnon@city.elliottlake.on.ca](mailto:dgagnon@city.elliottlake.on.ca)

**Mr. Daniel Gagnon**  
CAO, City of Elliot Lake  
45 Hillside Drive North  
Elliot Lake, ON P5A 1X5

Dear Mr. Gagnon,

**RE: Ed Pearce ats. City of Elliot Lake (Integrity Commissioner)  
Councillor Pearce's Costs of the Appeal**

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As you know, there is an ongoing dispute between Councillor Pearce, the Corporation of the City of Elliot Lake (the "City"), and Expertise for Municipalities ("E4M" or the "Integrity Commissioner" ) regarding who should be expected to pay the costs awarded by the Divisional Court to Councillor Pearce in the ruling found at [2021 ONSC 7859](#). I understand that you intend to put this issue to Council on June 27<sup>th</sup>, 2022, and that you require a letter from us outlining our request and the legal basis for same.

Councillor Pearce proposes that the City pay him \$28,000 in compensation for his costs (this includes both the \$16,000 costs award as well as the \$12,000 in unrecoverable legal fees). In exchange, we will offer whatever support we can to the City in a claim against E4M to recover the \$16,000 costs award and any legal fees charged to the City by E4M for the appeal.

**Background:**

E4M was, for a time, the Integrity Commissioner for the City. During that time, E4M investigated a complaint against Councillor Pearce under the *Municipal Conflict of Interest Act* ("MCIA"). Ultimately, E4M decided to bring an Application against Councillor Pearce under the MCIA, seeking his removal from office for having acted in a conflict of interest.

The Application was heard in 2021 and the Application Judge decided that, although Councillor Pearce had acted in a conflict of interest, the gravity of the offence was minor in nature. The Application Judge referred to several factors, including that Councillor Pearce was a volunteer member of the ELNOS Board, that ELNOS is a non-profit economic development corporation, that Councillor Pearce did not personally benefit from acting in the conflict, and that Councillor Pearce was chiefly concerned about the City and its relationship with ELNOS (as it relates to the health of local commerce). The Application Judge found that Councillor Pearce acted in what he believed to be the best interests of the City and the citizens of Elliot Lake. As a result of this, the Application Judge imposed a reprimand, rather than removal from office.

The Integrity Commissioner, dissatisfied with the ruling, subsequently filed an Appeal, to which Councillor Pearce had to respond.

E4M did not act on the instructions of the City in bringing the Appeal, but acted on their own. Councillor Pearce could have filed an appeal of his own, but did not. He had no choice, either to give up his seat or fight the appeal.

The Appeal was plainly and wholly without merit. It was based on E4M's erroneous interpretation of the law, and their determination to use the case of Councillor Pearce to make some kind of point that was important only to E4M itself. The appeal provided no benefit to the citizens of Elliot Lake, and caused harm to Councillor Pearce and his family. In fact, the appeal might serve as a deterrent to good citizens who might otherwise consider running for office.

In their decision, the Divisional Court, in part, held:

[32] There is nothing that supports [the Integrity Commissioner's] understanding. It is based on a false presumption that the legislation, as amended, far from leading to increased discretion in the determination of what, in any particular circumstance, is an appropriate penalty, remains narrow, even arbitrary in what it directs. On its face this is wrong.

[...]

[37] The failure to take the approach proposed by the Integrity Commissioner is not, as he would have it, an error of law. The judge's choice of penalty was an exercise of discretion based on a different balance of the values at stake and an assessment of the facts of the case. He was considering not just the punishing of an individual who breached the *Municipal Conflict of Interest Act*, but weighing the significance of this breach against the danger of creating a disincentive to good people running for office.

[...]

[57] In the presence of the broader discretion these statements go too far. They are hyperbole made in an attempt to emphasize a point. The problem with hyperbole is that it washes out nuance; nuance which is the result of the application of the wider discretion the legislation, as it stands today, provides for.

Moreover, the Court found Councillor Pearce to have been acting for the betterment of the community and in what he believed to be the best interest of the City, quoting with approval from a letter tendered by the Mayor:

Councillor Pearce has continued to work for the best interest of our community both as a councillor and also prior to being elected to serve the community. I do not personally believe there was a malice intent on his behalf and although we do realize his mistake, it would be a great loss to our community as [a] whole to see Councillor Pearce removed from his position. I would like to thank you for your consideration in this matter.

[39] This speaks to how the Respondent is perceived in the community and reflects on the nature and value of his contribution to that community. While acknowledging that the

Respondent had made a mistake, he was recognized as a valuable, positive and constructive contributor.

[...]

[42] If a valued member of the community, one who involved himself directly in the problem at hand is, nonetheless, severely punished for his error, it does raise a concern that this could be a disincentive to others who might consider becoming involved in community matters.

[...]

[55] In summary, as the letter from the Mayor sets out, these facts demonstrate that, viewed in the overall context a broader discretion calls for, the Respondent was a valued and dedicated contributor to the community of Elliot Lake and that while he made an error, the overwhelming fact is that, in the situation at hand, he acted for the benefit of that community and not his own. These facts, all from the reasons of the application judge, demonstrate the basis on which he was able to and did exercise his discretion to impose a reprimand as the appropriate remedy.

Ultimately, the Divisional Court sided with Councillor Pearce and awarded him \$16,000 in costs.

#### **The Costs Issue:**

There are two issues with respect to the costs of this appeal.

The first issue is that E4M and the City each took the position that the other should be responsible for paying the \$16,000 costs award and, as a result, neither body paid the award. I previously wrote to the Divisional Court to request that they revisit their costs decision to clarify which of the City or E4M was responsible for paying the costs award, however, they have declined to do so. This means that Councillor Pearce will have to commence another legal proceeding to collect what is rightfully and unquestionably owed to him by someone.

The second issue is that Councillor Pearce spent an additional \$12,000 on the appeal which was not covered by the costs award. Given that Councillor Pearce was forced to respond to a meritless Appeal brought by the City's Integrity Commissioner, he should not have to bear those costs himself.

Although we are not privy to the details, we understand that E4M likely sought to be indemnified for their legal expenses in advancing their meritless appeal. We expect that the City would not be disposed to paying that bill, given the comments of the Divisional Court and given that E4M was on a frolic of its own without regard to the interests of the City. Indeed, some might view this appeal as an attempt by the former Integrity Commissioner to run up a further final bill to enrich themselves as they were no longer concerned about alienating their customer.

#### **The Proposal:**

Councillor Pearce proposes that the City pay him \$28,000 in compensation for his costs for the appeal (this includes both the \$16,000 costs award as well as the \$12,000 in unrecoverable legal fees). To be clear, Councillor Pearce is not seeking to recover a penny of the fees he paid for the trial.

In exchange, we will offer whatever support we can to the City in a claim against E4M to recover the \$16,000 costs award as well as any legal fees charged by E4M for the appeal.

**The Legal Basis:**

With respect to E4M's liability for the costs award, section 233.3(6) of the *Municipal Act* requires the City to indemnify the Integrity Commissioner "for costs reasonably incurred by either of them in connection with the defence of a proceeding." Commencing an Appeal is not, in our view, a "defensive proceeding." In our view, the *Municipal Act* entitles the Integrity Commissioner to be reimbursed for expenses related to bringing the initial Application, and may also extend to defending against an Appeal brought by a Councillor, but it does not provide indemnification for an Integrity Commissioner who launches its own appeal, particularly where the Appeal was launched without the consent of the City. In addition, there is a general principle of law that, where the costs of a proceeding are expected to be borne by a non-party, that non-party is entitled to notice and entitled to make submissions on that point. The City appears not to have been consulted in any way regarding the costs of the Appeal, nor was it provided the opportunity to make submissions. On those bases, it is our view that the costs should be borne ultimately by E4M.

With respect to Councillor Pearce's unrecoverable legal fees, section 279 of the *Municipal Act* provides that councillors are entitled to be indemnified for fees related to the defense of proceedings where they are acting in good faith. Councillor Pearce acted in good faith in responding to the Integrity Commissioner's Appeal and, therefore, is entitled to be indemnified pursuant to s. 279. The appeal was not about the conflict of interest, only about the penalty available. This argument is supported by the findings of the Divisional Court, noted above.

**Not Legal Advice:**

The above is not intended to be legal advice. Although we have advised the City on other unrelated matters, we have not and cannot advise the City on this matter. You should obtain advice from the City's independent lawyer(s) on the above proposal.

**Conclusion:**

In conclusion, we kindly ask that you deliver this letter in addition to any other materials, to Council for their consideration on this issue. Should you require anything further from me, please do not hesitate to let me know. I have copied your counsel, John Mascarin, on this letter as a courtesy and to ensure there is no issue with my writing to you directly. I was advised by Councillor Pearce that this was your preference.

Yours truly,  
**CAMBRIDGE LLP**  
Per:



**R. Douglas Elliott, LSM LLD**

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