

PRIVILEGED & CONFIDENTIAL

June 23, 2022

File No. 153039

Mayor and Members of Council
The Corporation of the City of Elliot Lake
45 Hillside Dr. North
Elliot Lake, ON
P5A 1X5

Your Worship and Members of Council:

**Re: Elliot Lake Integrity Commissioner v. Pearce (Ont. Div. Ct.)
Councillor Pearce's Legal Costs**

We have been asked to review and comment on correspondence from Councillor Pearce's solicitor, R. Douglas Elliott, dated June 15, 2022 with respect to the above-noted matter.

In summary, the letter requests that the City reimburse Councillor Pearce in the amount of \$28,000 for his costs related to the Integrity Commissioner's failed appeal to the Ontario Divisional Court to impose a penalty of removal from office for the member's contravention of the *Municipal Conflict of Interest Act*. The Divisional Court strongly disagreed with the arguments advanced by the Integrity Commissioner and dismissed the appeal. In doing so, the Divisional Court awarded costs to Councillor Pearce in the amount of \$16,000. Councillor Pearce is seeking the City pay him the cost award as well as \$12,000 for additional unrecoverable legal costs he expended on the appeal.

The City was not a party to the original application to the Ontario Superior Court nor on the appeal before the Divisional Court. The decision to make an application to a judge is entirely the prerogative of the Integrity Commissioner pursuant to subsection 223.4.1(15) of the *Municipal Act, 2001*.

There is a limited right to appeal "any order" made pursuant to subsection 11(1) of the *Municipal Conflict of Interest Act*. In our opinion, the right to appeal can only be exercised by any party to the proceeding. The decision to appeal the application judge's order on penalty was made solely by the Integrity Commissioner and over the objections of Council.

While subsection 223.4.1(18) of the *Municipal Act, 2001* provides that the City is obligated to pay the costs of its Integrity Commissioner's application to a judge under section 8 of the *Municipal Conflict of Interest Act*, there is no express requirement that the City is responsible to pay the Integrity Commissioner's costs of the appeal and it is our opinion, given the explicit wording of subsection 223.4(18) pertaining to the costs of an application, that such liability cannot be read into the statute.

The Divisional Court's award of costs was made against the unsuccessful appellant: the Integrity Commissioner – not the City.

The City is not and cannot be responsible for an award of costs where it is not a party to a legal proceeding and where it has no statutory or contractual obligations of any kind to indemnify the Integrity Commissioner for costs that have been incurred based on an independent and voluntary exercise of its discretion to file an appeal.

The *Municipal Conflict of Interest Act* provides that a municipality may purchase insurance for its members to pay for or reimburse them for legal costs and expenses related to a proceeding commenced under the statute. However, the insurance coverage only extends to protect a member if he or she is found to *not* have contravened the statute. The City purchased such insurance coverage but it is not applicable to reimburse Councillor Pearce because he was found to have contravened the *Municipal Conflict of Interest Act*.

We do not disagree that Councillor Pearce – faced with a proceeding seeking a more forceful penalty requiring his removal from office – had no choice but to respond to the appeal before the Divisional Court and seek to retain his seat.

Subsection 283(2) of the *Municipal Act, 2001* provides that a municipality may pay the expenses of a member of council if the expenses are actually incurred in their capacity as a member. It is our view that the expenses incurred by Councillor Pearce in responding to the appeal by the Integrity Commissioner were incurred by him in his capacity as a member of Council. Therefore, Council is entitled to reimburse Councillor Pearce for his legal expenses.

Should Council decide to reimburse the legal fees to Councillor Pearce, it is our view that seeking to recover the cost award of \$16,000 from the Integrity Commissioner will likely be a protracted matter that result in a legal proceeding with more costs being incurred. It is our fear that any court will likely query why the City decided to pay the costs award when it had no legal obligation to do so. Such action will likely weaken the City's position to recover the costs against the Integrity Commissioner.

We also recommend that if Council makes a decision to reimburse the legal fees to Councillor Pearce that it do so based on the very specific findings of the court including that the Councillor:

- did not act in his own financial self-interest;
- had split loyalties between two entities (the City and ELNOS) that both had, as their mandate, the best interests of Elliot Lake;
- while he made an error, he acted for the benefit of his community and not just himself; and
- apologized for his conduct.

We believe it is important for the Council to recognize the basis for any reimbursement so that it not be used as a general precedent for reimbursement in the future where the facts may not exhibit such a meritorious light.

In conclusion, it is our opinion that the City:

1. is not liable nor responsible for the legal costs of Councillor Pearce in the appeal before the Divisional Court;
2. is not obligated to pay the award of costs issued against the Integrity Commissioner;
3. is entitled, should it choose to do so, to reimburse Councillor's Pearce's for his legal expenses pursuant to subsection 283(2) of the *Municipal Act, 2001*; and
4. should articulate the precise reasons for reimbursing Councillor Pearce if Council decides to reimburse him for his legal expenses.

We would be pleased to answer any questions related to our opinion.

Yours truly,

AIRD & BERLIS LLP



John Mascarin

JM/km