

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

CODE OF CONDUCT COMPLAINT RE:

COUNCILLOR PATRIE



*Office of the Integrity
Commissioner*

Prepared By:

Sean Sparling
E4m Investigator
Peggy Young-Lovelace
E4m Consultant

PREAMBLE

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

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*, 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] On March 11, 2019, a member of the public who requested that their identity not be released, and on March 12, 2019, Mayor Dan Marchisella (“Mayor Marchisella”) (collectively the “Requestors”) requested an inquiry into allegations that Councillor Chris Patrie (“Councillor Patrie”) did breach sixteen (16) sections of the City of Elliot Lake’s (the “City”) Code of Conduct by his actions at a meeting of Council held on March 6, 2019.
- [2] On March 29, 2019, an additional request for inquiry was filed which alleged that Councillor Patrie contravened sections 5(1)(c) and 5.2(1) of the *Municipal Conflict of Interest Act* (the “MCOIA”) as well as the City’s Code of Conduct [sections 6.2 and 13.2], by lobbying Council and staff to build the City’s Community Hub (the “Hub”) behind the Oakland Plaza. Councillor Patrie is an Officer and Director of a corporation that owns the Oakland Plaza and owns and operates the Trading Post, a retail store in the Oakland Plaza.
- [3] After the preliminary review, some of the allegations were determined not to give rise to contraventions of the City’s Code of Conduct and the scope of the investigation was narrowed to fully review twelve (12) allegations of breach of the City’s code of Conduct plus the alleged breach of the MCOIA [a breach of the MCOIA would also be a breach of sections 6.2 and 13.2 of the City’s Code of Conduct].

Conflict of Interest

- [4] With respect to the alleged breach of the MCOIA, this matter is the subject of a separate report wherein the details of the allegation and findings led to a finding that Councillor Patrie did breach sections 5.1 and 5.2 of the MCOIA. The details of this matter are not included in this report except for the general findings and our discussion as to whether Councillor Patrie has breached of sections 6.2 and 13.2 of the City’s Code of Conduct.
- [5] On March 6, 2019, a special meeting was held whereat Council voted to purchase of the Property for the Hub. Councillor Patrie did not disclose a pecuniary interest at this meeting.
- [6] Before during and after the March 6, 2019 meeting, Councillor Patrie lobbied Mayor Marchisella, Councillor Mann, Councillor Turner and Chief Administrative Officer Mr. Dan Gagnon about building the Hub on the Oakland Boulevard Site.
- [7] The investigator found that the “*totality of PATRIE’s conduct, the manner of his complaints, his approach to CYR about his [meaning Cyr’s] conflict of interest, how he misled the investigator, and his attempts to persuade others to his own advantage were all designed by PATRIE to influence this process. It is clear he wanted the complex next to his business and he stood to gain financially by having it there.*”

March 6, 2019, Special Council Meeting – Councillor Patrie Subverting Council

- [8] A special meeting of City Council was held on March 6, 2019. There was a public [open] portion of the meeting and an in-camera [closed] portion of the meeting. There were only two (2) items on the agenda. One matter in open session and another in closed session.
- [9] The matters to be discussed at the special meeting were covered in a memo to Council from the Chief Administrative Officer, Mr. Dan Gagnon (“CAO” Gagnon), attached to the agenda for the open session and a second memo dated March 5, 2019, outlining the nature of the in-camera [closed] portion of the special meeting. The in-camera memo was disseminated to Council in advance of the special meeting as required by the City’s Procedure Bylaw.
- [10] The agenda reported the closed session matter as:

“re: potential acquisition of property for municipal purposes.”

- [11] It is our practice not to violate the confidential nature of the in-camera [closed] meeting where possible however, the matter discussed by Council on March 6, 2019, has become public knowledge through the actions of members of Council as well as the passing of a bylaw in open session. The matter considered on March 6, 2019, during the closed session was the negotiation to purchase 151 Ontario Avenue from/with Mr. Guidoccio.
- [12] The open portion of this special meeting was televised/recorded. Councillor Patrie, who attended electronically as he was out of the country, made a statement, alleging that the matter Council was to consider during the closed session is illegal. The following is the transcription of what he said:

“...I have a few misgivings about coming into the closed session. First off, the purchase of this property has been dealt with by this council and turned down therefore in my opinion shouldn’t even be on the agenda especially of a special meeting... Second, if we’re to deal with this item today, it should not be in closed session as we discussed it in open at the December 19th meeting and Councillor Pearce stated that he had a proponent at that time. And third, and most importantly, is if any portion of this matter is the proponent that his Worship told me about in Thessalon a week ago last Thursday where he and Councillor Pearce are negotiating for him to purchase the property and we guarantee to purchase a portion of that from him at a more expensive rate than he is paying, that in my humble opinion is completely illegal, and I believe not only is it against the Municipal Act to negotiate this bonusing deal, but it also contravenes the REBBA laws, Section 4 uh 2 (a) and (b) at a minimum. So, with that being said, I believe we legally should not be dealing with this in open or closed session. I think it should be stricken from the agenda.”

- [13] CAO Gagnon's memo contained sufficient information to advise Council what the nature of the in-cameral discussion would be and it is clear from Councillor Patrie's statement that he is knowledgeable about what will be discussed during the closed session even though he is on vacation out of the country.
- [14] It is important to note that while City's Procedure Bylaw can allow Councillor Patrie to participate electronically in an open session, he was unable to participate electronically in the closed session pursuant to section 238 (3.1) of the *Municipal Act* and he did not participate in the closed session.
- [15] The Statement made by Councillor Patrie during the open portion of the meeting shows his determination to discredit Council's consideration of the potential purchase of 151 Ontario Avenue. Furthermore, Councillor Patrie had given sufficient information in his statement so that the public would be aware of what Council was considering. A more appropriate approach would have been for Councillor Patrie to have requested that the matter be tabled and considered at a future meeting so that he would be able to participate.
- [16] Of concern however, is that Councillor Patrie advised the IC that he does not want to take part in matters that are "illegal" and yet he failed to declare a pecuniary interest in this matter while attempting to have the Hub located next to his business. Additionally, Councillor Patrie admonished Council for considering a matter in which he believes they have contravened the *Municipal Act* and *REBBA*.
- [17] Councillor Patrie denied that his actions contravened the *MCOIA* and the City's Code of Conduct and further denied that he colluded with others regarding his statement at the special meeting of March 6, 2019. More specifically, that he did not speak with Ms. Van Roon about the matter. On March 5, 2019, Ms. Van Roon reported on social media the nature of the matter being discussed in closed session at the March 6, 2019, Special Meeting. Additionally, Ms. Van Roon reported that Councillor Patrie contacted her after the meeting and sent her a copy of the statement he made during the meeting.
- [18] Councillor Patrie was found not to have violated the Code of Conduct in the March 6th, 2019 meeting. We did find that his conduct at this meeting was part of his overall pattern of misconduct and breach of the *MCOIA*. This is primarily based on the fact that during the December 19th, 2018 meeting of Council, Councillor Patrie invited Mayor Marchisella to bring back this purchase with a more robust plan. Councillor Patrie's conduct in the March 6th, 2019 meeting was disingenuous and part of his efforts to subvert the will of Council. Overall, we did not find Councillor Patrie credible. We found that he misled the investigator and attempted to subvert Council in a number of ways and on multiple occasions.

Disclosure of Confidential Information

- [19] It was alleged that Councillor Patrie advised Ms. Van Roon that she was the topic of discussion at a closed session and that the Mayor wanted her removed from the Board that she had been appointed to.

- [20] During the investigations, both Councillor Patrie and Ms. Van Roon were found by the investigator not to be credible.
- [21] During the investigation Councillor Patrie obtained a legal opinion that was subject to solicitor and client privilege belonging to Council and obtained other confidential documents in closed session. Without obtaining a waiver of Council's privilege, he retained the services of Virginia McLean, a lawyer who works or worked for the City until recently and had her provide him with a report critical of the Municipality based on these confidential documents.
- [22] Councillor Patrie did not have authorization from Council to release these confidential documents and as such breached his obligation to maintain confidentiality of closed session information pursuant to sections 10.1.
- [23] It was also alleged that Councillor Patrie disclosed confidential information at the Special meeting on March 6, 2019. Councillor Patrie did not openly disclose specific details of the matter to be discussed in closed session. Instead, he made statements that inferred the nature of what would be discussed in closed session. It is clear that Councillor Patrie's electronic participation in this meeting, and the message he delivered was an attempt to influence Council in an effort to prevent them from considering the matter and avoid Council purchasing the Ontario property for the Hub.

Summary of Findings

- [24] The following is the summary of our findings

Conflict of Interest re: sections 6.2 and 13.2 of the Code of Conduct;

SUBSTANTIATED

Subverting Council re: purchase of 151 Ontario Avenue and related conduct.
Contrary to section 6.2 of the Code of Conduct;

SUBSTANTIATED

Disclosure of Confidential Information. Contrary to section 10.1 of the Code of Conduct;

- a. In regard to discussions about Mrs. Tammy VAN ROON held in a closed session of Council;

UNDETERMINED

- b. In regard to a legal opinion prepared by Mr. Paul CASSAN for the City and other associated documents;

SUBSTANTIATED

- c. In regard to the March 6th, 2019 Council meeting;

UNSUBSTANTIATED

Improper influence contrary to section 13.1 and 13.2 of the Code of Conduct in regard to attempts to locate the hub complex next to his personal business interests;

SUBSTANTIATED

II. LEGISLATIVE FRAMEWORK

- [25] Under section 223.4 (1) (a) of the *Municipal Act, Council*, a member of Council or a member of the public may make a request for an inquiry to the Integrity Commissioner about whether the Member has contravened the code of conduct applicable to that Member.
- [26] When a matter is referred to us, we may then conduct an inquiry in accordance with the City's Integrity Commissioner Inquiry Protocol and, upon completion of the inquiry, we may make recommendations to Council on the imposition of penalties.

III. THE REQUEST

- [27] The request before us was properly filed and in accordance with the *Municipal Act* and the relevant policies and procedures for the City. We received complaints from Mayor Marchisella and one (1) member of the public alleging Councillor Patrie made multiple contraventions of sixteen (16) provisions of the City of Elliot Lake Code of Conduct.
- [28] These complaints were filed on March 11th and March 12th, 2019.
- [29] On March 29, 2019, an additional request for inquiry was filed which alleged that Councillor Patrie contravened sections 5(1)(c) and 5.2(1) of the *Municipal Conflict of Interest Act* (the "MCOIA") as well as the City's Code of Conduct [sections 6.2 and 13.2], by lobbying Council and staff to build the City's Community Hub (the "Hub") behind the Oakland Plaza. Councillor Patrie is an Officer and Director of a corporation that owns the Oakland Plaza and owns and operates the Trading Post, a retail store in the Oakland Plaza.

IV. THE INQUIRY PROCESS

- [30] The responsibilities of the Integrity Commissioner are set out in section 223.3(1) of the *Municipal Act*. On March 1, 2019, section 223.2 of the *Municipal Act* was amended, and municipalities were required to adopt a code of conduct. Further, municipalities were to appoint an Integrity Commissioner who is responsible for the application of the code of conduct. Complaints may be made by Council, a member of Council or a member of the public to the Integrity Commissioner for an inquiry about whether a Member has contravened the code of conduct that is applicable to that Member.
- [31] After receiving the complaints, we followed the inquiry process as set out in the Integrity Commissioner Inquiry Protocol. We did a preliminary review of each complaint which included reviewing the available evidence and interviewing the Complainants. Subsequent to the preliminary review, the number of allegations to be investigated was reduced to twelve (12) [from sixteen (16)]. Four (4) of the allegations specifically related to the City's Procedure Bylaw do not give rise to contraventions of the City's Code of Conduct.
- [32] The investigation of these matters involved a voice recorded interview of each complainant. The recordings were transcribed, and the complaints were "crystallized" to clearly indicate the substance of the complaint. Thereafter, each respondent was provided with a written document laying out the complaint and was provided an opportunity to respond to the complaint in writing. The investigation of these matters involved a voice recorded interview of each complainant. The recordings were transcribed, and the complaints were "crystallized" to clearly indicate the substance of the complaint.
- [33] The conclusions we arrived at with respect to these matters are based upon the standard of a balance of probabilities. As required, assessments of credibility have been made. These assessments are based on:
- whether or not the individual had first-hand knowledge of the situation,
 - whether or not the individual had an opportunity to observe the events
 - whether or not the individual may have bias or other motive,
 - the individual's ability to clearly describe events
 - consistency within the story
 - the attitude of the individual as they were participating
 - any admission of dishonesty¹
- [34] Of importance to this inquiry, is that the allegations made by the Requestors are supported by the video recording of the December 19, 2018, meeting of City Council, the March 6, 2019, special meeting of City Council and there can be no dispute as to what transpired.

¹ *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at Para 10, 11. *Alberta (Department of Children and Youth Services) v. A.U.P.A.* (2009), 185 LAC (4th) 176 (Alta.Arb.)

- [35] Consultant reports, legal opinions, emails and other pertinent documents were considered.
- [36] Both Mayor Marchisella and the member of the public requesting this inquiry were found to be substantially credible.
- [37] Councillor Patrie was found by the investigator not to be credible. Therefore, evidence provided by him with respect to this inquiry was only accepted when it could be corroborated by another credible party involved in this inquiry. When it was not corroborated, it was not accepted.

V. THE FACTS

Conflict of Interest – Contravention of Sections 6.2 & 13.2 of the City's Code of Conduct

- [38] Since approximately 2016, the City has been considering the appropriate location to construct the Hub. The City commissioned two (2) consultant reports with respect to the appropriate location for the Hub. The first report, dated December 12, 2016, was prepared by Colliers and was titled "Multipurpose Complex Feasibility Study". In its report, Colliers concluded that the "facility is best built on either the privately-owned site located at 151 Ontario Ave [the Property] or the municipally owned site on Highway 108 South, north of Esten Drive."
- [39] In July 2017, Colliers provided the City with a second report. This report titled "City of Elliot Lake New Community Hub Site Options Comparative Analysis" considered the following sites:
- a. The site of the existing Centennial Area;
 - b. The site of the existing Civic Centre; and
 - c. The vacant lot located at 151 Ontario Avenue [the Property].
- [40] The report concluded that the Civic Centre was too small to accommodate the facility and that the 151 Ontario Avenue site [the Property] comprised less challenges and risks compared to the Civic Centre site.
- [41] In addition to the properties listed above, the City owns property in Elliot Lake situated directly north of the Oakland Plaza on Oakland Boulevard (the "Oakland Boulevard Site") Colliers did not list this property as viable option for the Hub in either of the consultant reports.

- [42] On March 6, 2019, a special meeting was held whereat Council voted to purchase of the Property for the Hub. Councillor Patrie did not disclose a pecuniary interest at this meeting.
- [43] Before during and after the March 6, 2019 meeting, Councillor Patrie lobbied Mayor Marchisella, Councillor Mann, Councillor Turner and Chief Administrative Officer Mr. Dan Gagnon about building the Hub on the Oakland Boulevard Site.
- [44] Councillor Patrie denied doing any of this. He asserted that he only ever spoke of an old tourism concept called "Destination Elliot Lake" that was supposed to be located at the ski hill. He also indicated that these conversations occurred before the empaneling of the current Council in the fall of 2018.
- [45] Councillor Patrie also asserted that even if he had these conversations, there was no pecuniary interest on his part as there would be no positive impact on his business. He stated that he thought there would actually be a negative impact. (Although this statement is not accepted by the IC, if it were true, it would still constitute a prohibited *negative* pecuniary interest for Councillor Patrie and require him to declare a conflict. Put differently, a pecuniary interest can be either positive OR negative.)
- [46] The investigator found that the *"totality of PATRIE's conduct, the manner of his complaints, his approach to CYR about his [meaning Cyr's] conflict of interest, how he misled the investigator, and his attempts to persuade others to his own advantage were all designed by PATRIE to influence this process. It is clear he wanted the complex next to his business and he stood to gain financially by having it there.*

March 6, 2019, Special Council Meeting – Councillor Patrie Subverting Council

Attempt to Prevent Purchase of 151 Ontario Avenue

- [47] A special meeting of City Council was called to be held on March 6, 2019, by Mayor Marchisella pursuant to the City's Procedure Bylaw.
- [48] On March 6, 2019, prior to the start of the Special Meeting of City Council, Councillor Patrie contacted the IC requesting to know if the actions of Councillor Pearce and Mayor Marchisella were legal. Councillor Patrie reported that Councillor Pearce negotiated for the purchase of 151 Ontario Avenue on behalf of the City without due authority and requested advice from the IC regarding whether or not Councillor Pearce had a conflict of interest and/or if the actions were a contravention of the City's Code of Conduct.
- [49] The chain of email is as follows:

From: Chris Patrie <patrie.chris@yahoo.ca>
Sent: March 6, 2019 1:28 PM
To: Peggy Young-Lovelace <peggy@e4m.solutions>
Subject: Seeking advise as a city council member

Advise required please I am a councillor at the city of Elliot lake and on February 20, I was informed of negotiations with a proponent by a member of council (mr Ed Pearce)and was given a copy of his working notes from that meeting.

During a discussion with the mayor on February 21 the mayor told me that **their negotiations** had been put on hold as the owners son wasn't happy with their price.

I am seeking advice as to wether these documents and this complaint would be conflict of interest, code of conduct, or strictly a legal matter. Could you please let me know which is the proper way to proceed.

Thank you.

Chris Patrie

On Mar 6, 2019, at 12:44 PM, Peggy Young-Lovelace <peggy@e4m.solutions> wrote:

Councillor Patrie

I am in receipt of your request but am not clear on what you are asking specifically.

- a) If you are asking if you have a conflict of interest, I would need an explanation as to why you believe you have one?
- b) If you are making a complaint with respect to the actions of the Mayor and/or Councillor Pearce, I would need to understand what parts of the Municipality's Code of Conduct you feel has been breached.

Once I have a better understanding, I can advise as to the role of the Integrity Commissioner.

Peggy Young-Lovelace

Director/Independent Consultant
Expertise for Municipalities (E4m)
705-863-3306
peggy@e4m.solutions

From: Chris Patrie <patrie.chris@yahoo.ca>

Sent: March 6, 2019 1:56 PM

To: Peggy Young-Lovelace <peggy@e4m.solutions>

Subject: Re: Seeking advise as a city council member

I am asking if councillor Pearce would have a conflict Or is this a code of conduct issue with the fact that council has not given him nor the mayor the authority to negotiate a deal with this person or this property but in fact have dealt with this issue and defeated it already. And/ or is this not illegal according to the municipal act for members of council to pre negotiate a deal with a third party where we will give them free property and portions at a reduced price

I am asking because you are the legal people that we are supposed to be able to ask to find solid advise as to the legality of issues

Sent from my iPad

On Mar 6, 2019, at 2:01 PM, Peggy Young-Lovelace <peggy@e4m.solutions> wrote:

Councillor Patrie

Thank you for clarifying what you are requesting. The Role of the Integrity Commissioner is to be an objective neutral third party. We may provide advice to individual members of Council when it deals with their **personal** questions regarding Code of Conduct and/or the *Municipal Conflict of Interest Act.* To be clear, it would be improper for me to provide you advice regarding another member of Council's alleged conflict of interest in a matter or their alleged breaches of the Code of Conduct.

These are more properly dealt with by filing a complaint on the proper form(s) with the Municipality's Clerk and then an investigation into the matter will be carried out by the office of the Integrity Commissioner. Should you feel that there has been a breach of either the Municipality's Code of Conduct or the *Municipal Conflict of Interest Act* I suggest you follow the process outlined in the Integrity Commissioner Protocol that has been adopted by the City of Elliot Lake.

I trust this responds to your request.

Regards,

Peggy Young-Lovelace
Director/Independent Consultant
Expertise for Municipalities (E4m)
705-863-3306
peggy@e4m.solutions

From: Chris Patrie <patrie.chris@yahoo.ca>

Sent: March 6, 2019 5:02 PM

To: Peggy Young-Lovelace <peggy@e4m.solutions>
Subject: Re: Seeking advise as a city council member

This item is on the agenda and I want to know if it is legal for us to do this because I don't want to be part of it if it is illegal

Sent from my iPad

- [50] We advised Councillor Patrie that we do not have the jurisdiction to provide advice to him regarding another Councillor's alleged pecuniary interest [under the *MCOIA*] we can only provide advice directly to the Member themselves. Additionally, we cannot advise as to whether or not there has been a contravention of the City's Code of Conduct without a proper/formal complaint before us.
- [51] Not being satisfied with this response, Councillor Patrie aggressively sought ways to cast aspersions on the legality of the decision made by Council during the closed portion of the March 6, 2019, Special Meeting.
- [52] In an email from the CAO to Peggy Young-Lovelace and Paul Cassan dated March 12, 2019, Mr. Gagnon confirms that Councillor Patrie is persisting in his efforts to characterize the purchase of the Ontario property as illegal and confirms that in March of 2019, Councillor Patrie was continuing to lobby Mr. Gagnon to put the Hub at Oakland drive, walking distance to his business.
- [53] Emails between Councillor Patrie and the CAO continued:

Begin forwarded message:

From: Chris Patrie <chris.patrie@city.elliottlake.on.ca>
Date: March 11, 2019 at 1:16:22 PM EDT
To: Dan Gagnon <dgagnon@city.elliottlake.on.ca>
Subject: Re: Paul Cassan

I am very disappointed that this is happening this way. Peggy will not give me this info.

I am getting tired of getting the run around

Sent from my iPad

On Mar 11, 2019, at 12:18 PM, Dan Gagnon <dgagnon@city.elliottlake.on.ca> wrote:

Paul confirmed that there is no legal consequences to the fact that Ed and/or Mayor were involved to varying degrees in “negotiating” deals. So there is no concern on the “fruit of the poison tree” angle anyway. That was my main time sensitive concern. Paul is in the bush for today and hesitant to give one councilor legal advice. You have Peggy for formal IC role and I can get a more formal opinion I can share with all of council. In fact, I think we should have another session with Paul and Peggy in a room in closed session (or open or little of both) and air some of this stuff out.

The mayor can have a role in talking to investors. The latest deal with Tony was brought to me early enough to avoid the concern that Ed did all the negotiating. Even if they did, the actual deal was done with staff’s involvement and later all of council there to confirm details and mandates (well you know, less you and Norm/Sandy last week but some of that was a little unforeseen).

Daniel Gagnon

Chief Administrative Officer / Directeur général
City of Elliot Lake / ville d’Elliot Lake
(705) 848-2287 x. 2131

- [54] On March 12, 2019, Paul Cassan, Lawyer with Wishart Law LLP, did provide a legal opinion to the CAO and the whole of Council in response to Councillor Patrie’s concerns regarding the March 6, 2019, Special Meeting and the decision to purchase 151 Ontario Avenue. For clarity, lawyers acting for a Municipality are required to act for and in the best interests of the municipal corporation and not an individual member of Council so, it is unusual that the CAO asked one of the City’s solicitors to provide advice directly to Councillor Patrie. Accordingly, Mr. Cassan’s advice was directed to the CAO as well as Council as a whole.

Discrediting Legal Opinion Obtained by the City

- [55] On March 13, 2019, Councillor Patrie retained the services of Ms. Virginia McLean. On May 9, 2019, Ms. McLean provided a rebuttal to Mr. Cassan’s opinion in which she questions the independence of E4m [opinion provided to the investigator as part of this inquiry]. Councillor Patrie did not share this opinion with Council but did allude to the fact that he obtained one during a Council meeting. Councillor Patrie advised the Investigator that he obtained this legal opinion and when asked to provide a copy to the investigator, Councillor Patrie did so.
- [56] E4m retained Cassels Brock to review Ms. McLean’s letter and provide an opinion as to the independence of E4m. The opinion from Cassels Brock highlighted multiple problems with Ms. McLean’s letter and confirmed that E4m is independent and can properly act as IC.
- [57] The opinion letters from Ms. McLean and Cassels Brock are appended as exhibits to the overall report as well as this report. They have been released to show the extent of

Councillor Patrie's willingness to subvert the decision of Council and protect his own interests.

Attempt to Influence Councillor Cyr and the IC

- [58] Of particular interest to this inquiry is Councillor Patrie's conduct and more specifically his behavior toward Councillor Cyr and Peggy Young-Lovelace [Director and Independent Consultant with E4m (IC)] which also supports the consistent pattern of Councillor Patrie's adamant belief that the City should not purchase of 151 Ontario Avenue and his attempts to reverse the decision and have the Hub located adjacent to his business.
- [59] Councillor Patrie attempted to influence Councillor Cyr's participation at the December 19, 2018, meeting whereat Council was considering the purchase of 151 Ontario Avenue.
- [60] Councillor Cyr declared his conflict of interest after being visited at work by Councillor Patrie, who suggested to him that he was in a conflict. Up until this visit, Councillor Cyr stated that it had never occurred to him that he might be in a conflict. Based on innuendo from Councillor Patrie, Councillor Cyr expected that Councillor Patrie was going to file a complaint against him if he participated in the meeting. Councillor Cyr obtained an opinion from the Integrity Commissioner at the time who advised him that he was not likely in a conflict of interest. Out of an abundance of caution however, Councillor Cyr declared a conflict of interest. As a result the December 19th, 2018 vote resulted in a tie which, pursuant to the Municipal Act, 2001 results in the motion being defeated. It is our finding that this event was the start of the misconduct and ultimate conflict of interest by Councillor Patrie that was described in the separate report specific to that matter.
- [61] On March 13, 2019, Councillor Patrie met with Peggy Young-Lovelace (Ms. Lovelace) [E4m] in relation to the preliminary review of complaints that he filed with the Integrity Commissioner. One of the complaints submitted by Councillor Patrie was about Councillor Cyr having breached the *MCOIA* when he voted at the March 6, 2019, Special Meeting.
- [62] The interview was voice recorded. After the formal interview was over and the voice recorder turned off, Councillor Patrie advised Ms. Lovelace that he had sued the Ontario Provincial Police and the City when fraud charges against him had been dropped in the past. The clear implication in this statement was that Councillor Patrie would sue E4m and/or Ms. Lovelace personally. It was not clear whether he was threatening to do so if the complaint she was investigating was ultimately found to be substantiated or unsubstantiated. The matter was noted but not explored further with Councillor Patrie.
- [63] This meeting took place prior to the investigation of complaints against Councillor Patrie.

- [64] At the conclusion of the December 19th, 2018, meeting, Councillor Patrie indicated that he was open to revisiting the purchase of 151 Ontario Avenue should there be a more robust plan brought before Council. This was also echoed by Councillor Mann. Mayor Marchisella took Councillor Patrie at his word and worked on a new plan.
- [65] It is clear that Councillor Patrie had did not want the City acquiring the 151 Ontario Avenue property for the Hub and instead wanted the Hub to be located adjacent to his business.

March 6, 2019, Meeting

- [66] A Special Meeting of City Council was held on March 6, 2019, while Councillor Patrie was out of the Country. There was a public [open] portion of the meeting and an in-camera [closed] portion of the meeting. There were only two (2) items on the agenda. One matter in open session and another in closed session.
- [67] The matter to be discussed in open session was the procurement of loader mounted snow blower unit. The matter to be discussed in closed [in-camera] session was the “*potential acquisition of property for municipal purposes*” was properly held in a closed session [in-camera] pursuant to section 239(2)(c) of the *Municipal Act*.”
- [68] The agenda and related materials [for both open and closed sessions] were circulated to all Members of Council.
- [69] A staff report and related material for the open session discussion was attached to the public agenda. The matter to be dealt with in closed [in-camera] session was detailed in a memo to Council from the Chief Administrative Officer, Mr. Dan Gagnon (“CAO” Gagnon”) dated March 5, 2019.
- [70] It is our practice not to violate the confidential nature of the in-camera [closed] meeting where possible however, the matter discussed by Council on March 6, 2019, has become public knowledge through the actions of members of Council as well as the passing of a bylaw in open session. The matter considered on March 6, 2019, during the closed session was the negotiation to purchase 151 Ontario Avenue from/with Mr. Guidoccio.
- [71] The open portion of this special meeting was televised/recorded. Councillor Patrie, who attended electronically as he was out of the country, made a statement wherein he alleged that the matter Council was to consider during the closed session is illegal. The following is the transcription of what he said:

“...I have a few misgivings about coming into the closed session. First off, the purchase of this property has been dealt with by this council and turned down therefore in my opinion shouldn't even be on the agenda especially of a special meeting... Second, if we're to deal with this item today, it should not be in closed session as we discussed it in open at the December 19th meeting and Councillor Pearce stated that he had a proponent at that time. And third, and most

importantly, is if any portion of this matter is the proponent that his Worship told me about in Thessalon a week ago last Thursday where he and Councillor Pearce are negotiating for him to purchase the property and we guarantee to purchase a portion of that from him at a more expensive rate than he is paying, that in my humble opinion is completely illegal, and I believe not only is it against the Municipal Act to negotiate this bonusing deal, but it also contravenes the REBBA laws, Section 4 uh 2 (a) and (b) at a minimum. So, with that being said, I believe we legally should not be dealing with this in open or closed session. I think it should be stricken from the agenda.”

- [72] CAO Gagnon’s memo contained sufficient information to advise Council what the nature of the in-cameral discussion would be and it is clear from Councillor Patrie’s statement that he is knowledgeable about what will be discussed during the closed session even though he is on vacation out of the country.
- [73] It is important to note that while City’s Procedure Bylaw can allow Councillor Patrie to participate electronically in an open session, he is unable to participate electronically in the closed session pursuant to section 238 (3.1) of the *Municipal Act*.
- [74] The Statement made by Councillor Patrie during the open portion of the March 6, 2019, meeting shows his determination to discredit Council’s consideration of the potential purchase of 151 Ontario Avenue. A more appropriate approach would have been for Councillor Patrie to have requested that the matter be tabled and considered at a future meeting so that he would be able to participate.
- [75] Also noteworthy, is the fact that while he did not openly report that the matter before Council was the potential negotiation/purchase of 151 Ontario Avenue, his statements were made without regard for the confidential nature of the closed session and contained sufficient detail to inform the public as to what was to be addressed in closed session.
- [76] Of concern however, is that Councillor Patrie advised the IC that he does not want to take part in matters that are “illegal” [as per email to Peggy Young-Lovelace March 6, 2019, reported on earlier] and yet he fails to declare a pecuniary interest when the evidence and his own statements support him having one. Additionally, of concern is that Councillor Patrie admonished Council for considering a matter in which he believes they have contravened the *Municipal Act* and *REBBA* when it is evident that Councillor Patrie has a pecuniary interest in the matter he is admonishing some members of Council about. It is clear that Councillor Patrie holds others to a higher standard of accountability than that with which he holds himself.
- [77] Councillor Patrie denied that his actions contravened the *MCOIA* and the City’s Code of Conduct and further denied that he colluded with others regarding his statement at the special meeting of March 6, 2019. More specifically, that he did not speak with Ms. Van Roon about the matter. On March 5, 2019, Ms. Van Roon reported on social media the nature of the matter being discussed in closed session at the March 6, 2019, Special

Meeting. Additionally, Ms. Van Roon reported that Councillor Patrie contacted her after the meeting and sent her a copy of the statement he made during the meeting.

- [78] Councillor Patrie expressed to the investigator [as well as at the September 12, 2019 Special Meeting of Council whereat E4m presented their overall report] that even if he did have conversations about the location of the Hub near his business it would not be a conflict. Furthermore, it would have a negative financial impact to him.
- [79] At the March 6, 2019, meeting during the in-camera session, Council discussed the potential purchase of 151 Ontario Avenue from/with Mr. Guidoccio.

Collusion with Councillors Finamore & Mann as well as Ms. Van Roon

- [80] The open portion of this special meeting was televised/recorded. This was reviewed by the investigator and transcribed for the purposes of this inquiry. What was said by Councillor Patrie was reported earlier. Of interest are the similar statements of Councillors Finamore and Mann.
- [81] During the open portion of the meeting, Councillors Finamore and Mann each made a statement, refused to participate in the in-camera session and left the meeting. The following is the transcription of what was said:

Councillor Finamore stated:

“Um. As we are a few days away from the next council meeting, I don’t see anything on any information I’ve been given, which isn’t very much, as to the uh time sensitivity of this um, acquisition. And uh, so I don’t believe that it meets the special meeting criteria and I don’t believe we should be even meeting about this, so I will be opposed to going into closed session at this meeting to discuss anything and... I won’t participate...information was not forwarded. I am not aware of anything other than a brief memo and so, um, I would require more information to go inside.”

Councillor Mann stated:

“Thank you, Worship. I think over my term, my terms on council, I’ve always prided myself in being able to go into closed session with an ability to make sound decisions. Unfortunately, I don’t have that feeling today. Um, I don’t feel that I have had full disclosure on this item, um, therefore I will not be staying for the balance of the meeting, and I will not be participating in the vote. So, at this point, I’m going to excuse myself from the table today and...thank you very much.”

- [82] What is notable about these three similar statements is that Council was going into closed session so they could obtain information about the issue and vote on the issue.

As such it is unusual for a Councillor to be saying they can not make a decision before the issue is even discussed. The vote to go in-camera was only to start the closed session of the meeting, not to make a decision on the issues to be determined in closed session.

- [83] It would have been open to any of the three (3) Councillors [Patrie, Finamore and/or Finamore to ask to defer the issue, to ask for a further and better staff report or to vote no if they opposed the matter. These are the options for responsible Councillors on any issue. Abandoning their seats gives the distinct appearance that the involved Councillors were collectively attempting to avoid quorum.
- [84] Councillor Patrie attended the meeting electronically. The *Municipal Act* prohibits electronic participation in an in-camera session. For clarity, Councillor Patrie could not have “left the meeting” in the same manner as those present. However, his words clearly show that he was not in support of the meeting proceeding to an in-camera session.
- [85] Similar to the statements by the three (3) noted Councillors were posted on social media by former Councillor [now appointed Commissioner/Committee Member for the City’s Elliot Lake Residential Development Commission/Committee] Tammy Van Roon (“Ms. Van Roon”) and former Mayor Rick Hamilton (“Mr. Hamilton”).
- [86] Ms. Van Roon reported to the Investigator that Councillor Patrie called her after the March 6th, 2019, Special Meeting and asked her if she heard what he said. She advised that Councillor Patrie sent her a copy of what he said during the meeting.
- [87] During the inquiry it was pointed out by one of the witnesses interviewed that likely there was collusion between the parties to sabotage the special meeting and Council’s subsequent decision to purchase 151 Ontario Avenue:

‘So, when Rick Hamilton said to these people [Councillors Finamore, Mann and Patrie as well as former Councillor Tammy Van Roon]: ‘I don’t agree with this’. They were on his Council when he was the Mayor. Everybody that is on here except for one, was part of his Council. So, when he met with them all and said, ‘This is what I want you to do.’ He [Rick Hamilton] posted on Facebook one day. Tammy [Ms. Van Roon] posted on Facebook the next day. And then at the meeting, Chris [Councillor Chris Patrie] call in on the phone and says his piece. Norm [Councillor Norman Mann] gets up and walks out after a brief statement, Sandy [Councillor Finamore] gets up and walks out before going into closed session. It was in concert. It was uniform. It was similar. And it was orchestrated.’

- [88] One of the Requestors stated that Mr. Hamilton advised that if Councillors Finamore, Mann and Patrie did not participate in the closed session quorum would be lost [because Councillor Luc Cyr would need to declare a conflict of interest] and it would circumvent a decision being made.

- [89] Ms. Van Roon submitted her first complaint to our office on March 5, 2019, regarding the purchase of 151 Ontario Avenue and Councillor Ed Pearce's ("Councillor Pearce") alleged breach of the *Real Estate Business and Brokers Act (REBBA)*.
- [90] Mr. Hamilton submitted a complaint to our office on March 6, 2019, alleging that Councillor Pearce contravened the *Municipal Conflict of Interest Act ("MCOIA")* but when requested did not provide the necessary statutory declaration.
- [91] Facebook posts of both Ms. Van Roon and Mr. Hamilton confirm their concerns with the purchase of 151 Ontario Avenue and generally the actions of some members of Council.
- [92] On April 4th, 2019, Councillor Patrie attended a committee meeting. Present at this meeting were a number of people including Mr. Gagnon. At this meeting, Councillor Patrie again advocated to place the Hub at the ski hill behind his own private business interests.
- [93] It is important to note that the evidence shows Councillor Patrie to have attempted to thwart every effort the City has made to consider the purchase of 151 Ontario Avenue before [intimidating Councillor Cyr December 2018], during [March 6, 2019, Special Meeting – making false/unfounded allegations] and after [pushing for legal opinions, securing his own opinion when he did not agree with Mr. Cassan's, and attendance at an April 4, 2019, committee meeting in which he promotes the location behind his property for the Hub].

Disclosure of Confidential Information

Disclosure of Closed Session Discussion with Ms. Van Roon

- [94] Councillor Patrie allegedly advised Ms. Van Roon that she was the topic of discussion during a closed session of Council whereat the Mayor put forward information regarding her behaviour and requested Council consider removing Ms. Van Roon from her position on the ELRDC.
- [95] Ms. Van Roon reported that Councillor Patrie told her about the closed session discussion.
- [96] Councillor Patrie denied telling Ms. Van Roon about the closed session discussion.
- [97] The Mayor confirmed the nature of the closed session.
- [98] Ms. Van Roon had sufficient detail to have been advised of what transpired in the closed session.

[99] Neither Ms. Van Roon nor Councillor Patrie were found by the investigator to be credible.

Disclosure of Legal Opinion and Other Confidential Documents

[100] After the March 6th, 2019, Council meeting, Councillor Patrie continued to protest the calling of the meeting and the outcome. It got to the point that Mr. Gagnon invited Councillor Patrie to communicate directly with Mr. Paul Cassan – lawyer for the City. Councillor Patrie then sent Mr. Cassan a detailed account of the issues he had with this matter. We have reviewed the information provided to Mr. Cassan by Councillor Patrie. We found the information to be inaccurate in many respects.

[101] Mr. Cassan then provided a written legal opinion to all of Council and endorsed the process that had been followed in this matter. This legal opinion belonged to the City and Council NOT to Councillor Patrie as an individual and it was not addressed to him. This opinion is solicitor and client privileged and is specifically protected under the Code of Conduct and cannot be disclosed except by consent of Council.

[102] When interviewed, Councillor Patrie advised that he had obtained his own legal opinion on this issue. When asked, he provided us with a copy of the opinion from Virginia McLean, a lawyer who frequently worked or works for the City. In reviewing the opinion, it was clear that Councillor Patrie not only shared with his lawyer the confidential opinion that Council received from Mr. Cassan, but he also shared the memo produced by Councillor Pearce from the February 19th, 2019, meeting where the purchase was discussed with staff and Mayor Marchisella. This is the same memo given to Councillor Patrie by a staff member opposed to this matter. We also noted that Councillor Patrie shared the same details to his lawyer that he gave to Mr. Cassan and which continued to contain inaccurate information.

[103] In the investigation, there was no evidence that Council authorized this disclosure, nor that Council waived the professional conflict of interest that this opinion appears to give rise to pursuant to rule 3.4(10) of the Law Society of Ontario Rules of Professional Conduct regarding Ms. McLean acting against a former (or possibly current) client.

[104] We found that the materials shared by Councillor Patrie were privileged documents and not his to share. He clearly violated the Code of Conduct in doing so.

[105] We asked Councillor Patrie in writing to explain why he shared this information. He did not provide a fulsome response. Instead, after he had already disclosed the opinion, he attempted to assert solicitor client privilege on the documents and advised us that we did not understand our duties under the *Municipal Act* in regard to this investigation. We again encouraged Councillor Patrie to provide an explanation as to why he did this. He did not respond to this request.

Disclosure of Confidential Information at the March 6, 2019, Special Meeting

- [106] During the March 6, 2019, it was alleged that Councillor Patrie did disclose confidential information that disadvantaged the City's negotiating position with respect to the negotiation to purchase 151 Ontario Avenue.
- [107] The transcript of Councillor Patrie's statement at the meeting, as previously presented, did show the following key statements:
- The matter on the agenda to be discussed had been previously considered by Council;
 - The matter was previously discussed in open at the December 19th meeting and should not now be discussed in closed;
 - Mayor Marchisella and Councillor Pearce were negotiating with a proponent to purchase the property and that there would be a guarantee to purchase a portion at a more "*expensive rate*"; and
 - That it is illegal, against the *Municipal Act* and *REBBA*.
- [108] Councillor Patrie did not openly disclose specific details of the matter to be discussed in closed session. Instead he made statements that inferred the nature of what would be discussed in closed session. It is clear that Councillor Patrie's participation in this meeting electronically, and the message he delivered was an attempt to influence Council in an effort to prevent them from considering the matter to purchase the Ontario property for the Hub.

VI. THE ISSUE

[109] We considered:

Conflict of Interest

- a. Whether Councillor Patrie had a pecuniary interest in the purchase of the Property for the Hub;
- b. Whether Councillor Patrie attempted before, during or after the March 6, 2019, meeting to influence the voting on whether to purchase the Property; and
- c. Whether Councillor Patrie used his office to attempt to influence City staff or officers' decisions or recommendations with respect to the purchase of the Property;

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- d. Whether Councillor Patrie contravened the City's Code of Conduct, Procedure Bylaw and/or the *Municipal Act* with the statement he made at the meeting;
- e. Whether Councillor Patrie colluded with other Members of Council and/or the public to sabotage the meeting and subsequent decision of Council.

Disclosure of Confidential Information

- f. Whether Councillor Patrie disclosed confidential information at the March 6, 2019, Special Meeting;
- g. Whether Councillor Patrie disclosed closed session [confidential pursuant to the *Municipal Act*] information to Ms. Tammy Van Roon; and
- h. Whether Councillor Patrie's disclosure of a legal opinion from Paul Cassan of Wishart Law LLP to Virginia McLean is a disclosure of confidential information.

VII. THE OPINION

Conflict of Interest

[110] 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.

[111] The matter before Council was whether they should purchase 151 Ontario Avenue to build the Hub. We find that Councillor Patrie had both an indirect and deemed pecuniary

interest in this matter. The details of this are explained in a separate report. To provide some context for the decision herein with respect to the contravention of sections 6.2 and 13.2 of the City's Code of Conduct it is necessary to provide an overview of the evidence.

- [112] The Oakland Plaza is owned by Klover Building Inc. Councillor Patrie and his wife, Kelli Patrie, are directors and officers of Klover Building Inc. Councillor Patrie is also the owner and operator of the Trading Post, a store in the Oakland Plaza. We conclude that Councillor Patrie has an indirect and deemed interest in matters which may have a pecuniary impact on the Oakland Plaza and the Trading Post.
- [113] In order to determine whether the placement of the Hub would have a pecuniary impact on the Oakland Plaza and the Trading Post, we commissioned an Asset Valuation Change Report from Northstar Consulting. This report was received on September 5th, 2019. The report considered whether building the Hub at the Oakland Boulevard Site would have a greater economic impact on the valuation of the Oakland Plaza when compared to the Property and the alternate site on Esten Drive – Highway 108 South.
- [114] Northstar Consulting concluded that “developing the Multipurpose Community Hub on Site 5 [the Oakland Boulevard Site] would be a lucrative opportunity for the plaza owner [Klover Building Inc], and that site 5 [the Oakland Boulevard Site] would be significantly more beneficial to the owner than sites 2 [the Property] or 4 [Esten Drive- Highway 108 South site].
- [115] Accordingly, we find that that Councillor Patrie had a pecuniary interest in the location of the Hub and Council's decision to purchase the Property for the Hub. Because Councillor Patrie had a pecuniary interest in the matter, we find that Councillor Patrie contravened sections 5, 5.1 and 5.2 of the *MCOIA* when he lobbied Mayor Marchisella, Councillor Mann, Councillor Turner and Chief Administrative Officer Mr. Dan Gagnon about building the Hub on the Ski Hill Property, failed to disclose the interest in the March 6, 2019 meeting and voted on the decision to purchase the Property.
- [116] Based on this evidence Councillor Patrie did also contravene sections 6.2 and 13.2 of the City's Code of Conduct.

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- [117] Councillor Patrie was found not to have violated the Code of Conduct with respect to his statement at the March 6th, 2019 Special Meeting. Of note, this was only considered to be unsubstantiated by the investigator due to the fact there was no clear disclosure of personal or other protected information. However, the fact that Councillor Patrie veiled his statements in innuendo and somewhat ambiguous threats is a pattern of behavior consistent throughout this inquiry.
- [118] We find that Councillor Patrie's conduct at this meeting was part of his overall pattern of misconduct.

- [119] Of significance to our consideration is fact that during the December 19th, 2018, meeting of Council, Councillor Patrie invited Mayor Marchisella to bring back this purchase with a more robust plan and then attempted to thwart Council from hearing of the new plan. Councillor Patrie's conduct in the March 6th, 2019 meeting was disingenuous of this previous contention wherein he invited the Mayor to bring the matter back to the Council table. Moreover, this behaviour is clearly part of his efforts to prevent Council from achieving quorum and the subsequent passing of a resolution to purchase 151 Ontario Avenue.
- [120] Additionally, the evidence supports that Councillor Patrie went to extensive efforts to try and have the decision to purchase 151 Ontario Avenue overturned. He sought legal advice from one of the City's Solicitors and then hired Ms. McLean when he did not like what was in the legal opinion. Councillor Patrie filed a complaint against Councillor Cyr wherein it was alleged that Councillor Cyr had a pecuniary interest in the negotiation/purchase of 151 Ontario Avenue due to the fact that Councillor Cyr is part of a class action suit against Eastwood Mall [previous owner of 151 Ontario Avenue] after Councillor Cyr advised publicly that he requested/received advice from the IC regarding the matter and he does not have a disclosable pecuniary interest.
- [121] Overall, we did not find Councillor Patrie credible. We found that he misled the investigator and further that he attempted to subvert Council.
- [122] With respect to the allegation that Councillor Patrie did contravene section 6.2 of the City's Code of Conduct by his actions at the March 6, 2019, Special Council Meeting we find that he did breach section 6.2 of the City's Code of Conduct.

Disclosure of Confidential Information

- [123] The investigator was unable to substantiate whether or not Councillor Patrie disclosed to Ms. Van Roon the nature of the closed session discussion during which she was the topic of conversation. Ms. Van Roon advised that Councillor Patrie told her some of the details and Councillor Patrie denies doing the same. Both parties were found to not to be credible and since the evidence before us is non-conclusive we find the matter to be undetermined. However, the investigator strongly suspects that Councillor Patrie did provide the information to Ms. Van Roon.
- [124] Councillor Patrie did disclose confidential documents to Ms. Mclean that he ought not to have without the express consent of Council and Councillor Pearce [the author of the meeting notes discussing the proposed deal with Mr. Guidoccio. We find that Councillor Patrie did contravene section 10.1 when he disclosed the solicitor client privileged opinion from Wishart and contravened the section a second time when he disclosed the note drafted by Councillor Pearce regarding the potential purchase of 151 Ontario Avenue [received by Patrie from municipal employee] to Ms. McLean.
- [125] The allegation that Councillor Patrie did disclose confidential information during the open session of the March 6, 2019, Special Meeting has been found to be unsubstantiated. Councillor Patrie did disclose information that he ought not have during his statement at the meeting as it clearly referenced what property was to be the subject of the closed

session. However, it was clear if this specific disclosure was insufficient to be captured by the definition of 'confidential information' in the City's Code of Conduct and subsequently the provisions of section 10.1 of the City's Code of Conduct.

VIII. CONCLUSION

NOTE: As will be seen below, Councillor Patrie has been found to have breached multiple provisions of the City's Code of Conduct. The Municipal Act, 2001 at section 223.4(5)(2) prescribes that the maximum financial penalty that Council may levy for a breach of the Code is a suspension of Councillor Patrie's remuneration in respect of his services for a period of up to 90 days. The reader will see that we have recommended multiple suspensions of Councillor Patrie's remuneration. Council can decide to suspend Councillor Patrie's remuneration for up to 90 days for each individual breach that he is found to have committed. As such, the recommendations are for suspension of his remuneration for ninety (90) days, then a subsequent suspension for two (2) months and then a third, subsequent suspension for ninety (90) days. While these entire suspensions are for a total of eight (8) months, Council should understand that they are permitted by the *Act* to levy a suspension of up to 90 days for each finding of breach, so this recommendation is consistent with the *Municipal Act, 2001* and the City's Code of Conduct. It is noted that the recommendation is not, in fact, for the maximum suspension available to Council.

1. Conflict of Interest re: indirect pecuniary interest pursuant to section 2(a)(i) purchase of 151 Ontario Avenue and the hub complex. Contrary to section 5(1) of the *Municipal Conflict of Interest Act* and 6.2 and 13.2 of the Code of Conduct;

SUBSTANTIATED

DECISION:

E4m as Integrity Commissioner will commence an application pursuant to section 8 of the *Municipal Conflict of Interest Act (MCOIA)* against Councillor Patrie. Councillor Patrie is an experienced Councillor and has had training with respect to the *MCOIA*. He took steps, in Council meetings and out, to thwart Council's decision to purchase the property at 151 Ontario Avenue and propose the property adjacent to property owned by a corporation in which he is a director and officer. These efforts included attempting to influence other Council members that they had a conflict, lobbying members of Council and staff to put the hub beside his business, seeking legal opinions and then challenging the legal opinions and even arguing that the IC process was flawed which stalled the investigation and cost the City significant public funds to resolve. It is recommended that **Council NOT sanction Councillor Patrie for the breach of the Code of Conduct arising from the finding of his breach of the**

MCOIA and that instead the issue of penalty for this breach be left to a Judge of the Ontario Superior Court of Justice.

2. Subverting Council re: purchase of 151 Ontario Avenue and related conduct. Contrary to section 6.2 of the Code of Conduct;

SUBSTANTIATED

RECOMMENDATIONS:

1. As in the breach of Municipal Conflict of Interest, Councillor Patrie's involvement in attempting to subvert Council's decision to purchase 151 Ontario Avenue for the Community Hub was pervasive and multi-faceted. It demonstrates clear intent and bad faith. We recommend that Councillor Patrie's **remuneration be suspended for a period of ninety (90) days**. This is the maximum financial penalty that Council could levy against a member for a single breach of the Code of Conduct.
 2. In addition to the suspension, we also recommend that **Council resolve to ask for Councillor Patrie's resignation from Council** and that Council remove him from any and all municipal committees, boards or commissions. The investigation revealed that he was untruthful in his evidence, that he was willing to threaten other members of Council and that he took various, ongoing steps to thwart this decision of Council. The investigation found that he was not credible and actively acted against Council and in his own interest and as such has significantly breached his duty to the ratepayers of Elliot Lake [as he committed to do when he was sworn in and subsequently signed his Oath of Office].
 3. We recommend that within 90 days of this report, **Council should receive further and significant Code of Conduct training with respect to members' obligations under the Code**. It is recommended that this training be provided by or approved by the City's current IC, Cunningham Swan.
3. Disclosure of Confidential Information - Contrary to section 10.1 of the City's Code of Conduct

In regard to discussions about Mrs. Tammy VAN ROON held in a closed session of Council;

UNDETERMINED

In regard to a legal opinion prepared by Mr. Paul CASSAN for the City and other associated documents;

SUBSTANTIATED

RECOMMENDATIONS:

1. Councillor Patrie went to great efforts to obtain advice from E4m, as Integrity Commissioner regarding what he perceived to be a conflict of interest for another member of Council as well as what he deemed to be illegal action by Council. When he was advised that E4m as Integrity Commissioner could not provide him with advice regarding another Councillor's alleged pecuniary interest, nor could E4m provide legal advice, Councillor Patrie aggressively sought legal advice from one of the City's lawyer [Wishart Law LLP] regarding the purchase of the property at 151 Ontario Avenue. When he did not like the advice that was obtained from the City's lawyer, he personally retained Virginia McLean (a lawyer who has often acted *for* Elliot Lake) to provide an opinion criticizing both the legal opinion of Wishart Law Firm and attacking E4m as the Integrity Commissioner. In doing this, Councillor Patrie released solicitor and client privileged documents and closed session information to Ms. McLean without the authorization of Council. This breach of confidentiality caused the investigations in these matters to stop so that E4m as the Integrity Commissioner could obtain independent legal advice with respect to Councillor Patrie's allegations against E4m as the City's Integrity Commissioner from Ms. McLean. This resulted in an independent opinion from a law firm in Toronto that Ms. McLean's opinion was incorrect, caused delay to the investigation and cost the ratepayers of Elliot Lake significant monies to obtain independent legal advice that the system set up by Council in February of 2019 was indeed proper.

The reports of Ms. McLean and the report of Cassels Brock² are attached hereto as **exhibits A and B**. They are provided so that readers can appreciate the nature of the opinion provided by Ms. McLean and the significant legal analysis and work done by Cassels Brock in developing their opinion that the advice from Wishart Law Firm was correct. In the end, we relied on the Cassels Brock opinion to confirm that the system set up by Council in appointing E4m as Integrity Commissioner [Further, that Council properly understood the provision of E4m's proposal, as submitted to Council which indicated Wishart Law LLP would be the legal Counsel used by E4m for any matters requiring legal advice] and the Integrity Commissioner protocol that permitted the Integrity Commissioner to use the City's lawyer was proper and correct and that Councillor Patrie's assertions were much more tactical than well founded.

² Cassels Brock, and specifically Raivo Uukkivi, have significant experience in municipal law.

This is another example of the problems that befall a municipality when Councillors breach their duties of confidentiality enshrined in the sanctity of the in-camera or closed session as well as in the Code of Conduct. It is recommended that Mr. Patrie's **remuneration as a Councillor be suspended for a period of two (2) months** as a result of this breach of the Code of Conduct.

2. We recommend that within 90 days of this report, **Council should receive further and significant Code of Conduct training with respect to members' obligations under the Code.** It is recommended that this training be provided by or approved by the City's current Integrity Commissioner, Cunningham Swan.

In regard to the March 6th, 2019 Council meeting;

UNSUBSTANTIATED

4. Improper influence contrary to section 13.1 and 13.2 of the Code of Conduct in regard to attempts to locate the hub complex next to his personal business interests;

SUBSTANTIATED

RECOMMENDATIONS:

1. Self-dealing is one of the most serious offences that a Councillor can commit. This gives rise to the application that E4m, acting as the Integrity Commissioner, will be bringing against Mr. Patrie pursuant to the *MCOIA*, but in the circumstances, it is recommended that Council **suspend the remuneration of Mr. Patrie for a period of ninety (90) days.**
2. We recommend that within 90 days of this report, **Council should receive further and significant Code of Conduct training with respect to members' obligations under the Code.** It is recommended that this training be provided by or approved by the City's current IC, Cunningham Swan.

DATED October 27, 2019



Elliot Lake

Asset Valuation Change Report
Elliot Lake Multipurpose Complex
September 4th, 2019



Northstar
Consulting



1.0 Introduction

Northstar Consulting Inc. has been retained to review the prospect sites that are being proposed for a multi-purpose sports/recreation and community hub for Expertise for Municipalities (E4m) who is the Integrity Commissioner for the municipality of Elliot Lake. Two previous consultant reports prepared by Colliers on behalf of Elliot Lake have been used to set the baseline assumption in this analysis. This report will compare three sites and determine if the proposed location next to the Oakland plaza situated at 14 Oakland Boulevard in Elliot Lake will have a greater economic impact in the valuation of the plaza when compared to the two recommended alternate sites at 151 Ontario Ave and North of Esten Drive - Highway 108 South.

2.0 Scope of work

This report is limited in scope to a high-level review of news articles pertaining to the matter as well as the two Colliers reports including the Multipurpose Complex Feasibility Study (820612-0021 v1.0) and City of Elliot Lake New Community Hub Business Case (820612-0031 v4.0). No discussions have occurred with Elliot Lake residents or project stakeholders during the preparation of this report. The report will formulate an opinion as to whether or not there is an expectation that by situating the hub complex next to the Oakland Plaza/Trading Post there would be either an increase or decrease in either the property values at this location or in regards to the foot traffic and associated revenues.

3.0 Multipurpose Community Hub Project Background

The proposed facility would be a \$30 million capital costs investment with yearly program revenues of approximately \$450,000, and expected to increase year over year. This facility would replace the aging Centennial Arena and Ruben Yli Juuti Centre Pool which generated yearly revenues of approximately \$100,000 and \$170,000 respectively. It is important to note that the new facility is expected to approximately generate \$180,000 in new revenue when compared to the existing two facilities that it will be replacing. That revenue is made up of a local component as well as an external tourism revenue attraction component originating from tournaments, special events, and gatherings. The expected monetization of this facility and cash flows from tourists and external residents is an important factor in this analysis and impact full to the retail bases tenants of the Oakland Plaza. The component revenue for the Multipurpose Community Hub can be found in Table 1 below.

Table 1: Expected Facility Revenue

Revenue expectations - Rounded to the nearest 1000		
Component	Year 1	Year 20
Arena	\$ 178,000	\$ 260,000
Aquatic Centre and multi purpose rooms	\$ 185,000	\$ 270,000
Gymnasium and fitness centre	\$ 74,000	\$ 108,000
Total	\$ 437,000	\$ 638,000

Source: Colliers Report 820612-0031 v4.0



4.0 Real Estate Valuation Methods

Real estate valuations can be calculated through a number of methods. These include; comparable sales approach, replacement cost method, and capitalization method. The sales comparison approach considers the selling prices of similar, recently sold properties. Those sales prices are adjusted to reflect the time, conditions, and differences between the comparable properties and the subject property. The result of the adjustments is a subject value estimate. Due to the fact that the Multipurpose Community Hub Project is expected to have a meaningful and significant impact on the area once it has been built and brought online, it has been determined that an analysis using historical sales data would not be appropriate. Replacement cost method is a commercial real estate valuation method in which its replacement cost (instead of its liquidation value) is considered which is usually higher than the book value (because depreciation is not taken into account). Given the scenario that this report is evaluating, replacement cost method is not appropriate to make the required determination. The capitalization method is an income-based approach to valuation that is based on the company's ability to generate cash flows in the future. It is the belief of Northstar Consulting that the Multipurpose Community Hub Project will positively affect future cash flows for some of the tenants of the Oakland Plaza and the location selected for the facility will have an impact on the magnitude of the increase. Capitalization valuation is the most appropriate method to draw the most accurate conclusion and will be the basis of the analysis used in the report.

5.0 Estimated Facility Traffic

The multi-purpose sports and recreation community hub will consist of a 500 seat arena, aquatic facility, fitness centre, walking track, gymnasium and multipurpose gathering rooms. The facility will generate a steady flow of reoccurring traffic from locals who plan to use the facility on an ongoing basis as well as special event driven traffic from concerts, trade shows, conferences, tournaments and sporting events. The special event driven traffic is expected to have a high volume of tourist or non-residents in attendance and would present the most significant economic increase over what exists in Elliot Lake today. A conservative estimate in traffic for the proposes of this report would be an average of 200 to 300 regular patrons per day, and an addition of 16,000 in special event traffic yearly. These consumers will generate the \$450,000 in revenue for the facility and drive sales at neighboring establishments. The basis of the attendance assumptions can be found in Appendix 1.



6.0 Oakland Plaza Cash Flow

To determine the valuation change of the Oakland Plaza, the net operating income (NOI) of the property is analyzed under the three different site scenarios. This analysis is done for each existing tenant as well as future prospects. We expect little change in operating expenses due to the addition of the multipurpose sports and recreation community hub and hence will focus primarily on income change. This report assumes that the value of the Plaza will increase as the tenant rents increase. It is acknowledged that it is probable that the tenants are in existing leases, however, if there is a substantial increase in revenue based on the location, the ability to charge increased rents is likely. Furthermore, the location will become more desirable with increased traffic and ability to charge more rent to new tenants is also very probable. Finally, Trading Post retail location is owned by the same plaza owner and increased revenue from sales of goods and services at this location would directly benefit the owner.

7.0 Prospective Location Analysis

Upon a review of the information presented to Northstar Consulting Inc., at the time of this report, there are three potential sites that are in question for the new Multipurpose Community Hub Project. Two of the sites were among those recommended in the Colliers report (820612-0031-v4.0) and have been identified as the best two locations. These are the preferred site at 151 Ontario Ave, Elliot Lake, ON P5A 2K3 (site 4) and the secondary choice North of Esten Drive at Highway 108 South (site 2). The third site is being proposed by the Oakland Plaza owner and is situated directly north of the plaza (site 5). This report will compare the three locations and decide if the site adjacent to the Oakland Plaza presents any increased direct benefit to the owner or the Plaza tenants, when compared to the suggested two sites in the Colliers report. Upon review of these sites, and the supporting data in the two Colliers Reports, Northstar Consulting also believes that the site at 151 Ontario Ave is the superior choice for the community and its stakeholders.

The development of the Multipurpose Community Hub will benefit the entire community. As more tourists and external dollars flow into the Elliot Lake economy, the local business community will realize that benefit in multiple ways. All three sites are within a 1.5 kilometer radius of the plaza and would be considered close enough to have some direct benefit to the location at 14 Oakland Blvd. The location being proposed directly north of the plaza would have additional benefits that could be easily monetized. The proposed location north of the plaza is within a “zone of convenience” which is defined as properties within a small radius to a major consumer driver. The properties within the zone of convenience benefit from the added consumer traffic pulled into the vicinity by the destination property. From table 2 below we can see that site 5 is well positioned to leverage pedestrian traffic as well as vehicular traffic due to its very close proximity to the traffic driver being the Multipurpose Community Hub. It would be likely that a consumer could walk to both the hub and the plaza without moving their car.

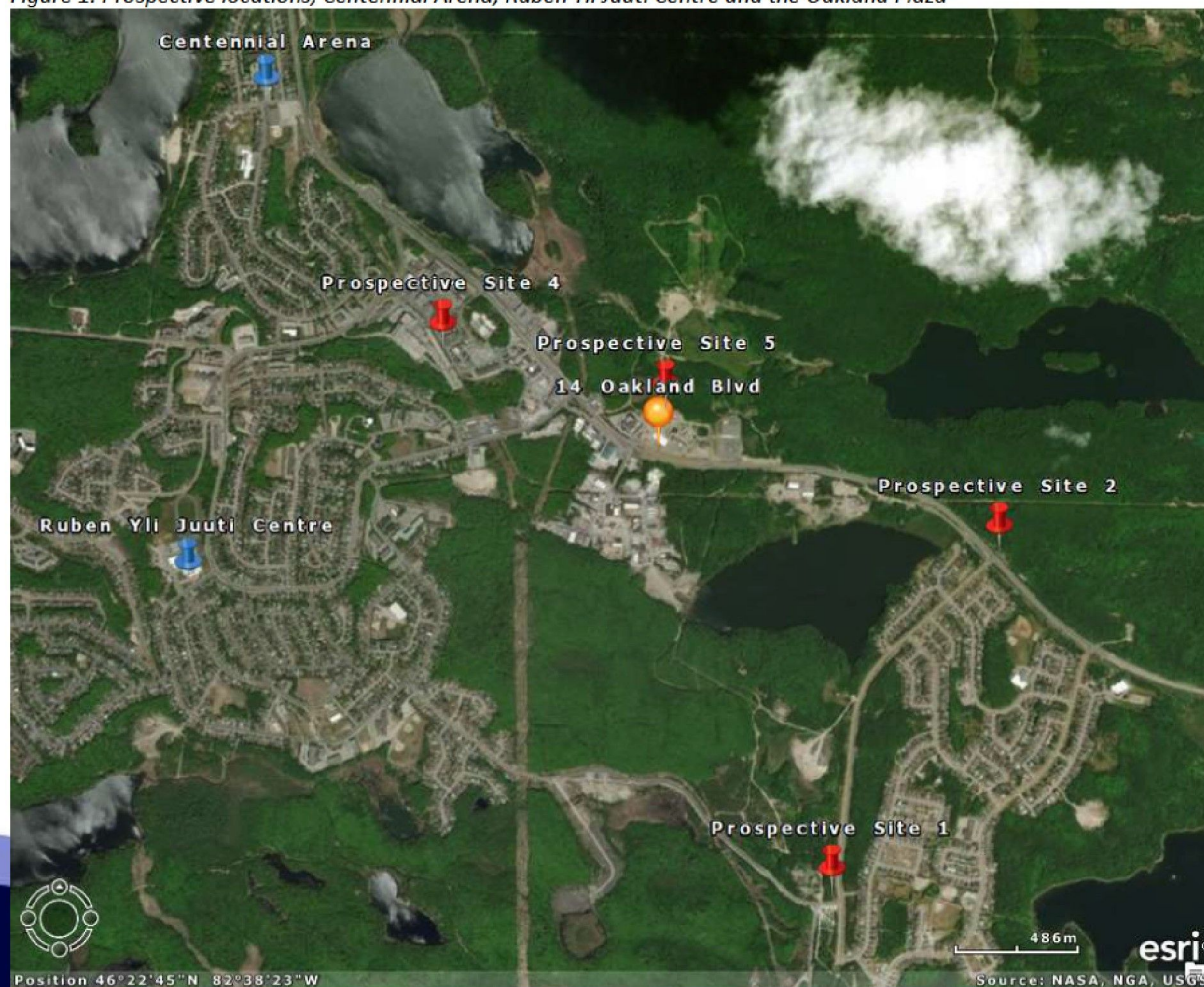


Furthermore, the access to the Multipurpose Community Hub would require the users of the facility to directly pass the Oakland plaza, presenting a further leverage opportunity. These competitive advantages do not exist for the Oakland Plaza with site 2 or site 4. There is significant value from and exposure and advertising perspective when look at the logistical funnel effect that would exist if site 5 were to be selected. The access points can be seen in Figure 2 below.

Table 2: Existing and Prospective Site Distance Analysis		Centennial Arena		Ruben Yli Juuti Centre		Oakland Plaza		Prospective Site 2		Prospective Site 4		Prospective Site 5	
		Driving	Walking	Driving	Walking	Driving	Walking	Driving	Walking	Driving	Walking	Driving	Walking
301 Mississauga Ave, Elliot Lake, ON P5A 1E8	Centennial Arena	0	0	4 Minutes	25 Minutes	5 Minutes	31 Minutes	5 Minutes	47 Minutes	5 Minutes	20 Minutes	5 Minutes	29 Minutes
180 Spruce Ave, Elliot Lake, ON P5A 2C8	Ruben Yli Juuti Centre	4 Minutes	29 Minutes	0	0	4 Minutes	26 Minutes	5 Minutes	45 Minutes	3 Minutes	17 Minutes	4 Minutes	27 Minutes
14 Oakland Blvd, Elliot Lake, ON P5A 2T1	Oakland Plaza	5 Minutes	31 Minutes	4 Minutes	26 Minutes	0	0	2 Minutes	19 Minutes	4 Minutes	16 Minutes	1 Minute	3 Minutes
North of Esten Drive - Highway 108 South (46.37679, -82.61997)	Prospective Site 2	5 Minutes	47 Minutes	5 Minutes	45 Minutes	2 Minutes	19 Minutes	0	0	5 Minutes	33 Minutes	2 Minutes	19 Minutes
151 Ontario Ave, Elliot Lake, ON P5A 2K3	Prospective Site 4	3 Minutes	20 Minutes	3 Minutes	17 Minutes	4 Minutes	16 Minutes	5 Minutes	33 Minutes	0	0	4 Minutes	15 Minutes
Oakland Blvd and Ski Hill Road	Prospective Site 5	5 Minutes	29 Minutes	4 Minutes	27 Minutes	1 Minute	3 Minutes	2 Minutes	19 Minutes	4 Minutes	15 Minutes	0	0

It is apparent from table 2 above that site 5 would be advantageous when looking to leverage pedestrian and vehicular traffic over site 2 and site 4.

Figure 1: Prospective locations, Centennial Arena, Ruben Yli Juuti Centre and the Oakland Plaza



The map above visually shows the proximity of each site to the plaza and the table below defines the distance.

Table 3: Plaza Proximity	Oakland Plaza Distance
Prospective Site 2	1.5 KM
Prospective Site 4	1.2 KM
Prospective Site 5	200 M

Figure 2: Logistical Access Points to Proposed Site 5



7.1 Existing Tennant Benefit Analysis

The Oakland Plaza is current operating location for the following businesses:

Building 1

1. Enbridge
2. Pet Valu
3. Shear Creations Hair Salon
4. Trading Post
5. Fire Side Classic Grill

Building 2

1. Paul Lalonde Alignements
2. Union Taxi
3. GR Entreprises – Power Sports – RV & Marine



The economic impact of the Multipurpose Community Hub is expected to benefit each business differently and this section will analyze the impact for each location as well as the probability that there will be an increase of their willingness to pay-based on increase revenues.

7.2 Enbridge / Union Gas

The Multipurpose Community Hub would present little to no benefit for this tenant and increased rents upon lease renewal based on the presence of the hub would be negligible.

7.3 Pet Valu

A web based search shows that at least 3 dedicated pet stores with a number of retail options that carry basic pet food and supplies such as grocery stores (No Frills) and Pharmacies (Shoppers Drug Marts) exist in the area. Retail is closely tied to consumer traffic and location has a significant impact on sales. Furthermore, added exposure and the benefits from external advertising can be leveraged due to the logistical funnel that exists with site 5 exclusively. The map below shows the location of the competitive pet stores in the area and their proximity to the prospective sites and the Oakland Plaza. We can conclude that from this information the Pet Valu store within the Oakland Plaza would see a direct benefit from the selection of site 5 over site 2 or site 4. This benefit could be monetized upon lease renewal by the owner to increase the NOI of the plaza.

Figure 3: Pet Store locations in proximity to the prospective 3 sites and the Oakland plaza.



7.4 Shear Creations Hair Salon

A web-based search revealed that ten or more hair salons are operating in Elliot Lake. In this business, clientele is often more sticky than other businesses in the service sector. A strong resistance to change exists once an individual has found a hairdresser that they are satisfied with. Despite that fact, there are some consumers that value convenience and look for an option that is best suited for them. When looking for a new hair salon, service quality as well as location are key drivers for consumers. Figure 5 below shows the location hair salons in the area. There is an apparent cluster of hair salons positioned around site 4. There is little competition situated around site 5 and would present additional benefits to Shear Creations over site 2 and 4. Walk in clientele would be expected to increase if the Multipurpose Community Hub were to be built on site 5 and a direct benefit would be derived from the additional exposure. We can conclude that from this information the Shear Creations Hair Salon within the Oakland Plaza would see a direct benefit from the selection of site 5 over site 2 or site 4. This benefit could be monetized upon lease renewal by the owner to increase the NOI of the plaza.

Figure 4 Hair salon locations in Elliot Lake in proximity to Prospective site 2,4 &5 as well as the Oakland Plaza

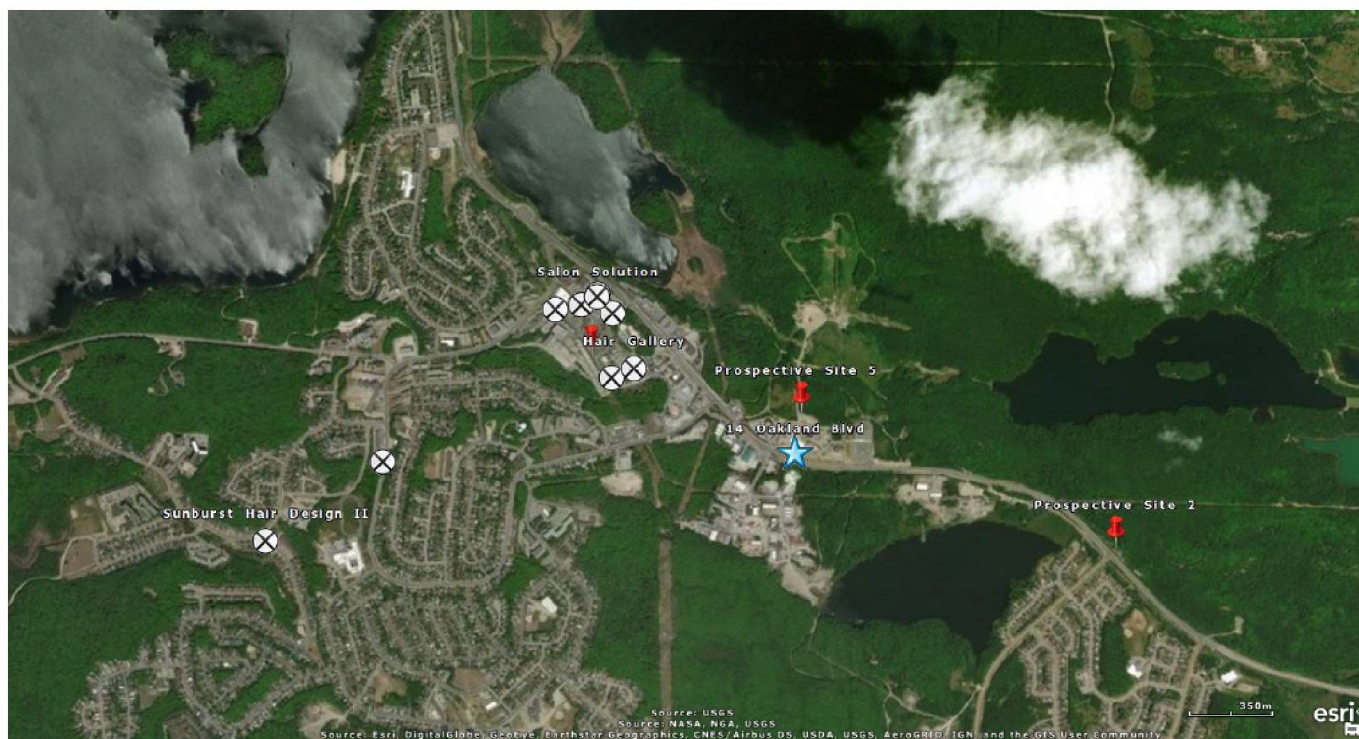


Figure 5: Hair Salon cluster positioned around Site 4



7.5 Elliot Lake Trading Post

This is a 1500-2000 square foot retail store focused on selling outdoor camping and fishing/hunting supplies as well as souvenirs. This store also carries a wide selection of snacks, and drinks. This store is well positioned to sell to tourists as well as pedestrian and vehicular traffic looking for convenience store items, as well as tourists looking for a souvenir. The increase traffic referenced in this report would be a direct benefit. Seeing as how the owner of the business and the plaza are one in the same, the benefit would be immediately realized or could be converted into a higher lease rate to increase the valuation of the property. The benefit seen from the development on site 5 is much stronger and more impact full for this business than if site 2 or 4 were selected, and can be directly translated into an increased valuation of asset.

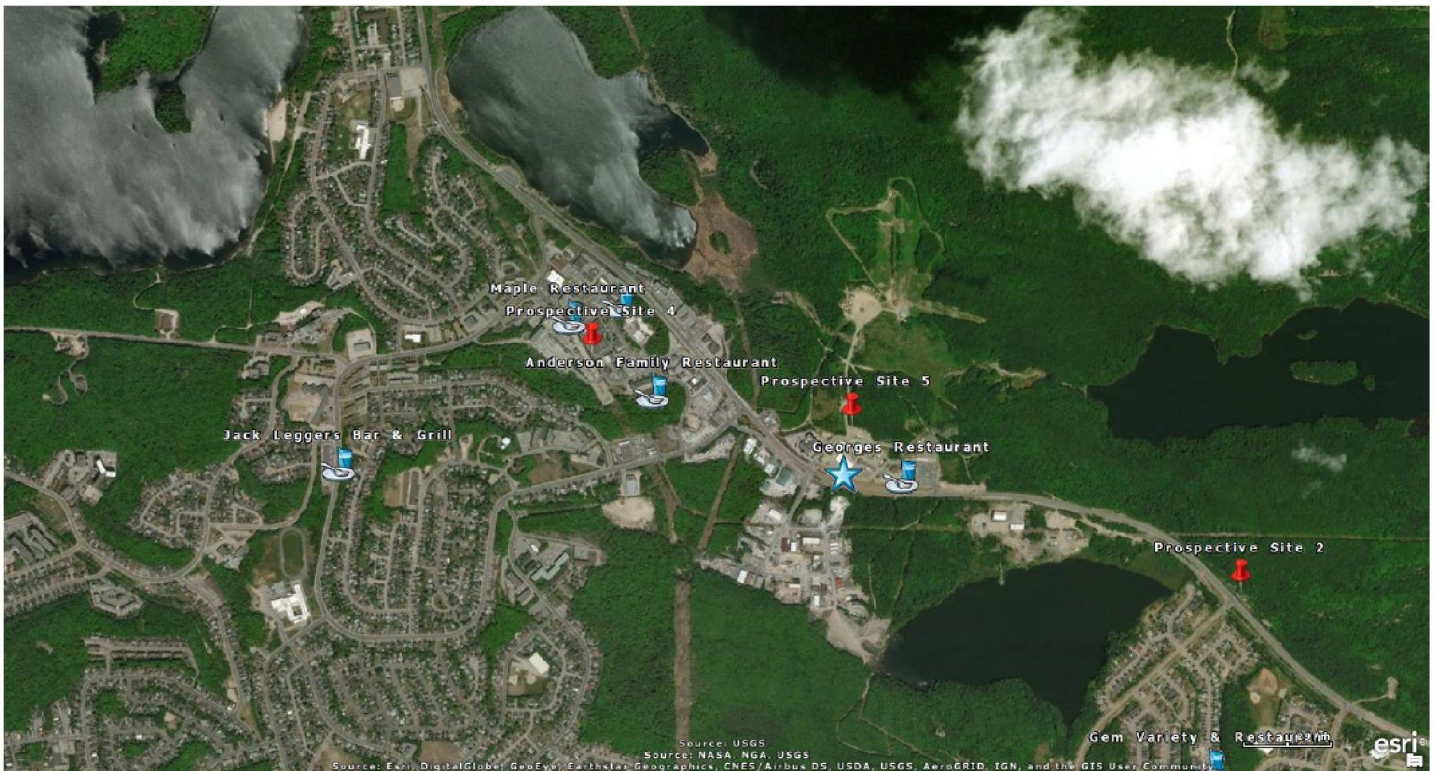
7.6 Fire Side Classic Grill

Six sit-down restaurants within the 2 km radius of the Oakland Plaza and multiple quick service options as well. These locations can be seen in figure 6 below. If the Multipurpose Community Hub were to be built on site 5, the increase in traffic would benefit both Georges and Fireside more so than the other four restaurants in the area. Similarly, the impact would be less so if site



4 were chosen where 3 additional restaurants can be found in that area. If site 5 were to be selected for the development, a significant benefit would exist before and after special events that were held at the complex. For example, the Elliot Lake Wildcats who participate in the NOJHL hold 28 home games per season, plus playoffs. The team has historically drawn just over 300 attendees per game on average. The typical target customer for these games would be likely to arrive at the arena early, to find an ideal parking spot and have a sit-down dinner before the game. This same concept would be applicable for concerts, trade shows and other events. The addition of a restaurant complex may lessen this effect depending upon options and price point, however, it is not expected to cannibalize existing sales and a net increase in revenues for the Fires Side Classic Grill would be expected with this development. The benefit seen from the development on site 5 is much stronger and more impact full for this business than if site 2 or 4 were selected, and can be directly translated into an increased valuation of asset.

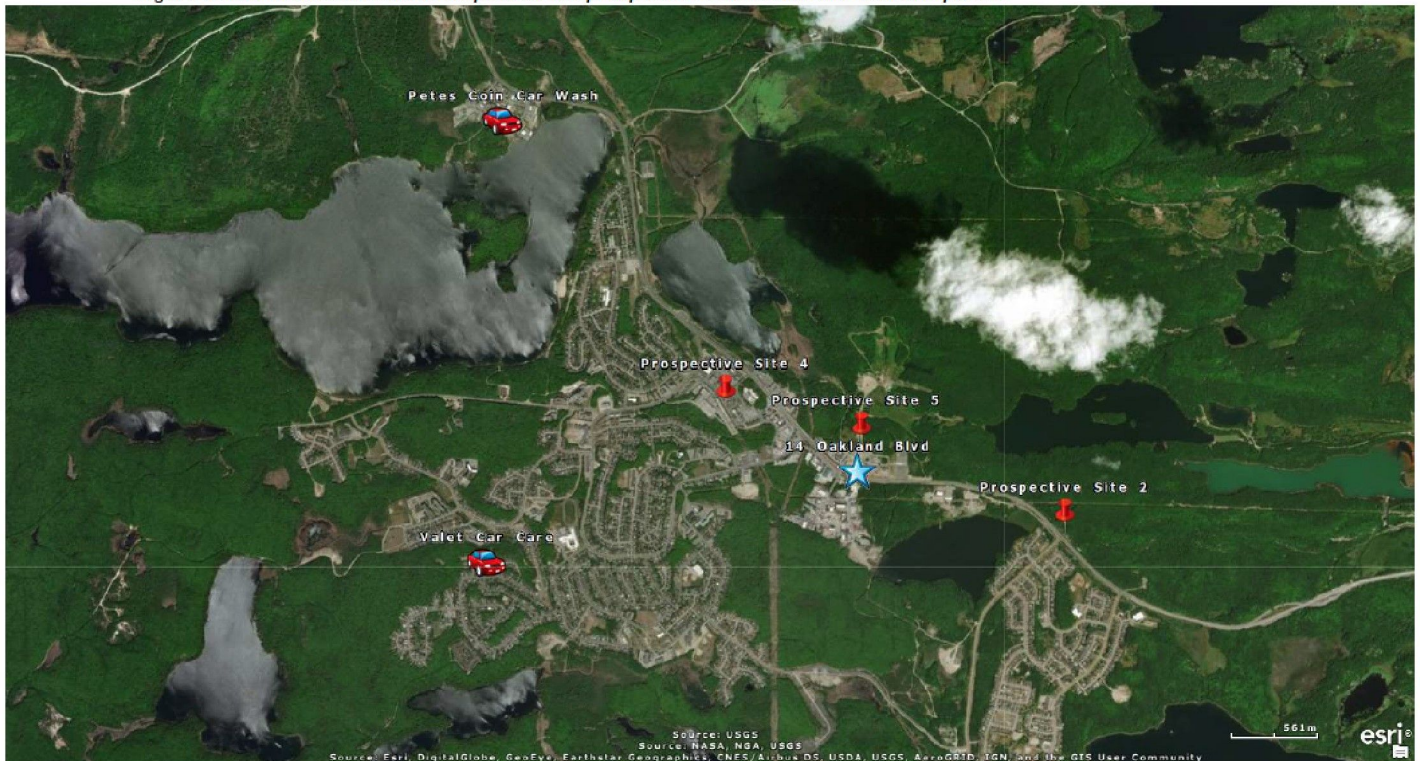
Figure 6: Locations of slow dining restaurants Elliot Lake



7.8 Paul Lalonde Alignments

This business services automobiles as well as has a touch-less car wash and vacuum station. The increased traffic that the Multipurpose Community Hub would bring would have some benefit to this location, but not nearly as significant as the Fire Side Classic Grill, trading post, or Pet Valu. There would be a direct benefit to the micro transactions such as car washes and vacuuming, however we would expect to see a marginal increase to the automotive service portion of the business. The increase exposure of site 5 would have an immediate benefit for this business, however, the increase in overall revenues when comparing site 5 to site 2 and 4 would be a small percentage of overall existing revenues. The figure below shows the existing car wash options in Elliot Lake.

Figure 7: Car wash locations in respect to the prospective 3 sites and the Oakland plaza.



From the figure above, it would appear to be at least two other car wash options in Elliot Lake, however, none as well positioned to capitalize on the additional vehicular traffic as Choice Tire & Repair Centre if site 5 were selected.



7.9 Union Taxi

The mobility and nature of this business ties little revenue to the location of the base of operations. There would be little difference in revenue for the business or the plaza if site 5 were to be selected over sites 2 or 4.

7.10 GR Enterprises - Power Sports

A web-based search shows that 3 other power sports dealers are operating in Elliot Lake. The locations can be found in figure 8 below. Purchases in this sector are often driven by product and brand loyalty; however, being in close in proximity to a high traffic flow can create a marginal benefit. There would certainly be a direct benefit ties to the increased exposure and advertising opportunity and it would be up to the operator to make the most of that. The increase in overall revenues when comparing site 5 to site 2 and 4 would exist for this business to some degree and would have a small impact on valuation.

7.11 Prospective New Tenants

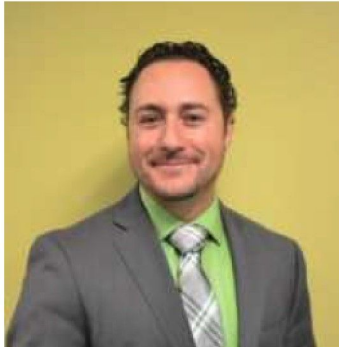
Perhaps one of the greatest opportunities to monetize development for the plaza owner is upon the expiration of the exiting leases. When this occurs, the owner may have an opportunity to solicit the space to the highest bidder. It is probable that some businesses would be willing to pay a premium to be situated next to the premier sports complex in the community with little options for alternate commercial space, unlike site 4 which seems to have multiple options in the vicinity. This increase in rental revenue streams would directly create an increase in the valuation of the plaza and increase the asset worth.

8.0 Conclusion

When evaluating at all the factors and competitive advantages sited in the report, it could be concluded with certainty that developing the Multipurpose Community Hub on site 5 would be a lucrative opportunity for the plaza owner, and that site 5 would be significantly more beneficial to the owner than sites 2 or 4. This would remain true both from a real estate asset valuation perspective, as well as from a retail sales standpoint when considering the Trading Post. The expectation for increase plaza revenues would directly lead to an increase in property valuation through the use of the Capitalization Valuation Method.



9.0 NORTHSTAR CONSULTING - JASON NACCARATO, PRESIDENT & CEO



Born and raised in Sault Ste. Marie, Jason Naccarato is a project manager who specializes in leveraging opportunities and managing initiatives related to finance, engineering, stakeholder engagement, and market development activities. Jason utilizes his experience to assist his team in the areas of economic development and strategy. He is a focused and driven individual who is results orientated.

Prior to starting Northstar Consulting, Jason was the Vice President of Development at the Sault Ste. Marie Innovation Centre (SSMIC) where he focused on economic development in the city of Sault Ste. Marie. During his tenure at SSMIC, he was also the CEO of Algoma Games for Health.

Jason is also the CEO of Northern Advancement Capital which is a real estate development firm. He currently owns and manages 45 residential units and over 60,000 square feet of commercial real estate space in Sault Ste. Marie.

In the past, Jason has held positions with Magna International as an Advanced Purchasing and Business Development team leader, Nissan North America as a Senior Program Controller in Cost Economics, Nissan Technical Centre North America as a Development Engineer, and with Siemens VDO as Test Engineer.

Jason was awarded an Honors Bachelor of Engineering Science in Mechanical/Materials Engineering from the University of Western Ontario. He holds an MBA from Wayne State University and was awarded his Project Management Professional (PMP) designation. Jason has also taught project management at Sault College. Jason has sat as a Director and/or Executive on numerous community-based Boards and Committees including:

Vice Chair - on the Sault College Board of Governors

Sault College is one of 24 publicly funded colleges in Ontario. Sault College is located in Sault Ste. Marie, Ontario, and began in 1965 as the Ontario Vocational Centre.

Director on the Ontario Sustainable Energy Alliance (OSEA) Board of Directors

(OSEA) is a non-profit organization supporting the growth of renewable energy and Community Power projects in the Canadian Province of Ontario.

Past President on the Sault Ste. Marie Chamber of Commerce Board of Directors

The chamber is the recognized voice of business committed to economic prosperity in Sault Ste. Marie.



Appendix 1

Hypothetical Regular Attendance		
Regular Usage	Daily Usage	Yearly Usage
League Hockey	100	26500
Swimming	50	13250
Fitness Center and Gymnasium	50	13250
		53000

Hypothetical Special Event Attendance			
Event	Occurrences per year	Expected Attendance per Event	Yearly Attendance
Concerts	5	300	1500
Swim Events	4	150	600
Trade Shows	4	250	1000
Confrences	2	400	800
Gymnasium Events	10	50	500
Hockey Tournaments	2	800	1600
Wildcats	30	325	9750
		Special Event Traffic	15750



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May 9, 2019

Councillor Christopher Patrie
21 St Laurent Pl
Elliot Lake
On P5A 2V9

By Email w/o attachments
Express Post with attachments

CONFIDENTIAL LEGAL OPINION

Dear Councillor Patrie:

Re: 151 Ontario Ave Elliot Lake – Conduct by some members of City of Elliot Lake Council

Introduction

In this legal opinion I will review the facts, identify the issues, examine the applicable statutes the common law and City policies, provide an analysis and conclusions and recommendations. In addition to the conduct of council members I will also address council compliance with the *Municipal Act, 2001* on April 16, 2019 re 151 Ontario Ave.

Facts

Prior to retaining me, on **March 13, 2019** you sent an e-mail to Paul Cassan, counsel for the City of Elliot Lake, with a copy to the CAO. The re line on the e mail was “issues regarding problems and actions of some members”. In your e -mail, you identified conduct which you believed to be “potentially putting the city at some risk”. I have reviewed your e-mail and having also examined the council minutes for the identified dates I have put the facts in chronological order under headings as follows:

The Special Council meeting December 19, 2018 agenda item 6.3: City purchase of 151 Ontario Ave from Eastwood Mall Inc.

- Councillor Cyr declared an indirect pecuniary conflict of interest on item 6.3 at the meeting. According to the meeting minutes of that meeting, indirect pecuniary interest is “due to ongoing litigation as a result of former employment”. According to your e-mail, the indirect pecuniary interest is “as part of the class action law suit against the owner of the mall”. According to the meeting minutes, councillor Cyr did not attend the discussion of the item at the meeting which was a closed session. By law 18-71, a by law to authorize the execution of the Agreement of Purchase and Sale between the City and Eastwood Mall Inc. was not passed on a 3:3 vote (councillor Cyr absent). Councillors Turner, Pearce and the Mayor, D Marchisella voted in favour of and councillors Patrie, Mann and Finamore voted against.

According to your e-mail: “the purchase was turned down after some heated words from some members. Councillor Pearce at that meeting stated Cyr’s declaration was a mere technicality. He also stated that he was working with a proponent on a portion of that property and heatedly that this is not finished.”

Conduct from after the December meeting up to early March 2019

- According to your e -mail, “Councillor Pearce has continued”[after December 19 ,2018] “ to negotiate with his proponent from that day on without council consent” including “negotiations that he”[the proponent] “buy the property and we” [the City] “purchase half from him at over 90 percent of the costs as well as give him additional land for the process”.
- According to your e-mail, “The Mayor has also been negotiating with the same proponent and the property owner directly” and had “drawings made up on behalf of the proponent with City resources” which were shown to you and “he is still creating these documents”.
- According to your e-mail, complaints were filed with the previous Integrity Commissioner (IC) and warnings issued to councillors Cyr and Pearce. The IC “would act on these practices if it had been filed after March 1.” [The IC lacked jurisdiction the *Municipal Conflict of Interest Act* (MCIA) until March 1, 2019 when the amendment enabled the IC to apply to a judge for the determination of whether a member had contravened sections 5,5.1 or 5.2 of the MCIA]
- According to your e-mail ,”Councillor Pearce had been told by staff that it is not his job to do staff work and he responded he could continue to do it until March 1”.Councillor Pearce in February “did bring forth to staff that he had been negotiating with the proponent directly and agreed with the proponents request.”[I assume this occurred at the February **19, 2019** meeting with councillor Pearce , the mayor, the Economic Development Commissioner, the Chief Administrative Officer, and a representative of ELNOS] .
- Councillor Pearce’s notes provided at the February **19,2019** meeting, **[attachment 1]** identify the proponent as Tony Guidoccio. The proponent “wanted some reassures and conditions of his own” [see **attachment 1**]. Councillor Pearce was of the opinion that 2 of

the requests were reasonable and the 4th that council pass the deal,” an absolute necessity” [see the **attachment 1**]

- According to your e-mail, the mayor advised you of these negotiations, you told him they were not legal and the mayor advised that “it didn’t matter because Lavon Nazarian”[the owner] “had found out that the purchase was for the City and killed the deal.”

March 6 Special Council meeting

- According to your e-mail, on **March 6,2019** a Special Council Meeting, was called by the mayor knowing you were in Mexico. Item 6.2 a report from the CAO re potential acquisition of property for municipal purposes was considered in closed session . Councillor Cyr attended the meeting and did not declare a conflict of interest. Councillor Mann attended refused to discuss the matter and left the meeting. You did not attend and procedurally could not attend a closed meeting by telephone. According to the Minutes of the closed meeting, the meeting was for “potential acquisition of property for municipal purposes”. Councillor Mann excused himself from the meeting. The recorded roll call: In Favour: Turner, Pearce, Cyr, Marchisella Opposed: Finamore It is not clear from the minutes if this was a vote on going in closed session or on the acquisition. The Minutes of the March 6 meeting were adopted on March 11 . No resolution appears to have been brought forward to open council.

THIS IS NOT PART OF THE CHRONOLGY BUT RELEVANT TO THE OPINION

According to council minutes, on March **11, 2019** Council considered a report from the CAO addressing council’s adoption of a recommendation that there be 2 Integrity Commissioners. The CAO recommended that E4M Inc. be identified as the primary IC for all inquires. [I cannot locate the resolution or terms of the appointment of the IC so for the purpose of this opinion I am assuming R Swayze ceased to be IC before March 1 and that E4M Inc was appointed IC sometime in March]

Cassan’s Response to your March 13,2019 e mail

- The written letter of response to your e mail was given by from Paul Cassan with copies to the mayor and CAO on **March 19,2019. (Attachment 2)**
Cassan responded that:
Not being the Integrity Commissioner, he could not provide advice to an individual councillor without instructions from council so he was providing legal advice to all of council. *“Much of the e-mail provides facts and seeks advice or suggests various breaches of the **Municipal Conflict of Interest Act**” “ or matters that may be seen as breaches of the **Staff Council Relations Policy** or **Code of Conduct**”. “These issues are within the jurisdiction of the Integrity Commissioner and should be forwarded to the Integrity Commissioner.” “Legal issues in the email that are not strictly within the jurisdiction of the Integrity Commission are”*

Mayor or Councillor negotiating with vendor or others “It might or might not be a *Code of Conduct* issue and nothing in this letter should be seen to impinge on the jurisdiction of the Integrity Commissioner investigating this matter”. A mayor can “explore opportunities and bring information back to council for consideration. A mayor may not bind Council without an appropriately passed resolution or by law.” “Councillors have a role in exploring and determining opportunities for council’s consideration and decision” but cannot “bind the municipal councillor their own accord. “I understand that no contract was agreed to by either the mayor or an individual councillor so there is no breach of the **Municipal Act,2001** on face of e mail.”

Reconsideration: The defeat of a by law to enter an agreement of Purchase and Sale does not have the effect of stating that the city will not ever purchase the property and this was not a reconsideration. “It is not a reconsideration for Council to consider a different motion to purchase the property on different terms”

Brokerage of real estate “A Mayor or Councillor exploring interest in real estate transaction for a Municipality is not acting as a brokerage or broker” “They not acting on behalf of others nor are they doing so for compensation or reward”. If there is compensation being sought it is in the jurisdiction of the Integrity Commissioner.

April Council meetings

- On **April 15 ,2018** Notice of a Special Council meeting on **April 16** was given to consider, in a closed session, the purchase of 151 Ontario Ave.
- The meeting was subsequently changed to an open meeting without any explanation
- Council passed a by law on **April 16,2019** authorizing the execution of an Agreement dated April 16,2019 to purchase 151 Ontario Ave from 2205730 Ontario Inc., the legal Owner. The Vendor became the owner on **April 11, 2019 when the 13 acre land parcel was purchased from the prior owner, Eastwood Mall Inc.(R. Nazarian).**
- According to the Minutes of the **April 16,2019** council meeting : Moved by Cyr and seconded by Pearce “That Council approve the purchase of 151 Ontario Avenue, the 13-acre former Algo Mall property by passing the necessary by law to adopt the agreement of purchase and sale with 2205730 Ontario Inc.” and that “the purchase be pre-approved as a 2019 expense in the municipal budget and referred to the ad hoc budget committee” .By law 19-13 was passed. The purchase was approved by: Cyr, Turner, Pearce and the mayor. It was opposed by Patrie, Mann and Finamore.
- The CAO’s April 15,2019 report to council on the purchase (**Attachment 3 with attachments**) noted that:

“legal advice was sought and obtained through out the steps that followed.”; “it was confirmed that the City could legally consider and express an interest in the subject property to anyone it deemed fit”; “On March 6 council directed the CAO to indicate to 2205730 Ontario Inc (the proponent)that it would be willing to consider purchasing 7 acres of the 13 acres Algo Mall site at an upset cost of \$750,000 subject to the proponent having clear title to the property. In this early context, the proponent would simply retain 5 acres of the land and sell the City the 7 acres. ;Severance was required

“the municipality controls the process by drafting a reference plan and declaring the land surplus etc.”; “The proponent is prepared to commit to build an appropriately scaled residential /commercial mixed building ...with typical covenants on building deadlines and site plan details “;“the \$750,000 net purchase (plus applicable taxes and legal costs) should be referred to the 2019 budget exercise for detailed review to secure and identify the required funding sources”.

- According to the April 12 e mail to the CAO from legal counsel attached to the CAO's report : “In accordance with the direction provided in a closed session, the City has an interest in approximately 7 acres of the subject site.2205730 Ontario Inc. has agreed to transfer 7 acres of the subject site to the City for the amount of \$750,000.00.City council has already committed to the transfer of this amount.” There is discussion about a severance of the 7 acres and the lawyer states “it seems unfair to burden 2205730 Ontario Inc with both the financial encumbrance and the administrative inconvenient associated with severing and transferring the lands.” “Accordingly, it is my recommendation that now that 2205730 Ontario Inc. has clear title to the subject site, it transfers the entire site to the city at cost”

[Under section 50(3)(c) of the Planning Act land being acquired or disposed of by a municipality does not require a consent so I fail to understand why this purchase and sale back by the City]

- The Agreement of Purchase and Sale is for a purchase price of \$900,000 contains one clause on the sale to the Vendor for \$150, 000. The clause lacks sufficient details and clarity.

Issues

In your **March13,2019** e-mail you posed a number of questions or issues. I agree with Cassan's response to you on reconsideration but not on negotiating or brokerage.

The conduct issues to be examined and addressed are set out below under the applicable statutory authority.

1.Municipal Conflict of Interest Act (MCIA)

Did councillor Cyr breach the (MCIA) at the meetings of March 6 and April 16, 2019?

2.Municipal Act 2001(MA)

The integrity Commissioner

Has the current IC been properly appointed under the MA? [I cannot locate the by law I assume was passed around March 11, 2019 when the Protocol was adopted?]

If the IC is E4M Inc., can the IC perform functions in an independent manner given that there appears to be a definite connection with Paul Cassan, the City's legal counsel?

Can the IC consult with legal counsel under 3.4 of the *Integrity Commissioner Inquiry Protocol*? If not, how does he or she get legal advice or guidance on interpretation given that they do not appear to be legally qualified.

Real Estate Purchase and Sale

Does a councillor have the power, absent a directive from council, to negotiate on his own an agreement for the purchase and sale of land for a municipal corporation?

Can and should council rely upon a third party, who is not a real estate professional, to negotiate the purchase and sale of land with them on behalf of the owner?

Should the councillor or mayor continued to negotiate through the third party knowing that the owner would not negotiate with time and know that the third party was acting for the City and the negotiations would fail ?

Can council purchase land when it is not clearly identified as being purchased for a municipal purpose?

Has council adopted a policy on the sale and disposition of land under section 270 of the MA?

If it has, is the proposed sale to the Vendor in compliance with the policy?

Is council required to have sufficient funds in hand and allocated in its budget to pay for the purchase of land before entering into an agreement of purchase and sale for the land?

Should a municipality purchase vacant land without an inspection and without objective determination about the environmental condition and the ground load bearing capacity

Did the City exercise due diligence prior to purchase?

Did the City have an independent appraisal prior to purchase to ascertain the fair market value of the land? If not why not?

Did the City exercise due diligence agreeing to sell a portion of the land to 2205720 Ontario Inc without proper legal agreement to insure that the Vendor would purchase? .

Why was it necessary to buy the entire parcel when the City would not require a consent?

Why was a consent required for a conveyance of land to the City?

Bonusing

Is the agreement with the 2205730 Ontario Inc respecting the purchase of 151 Ontario Ave. and the circumstance surrounding the purchase the granting of a bonus under the MA section 106?

Was the wording of the agreement prepared to hide an apparent contravention of the prohibition against bonusing?

Analysis-Applicable Law

MCI

Under section 5 of the MCI a member with a direct or indirect pecuniary interest in a matter to be considered at a council meeting, must before the meeting disclose "the interest and general nature thereof"; not take part in the discussion or vote and not attempt to influence the vote in any way. Under section 5.1 as soon as possible after the meeting the member who disclosed the interest must file a written statement of the interest and general nature with the clerk. This must be recorded in the minutes in the case of an open meeting and kept in a Registry under section 6.1 available for public inspection.

Under section 5.2 a member is precluded from using the office to influence decisions or recommendations by administrative staff.

As stated in *Moll v Fisher* (1979), 8 M.P.L.R. 266 at page 269 “The obvious purpose of the Act is to prohibit member of council and local boards from engaging in the decision-making process in respect of matters in which they have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of the council or board. So long as the member fails to honor the standard of conduct prescribed by the statute, then, regardless of his good faith or propriety of his motives, he is in contravention of the statute....”

The obligations of the member under MCIA are personal to the member. Although the Integrity Commissioner now has some powers under the MCIA [see *Integrity Commissioner Inquiry Protocol*] and can provide advice to a member under section 3.1 paragraph 6 of the *Protocol* The decision and the responsibility is that of the member.

The process, to determine if there has been contravention of the MCIA including following the process after disclosure is in section 8. Under section 8, an elector, an IC or a person “demonstrably acting in the public interest” may apply to a judge to determine whether a member has contravened section 5,5.1 or 5.2 of the MCIA.

There is a limitation period within which to bring an application under section 8 which commences when the applicant became aware of the alleged contravention. determine If the contravention occurred at the **April 16,2019** council meeting then the application to the court would have to be made no later than **May 27,2019** (within 6 weeks after the applicant).

If a judge determines that the member had contravened section 5,5.1 or 5.2 the judge could under section 9 has the power to reprimand, suspend, declare the seat vacant, disqualify the member. This could impact the decision.

A court application is a timely and expensive process.

There is an alternative, an application to the Integrity Commissioner under Part 6 of the *Integrity Commissioner Inquiry Protocol*. The section tracks the wording of the section 8 of the MCIA “An elector, or 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 section 5,5.1 or 5.2 of the MCIA by a member”. Section 223.3 (1) of the M.A. give the IC power to consider the application of the MCIA section 5,5.1 and 5.2 to members of council and to consider requests respecting their obligations under the MCIA. Under section 6.3 of the *Protocol* the IC first determines if the application complies with the section, if there are no reasonable grounds to support the allegation then it would be dismissed. The IC’s inquiry powers are broad and on completion of an inquiry the IC may apply to a judge for determined on whether there has been a contravention of the MCIA by the member.

In terms of limitation time under section 8(3) of the MCIA the 6-week limitation would not apply if an application was made to the Integrity Commissioner, the I C conducted an inquiry and advised the applicant that he would not be making an application to a judge, has not completed the inquiry or terminated the inquiry.

This is a cheaper process and a court in which all costs are paid by the City and the IC can if an inquiry is conducted under the Protocol have full access to all necessary information.

The limitation for the application under the Protocol is May 27, 2019 for review of the conduct at the April 16, 2019 council. The application form is Schedule B to the *Protocol*. It requires particulars of the contravention and the lack thereof could result in a request for more information or refusal to take further action.

If you have more details about Councillor Cy's first conflict keeping in mind if there is a personal economic interest to be alleged perhaps there is sufficient evidence. Only the judge can determine on the facts if there is a direct or indirect pecuniary interest not the IC or legal counsel for the City.

The caveat of this approach to address the MCIA is the potential that the Integrity has no been appointed by council and/or is not independent in performing the functions under section 3.1 of the Protocol including the MCIA applications and requests for advice under MCIA.

In the decision of *Bejnar v Fennell*, 2011 ONMIC 2 Donald Cameron the Integrity Commissioner for the City of Brampton the City By Law defined the role of the IC as "being to assist members of Council in order to ensure that they are performing their functions in accordance with the Code and other legislation, procedures, rules and policies governing their ethical behavior. The IC Office is specifically prohibited from providing legal advice."

The Divisional Court in *Michael Di Biase v City of Vaughan, Integrity Commissioner of City of Vaughan*, 2016 ONSC 5620 reviews the statutory scheme governing the IC and in paragraph 13 states:

[13] *The Integrity Commissioner is a statutory office created under the Municipal Act which was amended effective January 1, 2007 to add a new Part V.1, entitled "Accountability and Transparency." Part V.1 of the Municipal Act authorizes municipal councils to establish codes of conduct for members of councils, and to appoint Integrity Commissioners. The Integrity Commissioner is responsible for investigating and reporting on complaints regarding alleged breaches of the Code of Conduct by city councillors. The Integrity Commissioner reports to municipal councils, and is responsible for "performing in an independent manner the functions assigned by the municipality" with respect to the application of codes of conduct for members of council.*

The City of Toronto describes the Integrity Commissioner as a "neutral independent officer who oversees the conduct of the elected and most appointed officials at the City of Toronto.

Article 3-1.2 of Chapter 3 the City of Toronto Municipal Code states that:

An accountability officer carries out in an independent manner the duties and responsibilities of their office and under 3.-1.7 the operations of the office are included in the scope of the annual attest audit of the City conducted by an external auditor as well as periodic review of the mandate of the accountability office.

In 3-1.9 "an accountability officer is independent of the City administration

Conclusion and recommendations on the MCIA issues:

1. Because of the limitation period and the weakness of the existing evidence the best approach to address this important issue which could impact the decision to buy would be to consider the conduct of Councillor Cyr at the April 16,2019 council meeting only.
- 2.To determine if Councillor Cyr breached section 5 of the MCIA an application should be made to the IC under Section 6.1 of the *Integrity Commissioner Protocol* within the limitation period under 6.5 namely within 6 weeks after you became aware of the alleged contravention.
3. You may wish to have an Elector make the application

MA

The Integrity Commissioner

Currently not having all of the documentation respecting the appointment of the Integrity Commissioner or having a corporate search on E4M Inc. there are a lot ow questions unanswered which put into question the independence of the current IC. According to a web search in October 27 ,2017 e4m solutions was representing that it was “expertise for Municipalities a Not for Profit the principals: Chris Wray, Peggy Young-Lovelace and Theresa Cassan. What? Integrity Commissioner, Closed meeting Investigator, Municipal Ombudsman. Minutes from the United Township of Head, Clara & Maria of July 24,2018 adopted the recommendations included in the report from Wishart Law Group and E4M as prepared by Peggy Young-Lovelace and Paul Cassan.

This information raises many questions including whether E4M is practicing law without being licensed to do so and whether Paul Cassan is part of E4M either as counsel or silent partner. It is disturbing and indicates that the independence of the IC is not possible if there is some kind of business relationship which there appears to be. More conclusive evidence should be sought. A corporation’s search through Service Ontario?

Base on this information it appears that the IC is not independent and cannot act in an independent manner required under Section 223.3 of the MA. If this is true then Paul Cassan cannot and should not be engaged under section 3.4 of the Protocol nor should any one in the Wishart law firm

Conclusion and recommendation on the IC are:

1. The IC if E4M Inc is not independent of legal counsel.
2. If E4M Inc remains IC the City should consider new legal counsel
3. Notwithstanding the apparent lack of independence, proceeding with the MCIA application with IC will demonstrate both the competency as well as the independence of the IC. Perhaps it will demonstrate whether the IC should be removed and a new IC appointed.

Real Estate Purchase and Sale

There are many questions arising out of the conduct of Councillor Pearce and the mayor relating to the negotiations and purchase of 151 Ontario Ave. Many of them arise not only from the unusual presale negotiations with a third party as well as the documentation related to the future sale to the vendor of a portion of the conveyed lands.

There is no doubt that under the MA section 9 that a municipality has “the capacity, rights, powers and privileges of a natural person for the purposes of exercising its authority under this or any other Act”. Also, it is clear under section 2 that municipalities “are created by the Province of Ontario to be responsible and accountable governments with respect to the matters within their jurisdiction”

Section 6 gives the municipality the power to purchase land and section 270 requires a municipality to adopt and maintain policies with respect to “sale and disposition of land”. That section also requires a municipality to adopt and maintain policies on “the manner in which the municipality will try to ensure that it is accountable to the public for its actions, and the manner in which the municipality will try to ensure that its actions are transparent to the public”. I have not seen or found these mandated policies but I would suggest that they are import most important when considering the conduct of the Councillors and should not be overlooked.

In addition to the conduct matters in your e mail it appears that the conduct was less than transparent. It is interesting to note that the first proposed agreement with Eastwood Mall Inc with the staff report was discussed in a closed council meeting as it could be but the minutes do not make the staff report a public document as it should have been when the closed session business was brought into the public and public question period followed. It is not clear from the minutes when the vote was taken. I raise this as a matter to be examined if there is a section 270 policy and if the action was in accordance with the policy on accountability and transparency.

Some of the conduct issues are covered by the Code of Conduct- e.g.s 11 Use of Municipal Property , Services and other Resources-preparation of the drawings and the interaction of Councillor Pearce with staff .There is no evidence of a contravention of section 13 of the Code now. A request for an Inquiry under section 5.1 of the *Integrity Commissioner Inquiry Protocol* if conducted by a duly appointed independent IC could provide the answers to many of the unknowns such as why did Councillor Pearce take such a pro active approach in the negotiations to purchase the land?

Other aspects of the conduct raise the question of whether the actions could be considered to be those of a responsible natural person especially the lack of due diligence and undue haste in completion of the sale. The purchase is not well documented or explained and I would suggest that that this may be an attempt to fudge the facts and avoid and allegations of bonusing under section 106(will discuss later).

Under section 273 of the MA an application can be made to the court to quash a municipal by law in whole or in part within **one year of the passing** . The application may be brought on a number of grounds of illegality including no statutory authority. **BUT, section 272 of the MA restricts the grounds , If a by law is passed in good faith under the Act unreasonableness or supposed unreasonableness cannot be a ground.** The person attacking the by law must prove the bad faith. Such an application is expensive, will take a considerable period of time and is staked in favour of the municipality because

courts are reluctant to overturn the decisions of elected municipal officials except in very clear situations of a wrong doing.

Bonusing

Section 106 of the MA provides that:

106. (1) *Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.*

(2) *Without limiting subsection (1), the municipality shall not grant assistance by,*
(a) *giving or lending any property of the municipality, including money;*
(b) *guaranteeing borrowing;*
(c) *leasing or selling any property of the municipality at below fair market value; or*
(d) *giving a total or partial exemption from any levy, charge or fee.*

The Courts have considered the application of this section in a few decisions namely: *085459 Ontario Ltd. v. Prince Edward County (Municipality)*, 2005 CanLII 28851 (ON SC), [2005] O.J. No. 3471 ("PEI") and *Friends of Lansdowne Inc. v. Ottawa (City)*, 2011 ONSC 4402 (CanLII); 2012 ONCA 273 (CanLII)

The Ontario Court of Appeal decision in *Friends of Lansdowne* is the leading decision. The decisions are fact driven. The Lansdowne decision involved a complex legal public private partnership between a consortium of developers and the City of Ottawa. The City by law advancing the redevelopment of Lansdowne Park was attacked by some ratepayers as being bonusing contrary to section 106 of the MA. The Court rejected the argument confirming that:

- The broad powers given to a municipality are restricted by s.106.
- Restrictions on a statutory power are generally construed narrowly to give effect to the purpose of the power conferred.
- The court must apply a contextual approach to the interpretation of the agreement in question.
- An isolated provision cannot be interpreted as a prohibited bonus if that interpretation is not available upon a reading of the agreement as a whole.
- Section 106 prohibits the granting of an "obvious advantage".

According to the Court in *Vincorp Financial Ltd. v The Corporation of the County of Oxford*,²¹⁴ ONSC 2580(CanLII) the court in *Friends of Lansdowne* applied the modern rule of statutory interpretation. "The modern rule of statutory interpretation requires that "the words of an Act ... be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": "Thus, the objective of the legislation informs the interpretation of its provisions. In this case, s. 2 provides that the purpose of the Act is to create municipalities as "responsible and accountable governments with respect to matters within their jurisdiction" and to give municipalities "powers and duties ... for the purpose of providing good government." To ensure municipalities can fulfill that purpose, the Act specifies in s. 8(1) that municipal powers are to be "interpreted broadly so as to confer broad authority ... to enable the municipality to govern its affairs as it considers appropriate and to enhance the municipality's ability to respond to municipal issues." Thus, the

province intends municipalities to have expansive powers to self-govern in relation to matters within their jurisdiction."The court found that only an " obviously undue advantage is prohibited" under the section.

The MA in the Accountability and Transparency part also includes section 223.13

223.13 (1) *Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Ombudsman who reports to council and whose function is to investigate in an independent manner any decision or recommendation made or act done or omitted in the course of the administration of the municipality, its local boards and such municipally-controlled corporations as the municipality may specify and affecting any person or body of persons in his, her or its personal capacity..*

And section 223.19 is a similar provision to provide for the appointment of an Auditor General

I am aware that the open meeting provisions can be investigated by the Ontario Ombudsman and at one time is the municipality did not appoint an ombudsman the Ontario Ombudsman would have jurisdiction but I am unsure of the current position. I have no information on the Auditor General but that might a useful person to assist if he was appointed by council.

Conclusions and recommendations on real estate purchase and bonusing are:

1. Request an an Inquiry by the IC under section 5.1 of the Protocol on the conduct of Councillor Pearce and the mayor on actions relating to the negotiations and Agreement of purchase and sale specifically conduct under section 11 and section 13
2. Check the status of the ombudsman and if one has not been appointed see if the Ontario Ombudsman would investigate.
3. A court application is not recommended because of the cost and lack of certainty of success. The downside of costs cannot be ignored i. e. if fail pay the City or councillors cost award in addition to paying your own lawyers bill.
4. Explore the status of an Auditor General

Concluding Opinion

The facts support the following courses of action:

- An Inquiry in to the conduct of Councillor Pearce and the mayor relating to their dealings with Tony Guidoccio and his company 2205730 Ontario Limited re 151 Ontario Ave.
- An Inquiry into alleged contraventions of the MClA by Councillor Cyr who declared a conflict on December 19, but failed to declare a conflict at the subsequent council meetings (March 6 and April 16, 2019) re 151 Ontario Ave

- The request of an investigation by the Ombudsman Ontario into whether the City has complied with the MA in closing meeting to the public relating to 151 Ontario Ave (March 6, 2019 meeting).
- A request to council to Appoint an Auditor General under section 223.19 of the MA to assist council in holding itself accountable for the quality of stewardship over public funds. If there is none appointed this is an opportunity to be responsible and accountable going forward. The Auditor General shall perform in an independent manner the duties that may be assigned to him by council and this could include a report on the financing of the 151 Ontario Ave transactions.

The first two processes are commenced by application prescribed under the *Integrity Commissioner Inquiry Protocol* . So there is a guarantee of fairness and because the CAO recommended a 2 IC system Tony Fleming being the back up and truly independent it is suggested that the applications be made as soon as possible and that the request be made that they be considered only by Tony Fleming but not E4M Inc.

I would not recommend a court application but if the CAO / City refuse to voluntarily seek the services of Tony Fleming or another independent person to consider the applications a court application may be necessary require the Corporation to comply with the legislation.

There is no doubt in my mind that the actions on the real estate transaction are not normal. The mayor told you that the owner early in 2019 that Nazarian had found out that the City was trying to purchase through a agent and the the deal was dead but on April 11 the property was sold apparently to the same agent? This makes no sense neither does the similarity of the final transaction to Councillor Pearce's verbal opinion and notes of February 19,2019. The CAO's April report fails to address the proposed use of the property by the City. I really fail to understand the sentence in the report under Background "The City, in some capacity or another, has demonstrate various interests in the property, but none of them require the entire 13 acres"

I trust this is helpful and please contact me for any additional information or discussion .

Yours Truly,



Virginia MacLean Q. C.,L.S. M.

End Notes

1. On the bonusing issue if an application was brought similar to that in Landsdowne the City although not as open and transparent as the Landsdowne dealings would like argue that the City unlike any other municipality has unique economic needs and has to take extraordinary steps to attract business development.

2. The Lawyer is producing documents for the City which are property of the City and the public not Wishart Law LLP. The lawyer claims some licence right to public documents. This is clearly wrong those documents belong to the City and were prepared for the City and I am sure the lawyer has been well paid for so doing. In my opinion the the first 2 pages of the Protocol, Code and Council Staff Relations policy should be removed and replaced with no reference to Wishart Law LLP as should any and all City documents that may be so identified.



PRIVILEGED & CONFIDENTIAL

DATE August 20, 2019 **MEMORANDUM**
TO Peggy Young-Lovelace, Expertise for Municipalities
FROM Raivo Uukkivi
RE Allegation that E4M as integrity commissioner is not independent

You have asked us to consider the conclusion contained in the correspondence from Virginia MacLean dated May 9, 2019¹ that Expertise for Municipalities (E4M), as integrity commissioner for the City of Elliot Lake (City), is not independent from legal counsel for the City, being Paul Cassan and the Wishart Law Firm (Wishart) and therefore not independent as required by section 223.3 of the *Municipal Act, 2001*. You have also asked us to consider how, if at all, E4M lost its independence.

Conclusion

We are of the opinion that there is no support provided for the allegation that E4M has lost its independence. The conclusions reached by Ms. MacLean in her letter/opinion lack meaningful legal, rational or factual support for an allegation of what is loosely described as a lack of independence. In our opinion, the “questions” posed by Ms. MacLean are mere conjecture.

In our opinion, the correct legal analysis requires that there exists a reasonable apprehension of bias. If bias is shown, the jurisdiction to continue as the integrity commissioner is lost. In our opinion, there is no reasonable apprehension of bias.

The purpose of the integrity commissioner’s investigation is to deliver independent findings to the municipality in circumstances dictated by section 223.3 of the *Municipal Act, 2001*.

While the process requires an investigation to be conducted in an independent manner, it also provides for a process to be established within the spectrum of the duty of fairness that balances the right of the person subject of an investigation against the rights of the municipality and members of the public. The established decision-making structure is designed to create a separation between individual members of council and the integrity commissioner. For instance, section 223.3(5) contemplates the use of a municipal employee with the result that there will

¹ A copy of the correspondence is attached to this memorandum. This letter was obtained by E4M during the course of an integrity commissioner’s investigation into whether Councillor Patrie contravened the *Municipal Conflict of Interest Act*. It was provided voluntarily by Councillor Patrie. By doing so, privilege over the communication was waived and E4M must respond to the allegations it contains.

never be absolute independence but is intended to allow for process efficiency. This reduces the risk of political interference in the investigation and inquiry process.

The process also permits the use of municipal resources such as the City's lawyer and other municipal staff where the integrity commissioner deems doing so is appropriate. In adopting the City's integrity commissioner's protocol, the City approved the integrity commissioner's use of the City's lawyer for legal advice and approved the use of Wishart as the lawyer for the integrity commissioner.

While the City's lawyer may have his or her own professional obligations, that is not a matter that has an impact on the independence of the integrity commissioner.

Ultimately, the final decision on whether there has been a breach of a code of conduct rests with municipal councillors, so the process remains political. The decision on whether there exists a breach of the *Municipal Conflict of Interest Act* (MCIA) rests with the courts, so the individual continues to be entitled to make full answer and defence before the courts. This balancing demonstrates the reasonable expectations of the parties in the nature of the process and the fairness they will be entitled to. The City will conduct the investigation, but that investigation only results in a report, not a final decision.

Put at its highest, Ms. MacLean alleges that Mr. Paul Cassan of Wishart or Theresa Cassan have a direct or indirect financial interest in E4M, with the result that E4M's retainer of Wishart during the investigation jeopardizes independence. The existence of a financial ownership interest in E4M by any member of the Cassan family is demonstrably false. Even if such an ownership interest did exist, it does not follow that the independence of the investigation, or the integrity commissioner's independence, is compromised. The remaining matters raised by Ms. MacLean are irrelevant to the question of independence and will not be addressed.

We are of the opinion that there is no reasonable apprehension of bias that arises from the facts as set out below or in Ms. MacLean's correspondence. The established statutory scheme permits the process that has been followed and no concerns arise at common law. On this basis, we are of the opinion that there are no grounds to remove E4M as the integrity commissioner for the City based on the concerns raised by Ms. MacLean in her correspondence. We are aware of no other circumstance that would change this conclusion.

Facts, assumptions, and documents considered

We have, for the purposes of this opinion, considered the facts and have made the assumptions set out in the list below. If any of the facts or assumptions are incorrect, it could affect the conclusions reached in this memorandum of legal opinion.

1. E4M is a not-for-profit company registered in accordance with the *Corporations Act*, R.S.O. 1990, c. C.38.
2. No one working with E4M gets compensated in any way based on E4M's performance as a company.

3. Members of E4M's Board of Directors do not receive an income, benefits or any compensation from E4M. To the extent E4M requires the assistance of professionals to run its business, it hires those professionals based on an agreed upon hourly rate, just like any other corporation.
4. All fees paid to E4M, that are not required to pay professional consultant fees, are retained in E4M to promote excellence in the municipal sector. This includes providing training, reference aids, and materials to municipal councils free of charge and facilitating training and guest speakers like the Peter Kenyon² tour that E4M sponsored for municipalities in Northern Ontario.
5. Consultants working with E4M are paid hourly rates for the work they do. There is no other compensation for E4M consultants.
6. E4M does not practice law. It relies on advice received from law firms for that advice.
7. In response to the statement contained in Ms. MacLean's correspondence, you have confirmed that neither Mr. Cassan nor Ms. Cassan have an ownership stake or other secret or silent interest in E4M. You have further confirmed that no member of the Cassan family stands to make a profit based on the performance of E4M.
8. The City appointed E4M as integrity commissioner under the *Municipal Act, 2001* pursuant to a council resolution adopted by City Council in accordance with the *Municipal Act, 2001*, which was confirmed by a confirmatory municipal by-law in the ordinary course and in accordance with customary practice.
9. The City Council appointment authorized the work to proceed in accordance with a written proposal for the integrity commissioner work.
10. Pursuant to the City Council appointment agreement, Wishart and Mr. Cassan were appointed as the lawyers that could be retained by E4M to provide the integrity commissioner with legal advice. The proposal accepted by City Council discloses the strategic alliance E4M has with Wishart in providing legal services to E4M.
11. Wishart also acts for the City, but it does not act for any individual councillors.
12. City Council adopted an integrity commissioner Protocol that specifically permits the integrity commissioner to access the services of the municipal solicitor. In this case Wishart is one of the City's Solicitors.
13. The City appointed the law firm of Cunningham Swan as a second integrity commissioner. Cunningham Swan is subject to the same integrity commissioner protocol as E4M, namely the right to access the services of Wishart for advice during the investigation.

² Mr. Peter Kenyon is the founder and current Director of Bank of I.D.E.A.S.

14. A cursory review of the relationship between E4M and Wishart, or any member of the Cassan family, demonstrates that there is no personal or financial interest that exists in which Wishart or any member of the Cassan family could profit from E4M's performance.
15. The only fees paid are for professional services rendered in the course of a professional retainer by licensed practitioners. Specifically, while E4M often retains Wishart as its legal counsel, it pays a negotiated rate for those services that is competitive with the market.
16. Theresa Cassan, who is a Chartered Professional Accountant, provided assistance as a temporary municipal treasurer recommended by E4M and also provided training for municipal staff on behalf of E4M in the past, including for the City. She was paid for the professional services rendered. This work was strictly limited to Ms. Cassan's financial expertise. She has not done any work as an integrity commissioner for E4M.
17. The City's integrity commissioner received an inquiry from a member of the City Council about whether the two members of City Council had a conflict of interest.
18. The matter in question involved a land purchase transaction under consideration by the City. The municipal address for the land in question is 151 Ontario Avenue in the City. This is the site of the former mall site where a catastrophic collapse occurred.
19. At the time of the collapse, Ms. MacLean was the City solicitor. She subsequently played a role in the inquiry that followed as a result of her opinions being publically disclosed during the Elliot Lake Inquiry.
20. A cursory review of Part 1 of the Elliot Lake Inquiry shows that the nature of Ms. MacLean's advice was regarding the nature of the rights and obligations the City had with respect to signing leases and with the state of disrepair of the now demolished building, all with respect to the 151 Ontario Avenue property.³
21. The purchase of 151 Ontario Avenue first came to City Council on December 19, 2018. Council refused to purchase the property at the then offered terms.
22. On March 6, 2019, another special meeting of City Council was called for the purpose of considering the potential acquisition of the 151 Ontario Avenue site, this time based on a deal structure that was different than the deal considered by City Council in December 2018.

³ It is unclear whether this retainer relates to the current matters surrounding the City's purchase of the property. While nothing turns on this fact for the purposes of this memorandum, it does raise a question regarding whether Ms. MacLean should have accepted the retainer from Mr. Patrie given her former representation of the City on the same property and, if the matters are sufficiently connected, whether appropriate waivers were obtained from the City.

23. In a recorded vote, City Council approved the purchase of property by a vote of 4 to 1 at the March 6 meeting. Councillor Patrie was on vacation. At some point after this meeting, the closed session minutes were provided to Ms. MacLean.
24. There is no evidence that City Council approval was provided to release the minutes to Ms. MacLean, and we assume for the purposes of this memorandum that no such approval existed. There is also no evidence that City Council agreed to Ms. MacLean acting against the City in circumstances surrounding the 151 Ontario Avenue property.
25. On March 13, 2019, Councillor Patrie wrote an email in which he made numerous allegations of misconduct and breaches of law against two members of City Council, including:
 - a. Breach of the *Municipal Conflict of Interest Act* (MCIA);
 - b. Breach of the City's Code of Conduct;
 - c. Breach of the *Municipal Act, 2001*;
 - d. Breach of the City's procedural by-law; and
 - e. Breach of the *Real Estate and Business Brokerage Act* (REBBA);
26. Before providing advice to the member, the integrity commissioner asked the City's lawyer, Wishart, to provide the integrity commissioner with a legal opinion on the matter. The municipality's legal counsel opined that the member was not in conflict and provided an analysis of the MCIA to the integrity commissioner to support the opinion. The integrity commissioner used the opinion to give advice to the member.
27. On March 19, 2019, Wishart provided an opinion to the City of Elliott Lake regarding some of the matters raised in Councillor Patrie's email.
28. On April 15, 2019, a notice of special closed meeting of City Council was given for a meeting to occur on April 16. The purpose of the meeting was to consider the purchase of 151 Ontario Avenue.
29. On April 16, 2019, City Council passed a bylaw authorizing execution of an agreement dated April 16, 2019 to purchase 151 Ontario Avenue from 220730 Ontario Inc. The decision to purchase was made in open Council.
30. Councillor Patrie was present for the meeting that approved the acquisition of 151 Ontario Avenue. He voted against the purchase.
31. At some point, the legal opinion of Wishart was disclosed to Ms. MacLean, who prepared a response dated May 9, 2019.

32. In preparing her correspondence and legal opinion, Ms. MacLean makes a number of important statements and expresses a number of facts, assumptions and questions that are relevant to the questions you have asked us to consider. These include:
- a. Confirms no corporate search was conducted on E4M, but acknowledges this could be done;
 - b. An assumption based on a web search that there is a relationship between Mr. Cassan and E4M, presumably one that is other than a lawyer-client relationship;
 - c. Without any identified support, questions whether Mr. Cassan is a silent partner of E4M;
 - d. Questions whether or not the City has policies with respect to the sale and disposition of land;⁴
 - e. Assumes without analysis that section 270 of the *Municipal Act* applies to the purchase of lands;
 - f. Acknowledges there is **no evidence** of a contravention of section 13 of the City's code of conduct, but speculates that a nefarious intent exists because two members of Council took a proactive role to bring about the City's purchase of 151 Ontario Avenue and that is a reasonable basis to request an inquiry (third last paragraph of her letter on page 10);
 - g. She assumes that pre-sale negotiations with respect to the purchase of land are unusual, an assumption that is not supported by any analysis as to why negotiations with a vendor are unusual;
 - h. She assumes there has been a lack of due diligence and assumes there has been an attempt to "fudge the facts" and "avoid and [sic] allegations of bonus under section 106 (will discuss later)", an analysis that does not appear in her letter and no explanation is given as to why it is appropriate to allege facts may have been "fudged".
33. Councillor Patrie voluntarily disclosed Ms. MacLean's legal opinion to you as part of E4M's integrity commissioner investigation. In that legal opinion, Ms. MacLean makes the following findings:
- a. Wishart's opinion on the question of reconsideration is correct;
 - b. There has been a breach of the REBBA (no analysis provided);

⁴ A cursory review of the City website shows that the City does have such a policy.

- c. The mayor has no right to negotiate under the *Municipal Act* (no analysis provided);
 - d. Superficial overview about the MCIA with a recommendation that a complaint be filed with the integrity commissioner regarding the conduct of Councillor Cyr;
 - e. Concludes that the integrity commissioner is not independent due to an unclear alleged relationship with Wishart and Mr. Cassan;
 - f. Concludes that the integrity commissioner should be replaced, and that Mr. Cassan should discontinue acting for the City with no analysis provided as to why Wishart must discontinue acting for the City;
 - g. If E4M remains as the integrity commissioner, the City should consider new legal counsel;
 - h. Notwithstanding the above conclusions, an application under the MCIA will apparently demonstrate whether or not the integrity commissioner is independent;
 - i. Concludes that the confidential staff report should have been made public when there was public discussion about the purchase in open Council;
 - j. An integrity commissioner investigation is recommended because the Mayor and Councillor Pearce assisted in negotiating a deal brought to the City for approval.
34. Relevant documents publicly available:
- a. By-law 23, being a by-law for the sale of real property owned by the City;
 - b. Accountability and Transparency Policy passed under section 270 of the *Municipal Act*;

Analysis

In this opinion, we will consider what it means to lose “independence” and we will consider whether the integrity commissioner has lost that independence. The other issues and concerns raised by Ms. MacLean will only be considered to the extent they are relevant to the question of independence.⁵

What is “independence” and what does it mean to lose independence

⁵ To the extent matters raised by Ms. MacLean are not addressed in this opinion, it should not be taken as an indication that we agree with the analysis and conclusions of Ms. MacLean. Instead, matters that are not addressed are either directly related to the content and outcome of the integrity commissioner’s investigation that will be subject to that process, or alternatively, they are matters that have no impact on any legal relationship that needs to be addressed.

Understanding the legal concept of “independence” is critical to an accurate analysis of the allegations that have been made by Councillor Patrie, through his lawyer’s opinion. It is impossible to reach a conclusion of whether someone has lost “independence” without defining what it means to be independent, and how that independence can be lost.

In administrative law, loss of independence occurs where there is a reasonable apprehension of bias.⁶ The strict application of this rule is relaxed in the administrative law context, especially where the decision maker is not operating as a tribunal.⁷

Bias is a serious allegation and should not be taken lightly or based on conjecture, speculation or mere impression.⁸ We pause here to highlight our opinion that there is no evidence of bias in the opinion provided by Ms. MacLean beyond conjecture, speculation or mere impression. This fact alone could be relied upon to eliminate the concerns raised with the process.

The statements made make it clear that there are few, if any, facts to support the serious allegation of bias contained in the correspondence.

How does bias arise

The duty of fairness as a concept, and in this case the apprehension of bias, fall on a spectrum. The functions of the decision maker, as laid out in the enabling statute, determines the procedural protections that are intended.⁹ The closer a matter is to the executive branch of government and the less a decision maker operates as a quasi judicial tribunal, the fewer protections that will be available in the process.

The duty of fairness is fact specific with content decided in the specific circumstances of each case.¹⁰ It requires an examination of all relevant and applicable factors to determine how the decision-making regime has been established. If it is based on statutory powers, such as the case here, that statutory regime is fundamental to the fairness that can be expected in the decision-making process.

In this regard, the following matters are important to the decision-making process. The integrity commissioner finds its authority in section 223.3 and 223.4.1 of the *Municipal Act, 2001*. The important elements to the statutory regime applicable to the integrity commissioner are:

⁶ This is an oft cited principle – see for instance *Valente v The Queen* [1978] 1SCR 369 at 394 where it is said that the test for independence is one of a “reasonable apprehension of bias”.

⁷ While *Valente, ibid*, is applied in the judicial context, it has been applied with greater flexibility in the administrative law context. See for example: *Canadian Pacific Ltd. v Matsqui Indian Band* [1995] 1 SCR 3 at para 75 to 80.

⁸ *Arrachch v. Canada (Minister of Citizenship & Immigration)* (2006), 2006 CarswellNat 4693 (F.C.) at para 20.

⁹ *Bell v Canadian Telephone Employees Association* 2003 SCC 36 at para 22. While this decision applies to tribunals, it is equally applicable to a decision maker conducting an investigation.

¹⁰ *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), [1999] 2 SCR 817 (SCC) (“Baker”) at paragraph 21.

- (1) There is no final decision-making function in the integrity commissioner.
 - a. A report is made to Council in code of conduct investigations and Council makes the final decision on the imposition of a penalty and acceptance of the report; and
 - b. An integrity commissioner can commence a court application where a determination is made that the MCI A has been violated. In other words, the only decision made is whether to commence a court application.
- (2) The potential penalties:
 - a. in the case of a code of conduct investigation are not particularly serious: a reprimand or a maximum of 90 days loss of pay;
 - b. under an MCI A investigation, while is serious, namely a removal from office and the inability to run in the following election, are significantly mitigated because an application must be made to a judge where full procedural court protections are available to a councillor that must respond to that application.
- (3) The integrity commissioner can delegate tasks to others, so long as it is not to a Councillor (s.223.3(3))
- (4) The municipal council establishes the rules and regulations applicable to integrity commissioner investigation.
- (5) The integrity commissioner is not *required* to be a municipal employee, but by extension, can be a municipal employee (s.223.3(5));
- (6) The statutory role is to perform the role of integrity commissioner in an independent manner;

The result is that the procedural protections that are to be expected and that underly a duty of fairness owed to the person investigated by an integrity commissioner are not the same as can and should be expected from a judicial proceeding. This does not mean that there is no duty of fairness or that the job is not independent. Rather, it means that the fairness expected from the process is reduced because the integrity commissioner's role is by statute only the beginning of the process.

What is bias

Bias can arise from the decision maker's relationship to those involved in the decision-making process, or it can arise from the structure of the decision-making process. Where a reasonable apprehension of bias exists, the decision must be set aside because there has been a breach of the duty of fairness. This is not to say that the decision itself is right or wrong, but rather the process used to arrive at the decision cannot stand because it is said to be, legally speaking, unfair. The decision maker loses jurisdiction because of process.

The test for bias in administrative proceedings is well known and oft cited. An apprehension of bias:

... must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude."¹¹

Bias is treated seriously and requires a fact-based analysis because, if it were otherwise, a party could use speculation, conjecture, and ungrounded fact to derail a decision maker's authority. If groundless attacks were permitted, spurious allegations could be used to tactically attack an integrity commissioner.

Categories of Bias

While our opinion is that the content of Ms. MacLean's correspondence does not contain facts sufficient to establish a reasonable apprehension of bias, the following analysis is provided for completeness.

There are generally five recognized categories of bias:

- (1) financial interests;
- (2) personal relationships;
- (3) outside knowledge of, or a previous involvement with, the matter in dispute;
- (4) inappropriate comments or behaviour; and
- (5) institutional bias.

In the context of the correspondence as framed by Ms. MacLean, it is possible to argue that the correspondence is attempting to raise bias in categories 1, 2, and 5. Numbers 3 and 4 will not be considered as they have not been directly or indirectly raised.

Financial Interests

¹¹ Baker at paragraph 46 to name one of several hundred cases on the subject.

Financial interest means a financial interest in the *outcome* of the decision or matter being decided.¹² There is no allegation that there is such an interest in the outcome, and E4M's structure does not provide for profits based on an outcome or result.

The only money changing hands is the City's payment for the service of E4M, the City's payment of Wishart for legal services rendered, and E4M's payment of Wishart for legal services provided from time to time. We note that in municipalities with internal legal departments, legal advice to integrity commissioners is often provided by municipal in-house lawyers paid for by the municipality. For instance, this occurs in the City of Toronto.

In this case, we are dealing with a municipality that has no internal legal department. It is reasonable in these circumstances to use the City solicitor to provide these services in a manner consistent with municipalities with internal legal departments. This is the approach that was authorized in the Integrity Commissioner's Protocol adopted by the City.

In our opinion, this is not the kind of financial interest that is caught by this branch of the bias test as the City solicitor has no financial interest in the outcome. We do not understand Ms. MacLean to be alleging that this financial exchange gives rise to a bias, but we have provided the commentary above for completeness.

It is also possible that Ms. MacLean is suggesting that the financial interest is triggered by the speculation that Mr. Cassan or Theresa Cassan have a financial stake in E4M, perhaps as a shareholder, silent partner, or otherwise (the basis of this speculation is unclear).

E4M is a not-for-profit company, so shareholders do not have a financial gain in the performance of the corporation. While we understand that no member of the Cassan family is a shareholder in E4M (obviating the need for further analysis), even if they were there would be no financial interest in the outcome of the decision to be made in the outcome of the integrity commissioner's decision, both because the integrity commissioner does not have an interest in the outcome, and no shareholder of a not-for-profit corporation stands to make a profit.

Personal Relationships

A legally inappropriate personal relationship is one between the decision maker and someone who has a direct interest in the *outcome* (or a lawyer acting for a person, or key witness, with a direct interest in the *outcome*).¹³ Despite the ambiguousness in the nature of the alleged relationship that causes a concern in Ms. McLean's correspondence, there is no direct allegation made that E4M or Mr. Cassan has a legally impermissible relationship with someone that has a direct interest in the *outcome* of the decision.

Ms. MacLean speculates that Mr. Cassan or Theresa Cassan have some kind of inappropriate relationship arising from a "financial" interest in a not-for-profit company (dismissed above). We give no weight to this concern as it is not based in fact and is easily dismissed.

¹² *Moskalyk-Walker v. College of Pharmacy (Ontario)* (1975), 58 D.L.R. (3d) 665 (Ont. Div. Ct.)

¹³ *Ghirardosi v. British Columbia (Minister of Highways)* (1966), [1966] S.C.R. 367 (S.C.C)

The other matter raised is the fact that Wishart and Mr. Cassan also are retained as the City Solicitor. The question arises whether this gives rise to a personal relationship with someone that has a direct interest in the outcome of the decision.

This concern is disposed of by considering both the applicable statutory regime as well as the municipality's role as an organization as noted above.

This statutory regime demonstrates that the municipality, as a corporation, has a role in the decision-making process regarding code of conduct matters. It does not force the municipality to distance itself from the decision-making process. The municipality's obligation is to make available a municipal employee or other individual who can carry out an investigation in an independent manner.

It is then the municipality, through a decision made by its elected Council, that determines the result of a code of conduct investigation. In the case of a conflict of interest application, if the integrity commissioner concludes there exists a conflict of interest, a court application is commenced and the respondent in that application has the opportunity to make a full answer and defence to an allegation of a breach of the MCI.A.

The rational conclusion from a review of this regime is that the process is not intended to be a watertight independent decision-making process. Instead, the statute establishes a process to provide a separation between the integrity commissioner and the individual subject to the investigation. The integrity commissioner functions independently from Council, but the integrity commissioner can delegate duties and ask for assistance from appropriate personnel so long as the delegation is not to a municipal councillor.¹⁴

In our opinion, the overall statutory objective suggests an attempt to balance the independence of the process with a recognition that the investigation is the first step in the analysis. It is one that permits the use of municipal staff and municipal resources in the process of the investigation. Cost efficiency is one of the items acknowledged by Ms. MacLean where she discourages her client's use of private applications to the courts, while encouraging the use of municipal resources to carry out the inquiry as the approach is more cost effective. This is the reality of investigations that have every possibility of being politicized, or used for political gain.

As noted, Council establishes the terms and limitations on the integrity commissioner's appointment. These limitations will be subject to reasonableness. The fact is that the possible consequences of a negative outcome are relatively limited. As noted, a maximum of a reprimand or up to 90 days suspension of remuneration exists in the case of a code of conduct violation; or, a decision can be made to commence a court application to a judge.

Accordingly, we are of the opinion that, it is more likely than not there is no issue with the integrity commissioner turning to, or relying upon analysis from, the City's lawyer, especially since the integrity commissioner can delegate functions to people other than a councillor. We are also of the opinion that the City is within its rights to establish terms of reference for an

¹⁴ *Municipal Act*, section 223.3(3).

integrity commissioner that permits an investigation that uses the lawyer for the City for legal advice during the course of that investigation.

This is a practical result in light of the fact that the City can use its staff to conduct the investigation and it has the right under the statute to establish the process that can be followed in the conduct of the investigation. This is not to say that these rights are absolute, but we do not think that the use of municipal resources, including the City's legal counsel,¹⁵ would lead a reasonable and right-minded person, applying themselves to the question and obtaining the required information to conclude that bias exists in the integrity commissioner.

Institutional bias

Cases of institutional bias occur where a reasonable apprehension of bias is generated by the structure or operation of the decision-making process. It is not something that is caused by the words or actions of an individual decision-maker. Here, Ms. MacLean has not made this direct link or allegation. We are taking this opportunity to explain why this does not apply.

The test for institutional bias is whether a well-informed person, viewing the matter realistically and practically, and having thought the matter through, would have a reasonable apprehension of bias in a substantial number of cases.¹⁶ The facts of a specific case are not typically important. Rather, the question turns on whether the legislature has expressly or impliedly authorized a decision-making scheme that gives rise to this type of apprehension of bias.¹⁷

Here, we have a situation where the statute has specifically authorized the use of municipal employees to act as an integrity commissioner, and most importantly, only prohibits the use of municipal councillors as delegates of the integrity commissioner. The fact that the *Municipal Act, 2001* only prohibits the appointment of municipal councillors demonstrates the flexibility that is available to Council in establishing the process, including a process that provides for independence, together with reasonable flexibility in the choice of process. As a result, the appointment of an integrity commissioner that is permitted to use the same lawyer or law firm used by the municipality should not pose any special or extraordinary concerns beyond those that exist through the use of any municipal employee that would report to the municipality through its counsel.

Ultimately, the conclusions contained in Ms. McLean's correspondence are not supported by fact. While we need not finally conclude on the motives behind the release of Ms. MacLean's opinion to E4M, we are of the opinion that the matters raised by Ms. MacLean do not rise to the

¹⁵ As noted above, legal counsel may have their own duties through their various statutes, but a legal conflict with clients has nothing to do with independence of the integrity commissioner. Conflicts are generally, matters for clients (or former clients) to choose to enforce and are private matters.

¹⁶ *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)* (1996), [1996] 3 S.C.R. 919 (S.C.C.).

¹⁷ *Gahir v. Alberta (Workers' Compensation Board Appeals Commission)* (2009), 82 Admin. L.R. (4th) 172 (Alta. C.A.)

level necessary to support an allegation of a reasonable apprehension of bias sufficient to result in a loss of E4M's jurisdiction as integrity commissioner for the City.

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Attachment