

INVESTIGATION REPORT

FOR THE CITY OF ELLIOT LAKE

OVERVIEW REPORT

CODE OF CONDUCT & CONFLICT OF INTEREST

COMPLAINTS BETWEEN MARCH 5 & MAY 14, 2019



Office of the Integrity Commissioner

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Preamble

- [1] Expertise for Municipalities (E4m) was created by professionals with lengthy municipal experience and a strong desire to give back to the municipal sector and empower municipalities in Northern Ontario to achieve excellence.
- [2] With respect to the Corporation of the City of Elliot Lake (the “City”), we tried very hard to encourage the Council of Elliot Lake (“Council”) to act as community leaders. Accordingly, we gave guidance to Council on their role, the significant regime changes that *Bill 68* amendments to the *Municipal Act, 2001* (the “*Municipal Act*”) and the *Municipal Conflict of Interest Act (MCOIA)* caused and the potential financial impact on the City should Council choose to act outside of these rules.
- [3] We pause at the outset to give Chief Administrative Officer Dan Gagnon great credit for working hard to ensure that members of Council were given training in an effort to ensure compliance with the new regime that came into force on March 1, 2019, and his effort to advise members of Council to act in a transparent and accountable manner.
- [4] In an effort to assist the municipal sector, E4m offered subsidized candidate training before the election, Council Orientation (including specific training about roles and responsibilities) after the election, training on the Code of Conduct, the *MCOIA*, the Role of the Integrity Commissioner and the Staff Council Relations policy. We facilitated this training using experienced municipal, legal, financial and administrative experts. Further, E4m advised on an Integrity Commissioner Inquiry protocol [that was developed in cooperation with over seventy (70) municipalities] and was adopted by City Council. In our training, we gave specific examples of the process and cost of inquiries and provided advice to set up reserve accounts to fund inquiries if those were ever needed. It was E4m’s hope, in the circumstances, that members of Council would heed our advice about the potential costs to their municipality and be overly cautious with their conduct while at the same time establishing a reserve fund for emergencies. We are saddened, however, to say that our training and admonitions appear to have been unsuccessful in this case.
- [5] In addition to the above, we also brought Peter Kenyon (a world-renowned community development expert) from Bank of Ideas in Australia (<https://bankofideas.com.au/>) to Elliot Lake (at no cost to the taxpayers) to provide wisdom and inspiration for Council to work as a team and develop vision for the leadership and sustainability of Elliot Lake into the future. Councillors and staff from many Ontario municipalities near and far attended in Elliot Lake for this opportunity. Unfortunately, representatives of the Elliot Lake Council did not attend this session apart from the CAO and Mayor welcoming Mr. Kenyon and then leaving for an important meeting with the Minister dealing with financing of the planned Community Hub that will be further discussed below.

- [6] We emphasized our opinion that the new regime would substantially increase investigations and litigation and that we did not want any of our municipalities to make laws under the new rules.
- [7] Sadly, this information and these opportunities do not seem to have taken root and now Elliot Lake taxpayers have to bear the cost of the largest number of complaints and investigations that we have seen from any of the fifty-four (54) municipalities that we act for as IC since March 1, 2019:
- seven (7) Complainants;
 - twenty-three (23) complaints;
 - one hundred two (102) alleged breaches of the Code of Conduct or *Municipal Conflict of Interest Act* requiring inquiries.
- [8] We do find it interesting that Council was concerned that the complaints before E4m, acting as IC, were not actioned with the alacrity they wished. Of specific concern, is that Council [as a whole and Members individually] should not have been aware of the allegations made to the Integrity Commissioner (the "IC"), [except for those they made themselves] as they are statutorily confidential. E4m has advised all Complainants that their evidence must remain confidential during the investigation.
- [9] The *Municipal Act* requires inquiries into alleged contraventions of the *MCOIA* to be completed within one hundred and eighty days (180) of the application. All inquiries in this case were completed within the statutory timeline. The *Municipal Act* does not set a statutory timeline for inquiries into Code of Conduct breaches and no timeline was suggested or adopted by Council. Nevertheless, all inquiries in this case were completed within one-hundred and eighty days (180) days of the complaint.
- [10] We are very pleased that some Councillors did take advantage of the new advisory capability of the IC and sought advice with respect to their roles under these regimes. We are disappointed that many of the complaints we have investigated have been substantiated. The City will be the applicant in what appears will be the first two *Bill 68* court proceedings under the *MCOIA* against Councillors Patrie and Pearce.
- [11] Our efforts to educate Council and avoid these problems seem to have failed.

Inquiry Process

- [12] The authority of an IC to receive applications for and conduct inquiries comes from the *Municipal Act* [section 223.4]. More specifically, the *Municipal Act*, as amended by *Bill 68*, statutorily requires municipalities to adopt a Code of Conduct and a Staff Council Relations Policy and appoint an IC. Legislative amendments [*Bill 68*] also gave the IC

the authority to conduct an inquiry into allegations that a member of council or a local board [definition of local board is broad but does have some limitations - this will be discussed later as applicable] has contravened sections 5, 5.1 and/or 5.2 the *MCOIA*. Importantly, an individual requesting the IC conduct an inquiry into an alleged breach of the *MCOIA* must provide a statutory declaration that they became aware of the breach within the prior six (6) weeks. Additionally, the breach had to have occurred within the past six (6) years.

- [13] On February 11, 2019, the City appointed E4m as one of two (2) IC's.
- [14] On February 15, 2019, the City adopted a new Code of Conduct, a Staff Council Relations Policy and an Integrity Commissioner Inquiry Protocol.
- [15] An Integrity Commissioner Protocol is not a legislated requirement but is a good practice. This protocol advises the IC of the expectations of the role, the process for accepting a request for inquiry and the process for conducting an inquiry.
- [16] Between March 5, 2019, and May 14, 2019, E4m received requests for inquiries from seven (7) Complainants [with the exception of one (1)], all other complaints were received before the end of March 2019]. The Complainants were Mayor Dan Marchisella, Councillor Chris Patrie, one (1) Councillor who wished to remain anonymous, Ms. Tammy Van Roon, Mr. Rick Hamilton and two (2) members of the public wishing to remain anonymous. An IC must respect the request of an individual to remain anonymous unless there is/are valid reason(s) to release the individuals' names.
- [17] From these Complainants, there were a total of one hundred and two (102) alleged breaches involving six (6) members of Council, Mayor Dan Marchisella, Councillor Luke Cyr, Councillor Sandy Finamore, Councillor Norman Mann, Councillor Ed Pearce, Councillor Chris Patrie and two (2) members of a local board Ms. Tammy Van Roon and Mr. Mike Thomas. The complaints alleged ninety-five (95) breaches of the Code of Conduct and seven (7) breaches of the *MCOIA*. Of the one hundred and two (102) allegations, seventy one percent (71%) of them were made by a member of Council.
- [18] As per the Integrity Commissioner Protocol, each complaint was the subject of a preliminary review.

Preliminary Review

- [19] For the purposes of this inquiry, a preliminary review was conducted by Peggy Young-Lovelace, an investigator with significant experience in municipal operations and governance. The result of the review is that many of the allegations required a fulsome investigation.

[20] The key purpose of the preliminary review is to:

- a. Identify requests that have been improperly filed or do not contain sufficient information to determine if there are adequate grounds to hold an inquiry on the matter;
- b. Invite the individual requesting the inquiry to properly file and/or provide the required information;
- c. Crystalize the facts of the complaint (interview the complainant & review all documentation provided by the Complainant);
- d. Prepare a transcript of the interview, review the content and synthesize the facts;
- e. Determine if the facts represent a breach of the City's Code of Conduct, the *MCOIA* or other policies in the jurisdiction of the IC; and,
- f. Decide if a matter will require a full inquiry to validate the evidence;

[21] Based on the noted activities the following matters were dismissed:

- a. Conflict of Interest complaint filed by Mr. Rick Hamilton – a Statutory Declaration was requested by E4m and no response was provided. Mr. Hamilton alleged Councillor Pearce breached the *MCOIA*. We are reporting this so that Council is aware of the complaint and that Mr. Hamilton is aware the matter was not investigated nor reported on herein.
- b. Allegation that Mr. Hamilton breached the City's Code of Conduct. E4m was advised that although Mr. Hamilton is a past mayor, he has not been appointed to a local board [as defined by the *Municipal Act*] by City Council and therefore, he is not subject to the City's Code of Conduct.
- c. Two (2) allegations that Councillor Cyr breached the *MCOIA* - when contacted, both Complainants [members of the public], were not willing to file the statutory declaration because they felt the matter was otherwise addressed and as such, their names will not be reported.

[22] The allegations of one (1) of the Complainants contained workplace harassment allegations. The related Code of Conduct inquiry was put in abeyance until such a time as the workplace matter was addressed. This Code of Conduct matter was then fully investigated.

[23] E4m has a broad network of professionals and assigns them to carry out work accordingly.

[24] Due to the nature of the allegations and the complexity of the issues, Mr. Mike Kenopic and Mr. Sean Sparling, investigators with E4m, were assigned these inquiries. Both are retired police officers with extensive experience in conducting major case investigations and have excellent skills for carrying out the inquiries required to deal with these matters before the IC and on behalf of the City of Elliot Lake.

Inquiry Process

[25] The following was undertaken for the purposes of determining the facts as they pertain to the allegations:

- a. Complainant interviews – to collect additional information or confirm information provided during the initial “Preliminary Review” interview.
- b. Preparation of synopsis for the Respondent and Respondent interviews.¹
- c. Witness Interviews – based on the evidence provided by the Complainants or information learned.
- d. Prepare a transcript of each interview, review the content and synthesize the facts.
- e. Collect and review any supporting evidence [minutes, reports etc.]
- f. Analyze credibility of the Complainant, Respondent and any witnesses.
- g. Determine on a balance of probabilities the “truest” facts of the matter.
- h. Determine if the facts represent a breach of the City’s Code of Conduct or the *MCOIA*.

[1]

¹

in some circumstances the witnesses are interviewed prior to the Respondent. This is typically done when a concern has been raised that the Respondent will attempt to bias the evidence by breaching the confidentiality of the investigation and speaking with witnesses in an attempt to author or change their evidence.

- i. Prepare an investigative report including recommendations to Council on Code of Conduct breaches and information of the IC's decisions under section 223.4.1(15-18) regarding applications to Court under the *MCOIA*.

Standard of Proof

[26] The standard of proof that is applied by the IC to these inquiries is a “balance of probabilities”. A balance of probabilities means that something is more likely than not to have occurred. It is also known as the “civil standard of proof”. It has also been stated as the event is more likely to be true than not true, and as greater than fifty (50) percent.

Credibility

[27] During the inquiries, investigators measure the credibility of the parties and witnesses.

[28] Assessments of credibility are not simply a “feeling” of the investigator, but are based on an analysis of the following criteria:

- 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; and,
- any admission of dishonesty²

[29] This was used as the measure of credibility for each of the parties involved in the various inquiries.

Summary of Inquiry Findings

[30] This is a summary only. Our intention is to provide an overview of evidence obtained during the inquiries sufficient to substantiate our findings. Once an inquiry is complete, the *Municipal Act* requires the IC to provide a public report to Council. With respect to the matters before us, we have determined it prudent to provide one (1) public report for all allegations against a specific Member as well as one (1) overall report that

[1] _____

² *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.)

summarizes all allegations addressed. To be clear, there will be eleven (11) public reports in total, including this report. Each individual public report on the matters contained herein, will have full detail with respect to the findings of our inquiries. These documents will be released to the members of Council and the public upon receipt by the City.

[31] The following is a list of related public reports:

- a. Conflict of Interest re: Dan Marchisella, Mayor [released August 11, 2019]
- b. Code of Conduct re: Dan Marchisella, Mayor
- c. Conflict of Interest re: Luke Cyr, Councillor [released July 31, 2019]
- d. Code of Conduct re: Sandy Finamore, Councillor
- e. Code of Conduct re: Norman Mann, Councillor
- f. Conflict of Interest re: Ed Pearce, Councillor
- g. Code of Conduct re: Ed Pearce, Councillor
- h. Conflict of Interest re: Chris Patrie, Councillor
- i. Code of Conduct re: Chris Patrie, Councillor
- j. Code of Conduct Complaint re: Ms. Tammy Van Roon, Elliot Lake Residential Development Commission – Appointed by Council

Overview

[32] Where possible, this overview is presented in the chronology that events occurred based on the evidence provided to E4m [including Complainant, Respondent and Witness statements].

[33] The allegations described herein stem from, or came about, at the same time as the events surrounding the City's decision to purchase the property at 151 Ontario Avenue. This is the site where the Algo Centre Mall was situated prior to its collapse. To say that the purchase of this property [151 Ontario Avenue] was controversial for Council is an understatement. Council was apparently strongly divided with respect to this decision.

- [34] The lines of this divide are the same lines that resulted in the laying of complaints. Although most of the allegations were substantiated, it was not lost on us that the complaints appeared to come about as a “tit for tat” by various Complainants as complaints were made about them.
- [35] Council ultimately voted to approve the purchase of 151 Ontario Avenue on March 6th, 2019.
- [36] The point of buying 151 Ontario Avenue was to build a Community Multiuse Hub complex (the “Hub”). This project is worth approximately thirty million dollars and represents a significant milestone for the community. The Hub has been in the conception stage for many years. It was also the subject of at least two (2) consultants’ reports. The consultants recommended the 151 Ontario Avenue site as the most feasible location for the Hub. Prior to all of these current events, Council elected to build the Hub at the Centennial Arena site. This was one of the potential locations recommended by the consultants.

December 19th, 2018, Consideration of Purchase of 151 Ontario Ave.

- [37] On December 19th, 2018, Council was asked to consider and approve by resolution, the purchase of 151 Ontario Avenue in the City of Elliot Lake. The vote died in a tie as Councillor Cyr had declared a conflict of interest. Councillor Cyr indicated that his conflict was because he is a member of a class action lawsuit involving the former Algo Mall. The defendants in the lawsuit include Eastwood Mall Inc., Bob Nazarian, the City and ten (10) other entities. Eastwood Mall Inc. was the corporation that the property was being purchased from.
- [38] Of interest to this inquiry was how Councillor Cyr came to declare this conflict of interest. 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 IC at the time, who advised him that he was not likely in a conflict of interest. Out of an abundance of caution, Councillor Cyr declared a conflict of interest. This is why the December 19th, 2018, vote resulted in a tie. It is our finding that this event was the start of the misconduct and ultimate conflict of interest by Councillor Patrie that will be described later in this report.
- [39] 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.

[40] At the conclusion of the December 19th, 2018, open session of Council, there was a verbal confrontation between Councillor Pearce and Councillor Patrie. Councillor Patrie complained to the IC that Councillor Pearce yelled and swore at him. Councillor Pearce confirmed that this occurred, and that it was in relation to Councillor Patrie's conduct surrounding allegations of impropriety against Councillor Pearce and the purchase of 151 Ontario Avenue. Staff members present at the time of the incident corroborated these events.

Mayor Marchisella Speaks to Nazarian

[41] On December 25th, 2018, Mayor Marchisella received a telephone call at home from Mr. Levon Nazarian. Mr. Nazarian wanted to know why the vote to purchase 151 Ontario Avenue had failed on December 19^h, 2018. Mayor Marchisella explained to Mr. Nazarian that the deal had failed due to Councillor Cyr declaring a conflict of interest. Mayor Marchisella also advised Mr. Nazarian that ELNOS would be approaching him to buy the property as a proxy for the City.

Councillor Patrie Complains About Mayor Marchisella and AstroRabbit

[42] Over the course of several months, Mayor Marchisella assisted Mr. Corey McKenzie and his private business AstroRabbit to host a concert in the City. His assistance included helping with the business plan, organizing meetings and facilitating the matter being brought before Council for consideration. There is no dispute as to the level of involvement the Mayor had in this matter. By all accounts it was substantial.

[43] Councillor Patrie complained that the Mayor was engaging in work that belonged to staff members contrary to the Code of Conduct. Although he did not file the proper paperwork to make a conflict of interest complaint, he did, repeatedly, make this complaint to us. It was clear that had we not dealt with this matter as both a Code of Conduct Matter and an *MCOIA* matter, that the next step by Councillor Patrie would have been to file a new complaint.

[44] The evidence was clear that Mayor Marchisella was engaging in work that should be done by municipal staff. It is very likely he has done this on other occasions as well. We found that his reasons for doing this were not malicious and in fact, were for altruistic reasons. He truly feels that is doing his job as Mayor in providing this assistance.

[45] We have not restated the evidence on the conflict of interest allegation as it has been previously reported. The *MCOIA* allegation against Mayor Marchisella was unsubstantiated.

Meeting January 11, 2019, to Consider Purchase

[46] On January 11th, 2019, Councillor Pearce convened a meeting to discuss the purchase of 151 Ontario Avenue. He was proposing a new plan. This time it involved having a developer, Mr. Tony Guidoccio, buy the property from Mr. Nazarian and then sell a portion back to the Municipality. Mr. Guidoccio wanted a severance of the property, one portion for a residential development and the City wanted a portion for the Hub. Present at this meeting were Mayor Marchisella, Councillor Pearce, Chief Administrative Officer Mr. Dan Gagnon, Economic Development Coordinator Ms. Ashten Vlahovich, Mr. William Elliott from ELNOS, and Mr. Guidoccio.

February 19th Meeting to Consider Purchase

[47] On February 19th, 2019, the same people from the January 11th, 2019, met again to discuss this purchase. The only person not in attendance at this second meeting was Mr. Guidoccio. At this meeting, Councillor Pearce produced a document that detailed what needed to happen for this deal to occur. The document detailed items such as a potential purchase price and the fact that the City would have to guarantee the purchase of their portion of the land from Mr. Guidoccio.

[48] There was one staff member who took exception with this process. The issue was not that the property at 151 Ontario Avenue was being purchased. The issue revolved around Mayor Marchisella and Councillor Pearce doing work that belonged to staff and working against Council who had previously voted not to purchase this property. This staff member gave Councillor Patrie the memo created by Councillor Pearce and complained to him about the process. Councillor Patrie then used this information as part of his complaints that are before us.

[49] After the February 19th, 2019, meeting, staff led by Mr. Gagnon negotiated and documented the land deal with Mr. Guidoccio. It was then brought before Council for approval on March 6th, 2019. We have reviewed the process that led up to this transaction extensively, including the calling of the March 6th, 2019, meeting. It is important for everyone to understand that there was absolutely nothing wrong with this process. More to the point, Mr. Gagnon received legal opinions at a number of junctures in this process and fashioned the actions taken accordingly. We found the actions of Mayor Marchisella and Councillor Pearce to be proper and in full accordance with their duties as members of Council.

Councillor Patrie Attempts to Have Hub Built Adjacent to his Business

[50] On February 28th, 2019, Councillor Patrie met with Mayor Marchisella. Councillor Patrie discussed his desire to have the Hub placed at the ski hill. This location was not

previously considered by Council, does not appear in any of the consultants' reports and is directly behind Councillor Patrie's private business interests, those being the Trading Post and the plaza at this same location. Mr. Gagnon also reported being approached by Councillor Patrie who engaged him in the same conversation sometime in late winter of 2018 to early spring of 2019.

Notice of March 6th, 2019, Council Meeting to Consider Purchase

[51] On March 5th, 2019, the City posted notice, pursuant to the City's Procedure Bylaw, for the Council meeting to be held on March 6th, 2019. We found no issue with how this meeting was called. Mr. Gagnon also obtained a legal opinion in advance of this meeting which supports the process and Mr. Gagnon's diligence in this matter.

Commissioner Tammy Van Roon Offensive Posts and Disclosure of Confidential Information

[52] On March 5th, 2019, Ms. Tammy Van Roon posted offensive social media posts calling into question the calling of the March 6^h, 2019, meeting. Her conduct is captured under the Code of Conduct as she is a commissioner on the Elliot Lake Residential Advisory Committee. Ms. Van Roon then authored a number of subsequent posts that were deeply offensive and directly attacked Council. She was also a Complainant against Mayor Marchisella. The full contents of her social media posts are detailed in the comprehensive reports. Needless to say, they were very offensive and worthy of sanction.

[53] Ms. Van Roon also engaged in a number of instances where she disclosed confidential information to individuals in the community. This information related to complaints she had made with the IC and other highly confidential matters. This includes sending one individual a confidential email that Ms. Van Roon had properly received from Mr. Gagnon providing her with notice that one of our most confidential inquiries was about to begin. This email contained highly sensitive information protected by City policy and by provincial law. Ms. Van Roon also disclosed details of her complaint to former Mayor Rick Hamilton and is suspected of sharing confidential information with Councillor Patrie, who in turn is suspected of sharing confidential information with Ms. Van Roon. These suspicions did not result in a finding of misconduct as Ms. Van Roon and Councillor Patrie lacked the credibility on which to base a finding.

[54] When Ms. Van Roon was asked what exactly she disclosed to Mr. Hamilton, she indicated she shared everything with him. When asked why, she stated that it was to "bitch" and to "gossip".

[55] Ms. Van Roon also raised with us that she was the next person in line to be appointed to Council if a seat should become vacant. When challenged on this as a motivation for her complaints she did not deny the allegation but only stated Council would likely not appoint her. We did not find Ms. Van Roon credible. We found Ms. Van Roon to be motivated by her own political agenda. It was clear to us that she was colluding with other members of the community and likely with Councillor Patrie to subvert Council. Ms. Van Roon was actively engaged in spreading false information via social media and was misleading in her evidence during the course of this inquiry.

March 6, 2019, Meeting – Councillor Cyr Participation

[56] When the purchase of 151 Ontario Avenue returned to Council on March 6^h 2019, the City was now buying the property from Mr. Guidoccio and not the original owners. Both Councillor Cyr and Mr. Gagnon obtained new opinions independently of each other indicating that Councillor Cyr was not in a conflict of interest. Immediately prior to the March 6th, 2019, meeting, Councillor Cyr advised his fellow councillors of this change in position. This became the essence of how Council came to approve the purchase and the foundation for the allegation that Councillor Cyr was in a conflict of interest. This meeting of Council was called to discuss the purchase of 151 Ontario Avenue. The conduct of several participants in this meeting has been called into question.

[57] For example, complaints were made that Councillor Patrie disclosed confidential information in his speech and that Mayor Marchisella, Councillor Finamore and Councillor Mann's conduct violated the Code of Conduct. Most of the complaints about this meeting came directly from Councillors about their peers.

[58] The allegations against Councillors Finamore and Mann relate to the fact that they claimed to have not received adequate information about the subject of the closed session of Council in order to make an informed decision to approve going into closed session. Both Councillors left the meeting prior to the closed meeting commencing (rather than attend and vote or move for a deferral). Contrary to their public statements, all of Council received a detailed email from Mr. Gagnon explaining what the meeting was about. It was sent to them on March 5th, 2019, - the day before the meeting. We have not repeated all that was said at this meeting for the sake of brevity at these proceedings. Those details will be disclosed in the full reports to follow.

[59] We found that both Councillors Mann and Finamore were misleading when they claimed to not have enough information to move from the open meeting to the closed meeting. Although we made this finding, we were not prepared to declare that they committed misconduct. However, this in no way should be seen as an exoneration of their conduct.

[60] Mayor Marchisella was found to have not breached the Code of Conduct in how he spoke at the March 6th, 2019, meeting.

[61] 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.

March 7, 2019, Mayor Marchisella Facebook Post

[62] On March 7th, 2019, Mayor Marchisella authored a lengthy Facebook post in relation to the conduct of Council on March 6th, 2019, and Ms. Van Roon's social media post. This post was the subject of complaints that it violated the Code of Conduct and the Social Media policy. We found that although the Social Media policy does not apply to elected officials in this scenario, the Code of Conduct does apply.

[63] We analyzed the Mayor's comments in detail. His comments were not inaccurate. Officials such as Councillors Patrie, Mann, Finamore and Ms. Van Roon had behaved unprofessionally. Conduct by Councillor Mann and Councillor Finamore can easily be described accurately as grandstanding when they refused to participate in the meeting and ostensibly walked out. Ms. Van Roon's social media posts were deeply offensive and Councillor Patrie's behaviour in general was very inappropriate and worthy of sanction.

[64] We found that as head of council, there is a higher standard of conduct expected of Mayor Marchisella. Both policy and common sense dictate that he must rise above the petty political behaviour and petulance demonstrated by his peers. He had a duty to set an example with his own conduct. His best course of action would have been to say nothing and file the complaints with the IC. Engaging in this type of conduct only served to lower himself to the level of the other offenders and damage the overall reputation of his office, Council and the Municipality.

Councillor Patrie Continues to Influence the Decision after March 6, 2019

[65] After the March 6th, 2019, Council meeting, Councillor Patrie continued to protest the calling of the meeting and the outcome. 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.

- [66] 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.
- [67] 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.
- [68] In the investigation, we did not find any 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.
- [69] We found that the materials shared by Councillor Patrie were protected documents and not his to share. He clearly violated the Code of Conduct in doing so.
- [70] We asked Councillor Patrie in writing to explain why he shared this information. He did not provide a fulsome response. Instead, he attempted to assert solicitor client privilege on the documents that he previously gave to us 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.

March 19, 2019, Allegation of Disclosure of Confidential Information by Mayor Marchisella

- [71] On March 19th, 2019, Mayor Marchisella brought a disciplinary matter to a closed session of Council. At the start of the meeting, he was asked by Councillor Finamore if Mr. Mike Thomas knew what they were discussing in closed session. Mayor Marchisella is reported by Councillor Patrie to have acknowledged that Mr. Thomas did know what they were discussing. Councillor Patrie used this to make a complaint that the Mayor had disclosed confidential information to Mr. Thomas.

[72] Mayor Marchisella and Mr. Thomas denied the assertion that the Mayor had shared confidential information. Councillor Finamore confirmed the statement by Councillor Patrie, however could not say for certain whether or not the Mayor was simply stating that Mr. Thomas knew what was being discussed or that the Mayor had told Mr. Thomas about what was being discussed. There was no other evidence to support this allegation.

Further Offensive Posts by Commissioner Van Roon and Attendance at Legion by Mayor

[73] Around the end of March into very early April 2019, Ms. Van Roon again turned to social media and made very offensive posts about Council and all levels of government. Mayor Marchisella saw these posts and he was deeply offended by them. The reason he took such great offence to these particular posts was due to the fact that Mrs. Van Roon had made them in close proximity to posts she had made in her position on the executive team of the local Royal Canadian Legion. As a veteran and member of the Legion, the Mayor was offended.

[74] Mayor Marchisella then made arrangements with the President of the Legion to address the membership about Ms. Van Roon's conduct. He attended a membership meeting and spoke about his upbringing in Elliot Lake, his military service and the fact that someone had attacked his integrity. At the end of his speech he thanked Ms. Van Roon for her insight.

[75] We found that Mayor Marchisella had good reason to be offended by these posts. His action in how he confronted Ms. Van Roon was a very measured response to her conduct directed at him and Council. She had to expect a response from him. The only issue we found was that Mayor Marchisella failed to distance his office as Mayor of Elliot Lake from his speech at the Legion. Had he done so; we would not have found any misconduct on his part.

Councillor Patrie Continues to Advocate the Hub be Placed Adjacent to His Business

[76] 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.

Conflict of Interest Allegations against Mayor Marchisella and Councillor Cyr Unsubstantiated

[77] As detailed in previous reports, the allegation that Mayor Marchisella was in a conflict of interest in relation to Mr. McKenzie and AstroRabbit and the same allegation made against Councillor Cyr in regard to his participation in the March 6th, 2019, meeting of Council is unsubstantiated.

Councillor Ed Pearce and ELNOS

[78] Prior to being elected to Council in the fall of 2018, Councillor Pearce was a member of the ELNOS Board. ELNOS is an economic development agency that services a number of communities such as Elliot Lake and the surrounding area.

[79] Councillor Pearce continued in his role with ELNOS when he came to Council. A very important fact in the ultimate analysis of his conduct is that Councillor Pearce is NOT appointed to ELNOS as a representative of Council. There are Council appointees, but Councillor Pearce was, and remains, a member at large.

[80] A financial matter related to ELNOS was considered in an in-camera session. Matters discussed during in-camera meetings are to be kept confidential. We will not be disclosing the nature of the discussion herein.

[81] Councillor Pearce was very candid with the investigators. He readily admitted to participating in discussions at Council about ELNOS and the financial issues of ELNOS as they had been discussed in the closed meeting of Council.

[82] It is clear from the evidence that Councillor Pearce was present, participated in and did not recuse himself from discussions at Council involving ELNOS and more specifically, financial dealings of ELNOS. Councillor Pearce disputed the assertion that his conduct in any way offended the *MCOIA*.

[83] The investigator considered Councillor Pearce's conduct in two (2) ways. The first was the hypothetical scenario of Councillor Pearce as a member appointed by Council to ELNOS. The second scenario is the reality that Councillor Pearce is not appointed by Council and is a member at large of ELNOS.

[84] In the first scenario, if Councillor Pearce had been appointed as a member of ELNOS by Council, it would have been found that Councillor Pearce did not have to declare a conflict of interest due to the exceptions in the *MCOIA* (section 4(h)). Unfortunately, he is **not** appointed by Council so the exception in section 4(h) of the *Act* does not protect him. The investigation has revealed the following about this situation:

- [85] The relevant discussions involved the pecuniary, or financial interests of both ELNOS and the City;
- [86] Councillor Pearce was a “member” of ELNOS. ELNOS is a “Body” in the language of the *MCOIA*.
- [87] Where ELNOS has a pecuniary interest in the matters being discussed by Council, section 2(a)(iii) states that the member who is a “member” of the “body” with the pecuniary interest has an “Indirect Pecuniary Interest” and must comply with their obligations detailed in section 5(1) of the *MCOIA*.
- [88] Specifically, in that circumstance, the member would need to:
- a. Prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
 - b. Not take part in the discussion of, or vote on any question in respect of the matter; and
 - c. Not attempt in any way whether before, during or after the meeting to influence the voting on any such question.
- [89] Councillor Pearce did not comply with *any* of the obligations under section 5(1) and thereby breached the *MCOIA*.
- [90] We note that Councillor Pearce was trained on the issue of being a member of a body. He did not seek advice from the IC about whether his unappointed membership on the ELNOS Board constituted a prohibited conflict and proceeded to participate in Council discussions notwithstanding the legislation and his training on it.
- [91] We do not find that Councillor Pearce realized any personal financial gain from this breach. He was trying to assist all involved albeit in contravention of the *Act*.

Councillor Patrie – Hub Complex

- [92] It was clear from the evidence that Councillor Patrie had engaged both Mayor Marchisella and Mr. Gagnon in conversations to place the Hub next to personal business interests prior to the March 6, 2019, Council meeting. It is also clear that he did this again during the April 4th, 2019, committee meeting.

- [93] 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.
- [94] The evidence that Councillor Patrie misled the investigator in relation to what he spoke about and when, is very clear. He clearly had these impugned conversations very recently and it was about the Hub and not “Destination Elliot Lake”.
- [95] We take the position that when Councillor Patrie conceived the idea to place the Hub beside his business interests and attempted to implement the idea by lobbying members of Council and staff, he had a pecuniary interest in the placement of the Hub and was therefore required to declare a conflict on all decisions regarding placement of the Hub. Decisions either for or against locating the Hub at Councillor Patrie’s business would affect the finances of his corporation and constitute a prohibited indirect (or perhaps direct pecuniary interest – we did not investigate the financial relationship between Councillor Patrie and his corporation) conflict of interest. Decisions to locate the Hub at 151 Ontario Avenue, directly adversely affected Councillor Patrie’s plan, and either negatively affected the pecuniary interest of his corporation, Klover Building Inc. or did not positively affect Klover as much as locating the Hub next to that property would have.
- [96] 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).
- [97] To test this final assertion by Councillor Patrie, we were required to engage an outside expert to provide an opinion as to the financial impact that situating the Hub beside Councillor Patrie’s business would have on Councillor Patrie’s private business interests. The opinion was clear that his corporation stood to gain considerably if this were to happen.
- [98] We found that Councillor Patrie violated the *MCOIA*.

Conclusion

- [99] It is clear to us that Council is fractured. There is a split within this group that followed how these complaints were made. The “side” they were on, in regard to the purchase of 151 Ontario Avenue, dictated who they complained about. It seems very unlikely that

any of these complaints would have been made had it not been for the purchase issue and its surrounding events.

[100] In a number of the reports, we described the conduct of those opposed to the purchase of 151 Ontario Avenue as petulant. In simple terms, those opposed to the purchase of 151 Ontario Avenue simply did not get their way and resorted to attacking the process and persons involved instead of moving together in unison to support a proper decision of Council as required by section 6.2 of the Code of Conduct.

[101] The following comments are reserved for a select few individuals involved in this matter: We found it deeply disturbing the lengths to which some went to actively subvert Council and mislead the investigation and overall the unprofessional conduct they engaged in for their own personal and political gains.

[102] The investigator has serious concerns as to the ability of Council to properly digest this report, sanction themselves appropriately, and move forward as a cohesive unit. For example, the findings of misconduct must now go back to Council for deliberation. How can the public expect Council to do this dispassionately and with the proper level of professionalism when so many of them are engaged in misconduct? Council has truly damaged their collective credibility. As of the time of the final edits to this report, the investigator is still receiving reports from those involved that Council continues to be divided and much of the same conduct is continuing. This is deeply troubling.

[103] Council is encouraged to give serious consideration to how they will move forward and find the common ground to work together cooperatively for the greater good of the community. They should seek out training and advice in this regard. It would be a strong step for Council to develop and adopt a written plan with key indicators to demonstrate to the ratepayers of Elliot Lake that they can lead the community as a productive elected body. As it stands, Council appears to be deeply fractured and this is to the detriment of the people they serve. In its present state, E4m expects more complaints to come from Council about each other's conduct as well as members of the public. This is counterproductive and contrary to the best interests of the community.

[104] We remind all Members that there is but one reason that they hold their seats on Council and that is, or must be, to serve faithfully, the ratepayers of the City of Elliot Lake [based on their sworn Oath of Office].

[105] We wish Council and the City the very best in moving forward and again regret that our efforts were not successful in guiding the Councillors who are the subjects of this investigation to avoid these issues.

Summary of Findings and Recommendations

The following summarizes the allegations considered by E4m during the inquiry and the findings after investigation and review of all of the evidence.

Mayor Dan MARCHISELLA

1. Conflict of Interest – re: AstroRabbit. Contrary to section 5(1) of the *Municipal Conflict of Interest Act*;

UNSUBSTANTIATED

2. Doing Staff Members' Work. Contrary to section 8.2 of the Municipal Code of Conduct;

- a. In relation to the purchase of 151 Ontario Avenue;

UNSUBSTANTIATED

- b. In relation to AstroRabbit;

SUBSTANTIATED

RECOMMENDATIONS:

1. That within sixty (60) days, **all of Council receive training with respect to the Role of Council and the Role of Staff** pursuant to sections 224 and 227 of the *Municipal Act* and section 8.2 of the Municipal Code of Conduct and the Staff Council Relations Policy. It is recommended that this training be provided by or approved by the City's IC, Cunningham Swan.
2. That Council **reprimand Mayor Marchisella** for doing staff work in contravention of section 8.2 of the Code of Conduct.

3. Disclosure of Confidential Information. Contrary to section 10 of the Code of Conduct.

a. To Mr. Michael THOMAS re: closed session of Council discussions;

UNDETERMINED

b. To Mr. Levon NAZARIAN re: purchase of 151 Ontario Avenue;

SUBSTANTIATED

RECOMMENDATIONS:

1. This was a serious breach of confidentiality that may have resulted in the City paying significantly more than required for the property now obtained at 151 Ontario Avenue. Although we do not attribute malice to Mayor Marchisella's breach of confidentiality, we have seen that a lack of confidentiality is a serious problem with Council and staff in Elliot Lake [our belief is that this is a systemic problem Council needs to absolutely address]. Council, as the policy leaders of the Municipality, must demonstrate that breaches of confidentiality are not to be tolerated and can seriously prejudice the City as occurred in this case. We recommend that **Mayor Marchisella receive both a reprimand and that his remuneration as a member of Council be suspended for the period of one (1) month.**
2. We further recommend that within sixty (60) days, **all of Council receive training with respect to requirements for confidentiality of in-camera information and other private information that Council will obtain in the course of their duties.** Further, it is recommended that **Council consider and implement a Confidentiality Policy for staff and ensure that training of all staff who are privy to confidential information be developed and implemented within three (3) months.** This is an urgent issue. Release of confidential information from in-camera meetings may only occur when Council, as a whole, at a properly called meeting, decides that information may be released. Single Councillors and even the Mayor do not have the authority to make this decision on Council's behalf [this includes staff]. Further, the City collects a host of confidential information which is protected by the *Municipal Freedom of Information and Privacy Protection Act (MFOIPPA)* and liability can befall the Municipality for improper disclosure. It is recommended that this

training be provided by or approved by the City's current IC, Cunningham Swan.

4. Misconduct – March 6th, 2019, Council Meeting. Contrary to section 7.2 of the Code of Conduct;

UNSUBSTANTIATED

5. Misconduct – March 7th, 2019, Social Media Post. Contrary to section 7.2 of the Code of Conduct;

SUBSTANTIATED

RECOMMENDATIONS:

1. Council should **reprimand Mayor Marchisella** for this conduct. The Code of Conduct requires civility in section 7.2. While it was substantiated that Ms. Van Roon made very derogatory statements about Council and Mayor Marchisella personally, the Mayor, as head of Council, is held to a higher standard of conduct and is required not to descend into the fray of “unparliamentary” language. Further, when any elected official is speaking “in a personal capacity”, it is critical that the facts be clearly enunciated and announced. In public, it is simply a fact of municipal politics that one does not “take off the hat” of Mayor without doing so expressly.

6. Misconduct – Attendance at the Royal Canadian Legion. Contrary to section 13.1 of the Code of Conduct;

SUBSTANTIATED

RECOMMENDATIONS:

1. As in substantiated breach #5 above, **Council should reprimand Mayor Marchisella for this conduct.** The Code of Conduct requires civility in section 7.2. While it was substantiated that Ms. Van Roon made very derogatory statements about Council and Mayor Marchisella personally, the Mayor, as head of Council is held to a higher standard of conduct and is required not to descend into the fray of “unparliamentary” language. Further, when any elected official is speaking “in a personal capacity”, it is critical that the facts be clearly enunciated and announced. In

public, it is simply a fact of municipal politics that one does not “take off the hat” of Mayor without doing so expressly.

Councillor Ed PEARCE

1. Conflict of Interest re: Pecuniary Interests of ELNOS Board and Member of a Body per 2(a)(iii). Contrary to section 5(1) of the *Municipal Conflict of Interest Act*;

SUBSTANTIATED

DECISION:

1. E4m, acting as IC, will commence an application pursuant to section 8 of the *Municipal Conflict of Interest Act* against Councillor Pearce. Councillor Pearce was trained with respect to his duties as a “member of a body” in accordance with section 2(a)(iii). Notwithstanding his training, he continued to participate in Council meetings where ELNOS had a pecuniary interest in the matter in question.

2. Doing Staff Members’ Work re: purchase of 151 Ontario Avenue. Contrary to section 8.2 of the Code of Conduct;

UNSUBSTANTIATED

3. Misconduct towards Councillor Chris PATRIE. Contrary to section 7.2 of the Code of Conduct;

SUBSTANTIATED - it is clear that Councillor Pearce violated 7.2 of the Code of Conduct as adopted after February 15, 2019. However, the violation alleged by Councillor Patrie occurred on December 19, 2018, which is prior to the adoption of this Code of Conduct and the appointment of E4m as IC.

Councillor Chris PATRIE

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 ninety (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 ninety (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 ninety (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:

1. E4m, as IC, 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 instead, to have the hub located adjacent to the property owned by his corporation. 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 Act*, 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 ninety (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 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

RECOMMENDATIONS:

1. Councillor Patrie went to great efforts to obtain advice from E4m as IC 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 IC, 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 Firm 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 IC. 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 IC could obtain independent legal advice with respect to Councillor Patrie's allegations against E4m as the City's IC 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 Brock³ 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 IC [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 IC protocol that permitted the IC to use the City's lawyer, was proper and correct and that Councillor Patrie's assertions were much more tactical than well founded.

[1]

³ 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 ninety (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.

c. 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 IC, 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 ninety (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.

Commissioner Tammy VAN ROON;

1. Disclosure of Confidential Information in regard to this investigation and associated investigations. Contrary to section 10 of the Code of Conduct;

SUBSTANTIATED

RECOMMENDATIONS

1. We recommend that within ninety (90) days of this report, **Council, its committees and local boards, 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.
 2. Ms. Van Roon revealed confidential information and **should be reprimanded for this breach.**
2. Misconduct re: offensive social media posts. Contrary to section 7.2 of the Code of Conduct.

SUBSTANTIATED

RECOMMENDATIONS

1. We recommend that within ninety (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 important that this training extend to members of committees and local boards who are also subject to the Code.** It is recommended that this training be provided by or approved by the City's current IC, Cunningham Swan.
 2. Canadian society is based upon a principle of free speech. That does not, however, permit a member of a committee, local board or commission to speak in a manner that is factually inaccurate, inflammatory and not in accordance with their civility obligations under the Code of Conduct. Ms. Van Roon's breach of her obligations in this matter is significant. **It is recommended that this breach be considered by Council in conjunction with the breach in item #1 above and item #3 below.**
 3. That the City adopt a Social Media Policy for Council, members of committee and local boards within one hundred and twenty (120) days.
3. Subverting Council in regard to purchase of 151 Ontario Avenue and other related matters. Contrary to section 6.2 of the Code of Conduct.

SUBSTANTIATED

RECOMMENDATIONS

1. As indicated above, this is another significant breach of her obligations by Ms. Van Roon. Specifically, she participated with Councillor Patrie in attempting to subvert Council's decision with respect to the purchase of 151 Ontario Avenue by indicating that the purchase of the property breached the *Real Estate and Business Brokers Act* when she knew, or ought to have known, that the allegation was untrue. Ms. Van Roon is a practicing Real Estate Agent and should have been familiar with the operation of this statute. It is recommended in the circumstances of all of the breaches by Ms. Van Roon that she **immediately be removed from all committees, commissions or boards of Council and that she not be considered by Council to fill any vacancies that may appear on Council. Further that Council lodge a complaint to the Real Estate Council of Ontario (RECO) regarding Ms. Van Roon's behaviour.**

Councillor Sandy Finamore

1. Misconduct – March 6th, 2019, Council Meeting. Contrary to section 7.2 of the Code of Conduct;

UNSUBSTANTIATED

Councillor Norman Mann

1. Misconduct – March 6th, 2019, Council Meeting. Contrary to section 7.2 of the Code of Conduct;

UNSUBSTANTIATED

SCHEDULE "A"

M. VIRGINIA MACLEAN, Q.C. L.S.M.
Barrister & Solicitor



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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.

SCHEDULE "B"



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 disrepair³ 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