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File No. 50606-001

Via Email: integrity.commissoner@edmonton.ca

Edmonton City Council

3rd Floor, City Hall
1 Sir Winston Churchill Square
Edmonton, AB T5J 2R7

Attention: Ms. Jamie Pytel, Integrity Commissioner

Dear Madame:

Re: Councillor Mike Nickel

Introduction:

Please be advised that we have been retained as counsel for Councillor Mike Nickel. Kindly direct any and all further communications to the attention of the writer.

We submit for your consideration our client's responses in respect of the motion by the Integrity Commissioner for sanction. This motion stems from six investigation reports (2101, 2104, 2106, 2107, 2109 and 2111). In essence, these reports stem from two main categories, summarized as follows:

- (a) the first are a series of accusations that Councillor Nickel was using email addresses that were provided to him in his capacity as Councillor for his mayoral campaign;
- (b) The second allegation is that Councillor Nickel made two social media posts. One on April 12, 2021 and one on April 13, 2021, where Councillor Nickel was critical of the taxpayer money being spent on *Code of Conduct* Investigations into him.

These two allegations will be addressed separately.

It is noteworthy that this is not the first time that Councillor Nickel has been targeted by the Integrity Commissioner. As we are sure you to recall – in September 2020, Councillor Nickel was forced to defend himself (at his own personal expense with no funds being billed to the taxpayer) for conduct that was deemed not deserving of sanction by Council. At this juncture, Edmonton

City Council issued no sanction as against him. *It is our position that this matter has been fully addressed and that it is not in order to bring this matter forward for consideration for a second time.*

It is our respectful position that this current investigation into Councillor Nickel is a colourable attack by Mayor Don Iveson on his way out of office in an (at best) questionable attempt to utilize the City's internal processes to discredit Councillor Nickel during a mayoral campaign and, thus, constitutes both an abuse of this process and a flagrant waste of taxpayers' dollars.

Ultimately, Edmonton City Council is once again going to be asked to decide how to interpret the rules that govern political debate, both within and outside of the chamber, and how closely they wish for the Integrity Commissioner to monitor their interactions with both each other and constituents for accuracy and tone. Councillor Nickel's position is that the *Code of Conduct* does not empower the Commissioner to govern or "police" the tone of communication - so long as any attacks are directed at ideas, and not people. Personal attacks are not permitted, and vulgar language is not permitted; but attacks - even heated attacks on ideas are the daily bread of politics and should not be sanctioned. Similarly, where an attack is substantively true, even if it glosses over details, the *Code of Conduct* does not circumscribe that type of political debate either.

Of further question for sitting members of City Council: does the conduct complained of in these circumstances warrant the large expenditure of taxpayer money that has already been spent investigating a member of Council for behaviour that should be seen as political debate?

The Code of Conduct:

The relevant *Code of Conduct* provisions for this investigation are as follows:

Part A Representing the Municipality

Section 1 (a)

While carrying out their duties, Councillors must act in the best interests of the City as a whole.

Section 1 (d)

While carrying on their duties, Councillors must accurately represent and respect decisions made by Council while preserving the value of fair comment and differences of opinion.

Part B Communications

Section 1 (c)

Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will ensure that all communications are accurate and not issue any communication that the Councillor knows, or ought to have known, to be false.

Section 1 e)

Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will not issue any communications that mislead Council or the public about any matter.

Part E Respectful Interactions

Section 1

Councillors will conduct themselves with decorum at all times, including while attending meetings, interacting with City employees and Councillor's employees, and engaging with the public.

Part F Confidential Information:

Section 2

If a Councillor received confidential information, they must use the information only for the purpose for which the information is intended and to fulfill the duties of their office, and must not seek to access confidential information for any other purpose.

Section 3

A Councillor must not use confidential information for personal or private interests, including interests of the Councillor's family, or in any way that may cause harm or detriment to any person.

Section 4

Councillors must respect the right of access to City records under the Freedom of Information and Protection of Privacy Act and the obligation to protect privacy, and will:
d) safeguard personal information

Part K Elections and Campaigning:

Section 4

Councillors must not use any of the City's intellectual property, communication facilities, or other facilities, for election or campaign-related activities.

Section 5

Councillors will maintain separate websites, social media, and electronic mail accounts for all campaign activities and communications. Website and electronic mail distribution lists that are used for official duties may not be used for campaign activities and communications.

Section 6

Councillors may not use any City communications facilities for their campaign, including the use of electronic email addresses and distribution lists.

Section 8

Councillors must not use their office to gain an unfair advantage over other candidates.

Part M Retaliation, Interference, and Obstruction

Section 1

Councillors must not retaliate against anyone, including another Councillor, who participates or provides information in good faith during an investigation by the Integrity Commissioner.

Analysis:

Complaints 2101, 2104, 2106 and 2107:

These complaints stem from four instances where it is alleged that Councillor Nickel used e-mail addresses provided to him in his capacity as a city Councillor and the emails were subsequently used for promoting his mayoral campaign. Simply put, these allegations are patently false. As Councillor Nickel stated in his response to the investigator, all of these emails were collected in Councillor Nickel's campaigns in 2013 and 2017 and, accordingly, were collected with the party's consent and clearly for purposes of campaigning.

Of specific note on all of these complaints, Councillor Nickel contacted Elections Alberta in 2020 to inquire about Mayor Iveson potentially using charitable resources. The reply from Elections

Alberta indicated that they were not concerned about political lists. Further to this point, the *Personal Information Protection Act* R.S.A. 2000 c. P-65 specifically exempts political activity from privacy legislation:

4(3) This Act does not apply to the following

...

(n) the collection, use or disclosure of personal information by, or for, an individual who is a bona fide candidate for public office ... where the information is being collected, used or disclosed, as the case may be, for the purposes of campaigning for that office or position ...

This provincial legislation is at a higher legislative authority than a municipal government (which, of course, is only organized at the pleasure of the Province of Alberta pursuant to the *Municipal Government Act*, R.S.A. 2000 c. M-26. Accordingly, it is beyond the legal authority of the Integrity Commissioner or City Council to make any finding of fault or sanction as against Councillor Nickel in any of these complaints.

The willingness of the Integrity Commissioner to pursue these complaints against Councillor Nickel, absent any solid foundational evidence or legal authority gives further testament as to the ongoing bias as against Councillor Nickel from this Integrity Commissioner.

Speaking specifically as to the complaints themselves:

Complaint 2101

The email address s.17(1) was in Councillor Nickel's 2017 election campaign list of individuals. This information was already provided to the Investigator on March 9, 2021. The continuation of this allegation is without merit and is an abuse of this process and of Edmonton taxpayers' funds.

Accordingly, this complaint ought to be dismissed.

Complaint 2104

The complainant in this case did sign the "River Valley Petition" and did sign up to Mike Nickel's River Valley Petition. This is how this email address was obtained. A more thorough investigation into the complaint would have revealed this and resulted in a dismissal of this complaint.

Accordingly, this complaint ought to be dismissed.

Complaint 2106

This is a complaint stemming from a s.17(1). s.17(1) emailed Mike Nickel's campaign website www.mikenickel.ca and not his city hall email. This is how s.17(1) email address was obtained, not through a "cross walk inquiry" as falsely alleged.

Accordingly, this complaint ought to be dismissed.

Complaint 2107

This was taken from a prior election list in the same manner as Complaint 2101. There is no violation in this instance for the identical reason.

Accordingly, this complaint ought to be dismissed.

Complaints 2109 and 2111:

These complaints originate from two posts which occurred on Councillor Nickel's social media pages. The investigator finds (erroneously, as we maintain) that these posts were retaliatory against Councillor Knack and therefore a violation of the *Code of Conduct*.

Our response to these findings is the same as our response to the 2020 investigation's findings of the Integrity Commissioner—the purpose of the *Code of Conduct* never has been and never will be to police political speech (nor should it, as such a finding would be unconstitutional in our democracy).

Of greater concern is the fact that one of these complaints was made by Mayor Don Iveson himself—an individual who is currently sitting in the seat that Councillor Nickel is running for. This complaint is a colourable attempt to discredit Councillor Nickel in the public eye and harm his mayoral campaign.

The *Code of Conduct* specifically references conflicts of interest under Part G thereto. Specifically but without limitation, we quote and rely upon the following passages:

2. When exercising official duties, a Councillor must not give preferential treatment to any person or organization with the intent of advancing the Councillor's private interests or for their personal benefit.
5. Councillors should avoid carrying out their duties in any manner that may reasonably be perceived as being in conflict with any future endeavour that may be undertaken by the Councillor.

The *Code of Conduct* is silent as to the definition of “private interests” or “personal benefit”, but it can be reasonably extrapolated that this includes a councillor or mayor's personal views or abusing the process of the Integrity Commissioner (and the accompanying taxpayer-funded resources) with the sole purpose to discredit a councillor of different political views or for their own future political benefit.

The Supreme Court of Canada has a long history of commentary on conflicts of interest relating to those who hold public office. In *Lapointe v. Messier* 1914 CanLII 569 (S.C.C.), the Supreme Court of Canada commented that:

The members of a council should have no interest to bias their judgments in deciding what is for the public good. Members of a town council should be advised to keep themselves absolutely free from the possibility of any imputation in this respect.

It is particularly noteworthy that Mayor Iveson is the instigator of these complaints and Councillor Knack has filed a witness statement in support thereof. It would therefore follow that, at best, there is a perceptual conflict of interest with Mayor Iveson and Councillor Knack participating in the debate and voting on this matter, and at worst, a material conflict of interest exists. Mayor Iveson and Councillor Knack are therefore duty-bound to recuse themselves from voting and/or debating on this complaint.

The posts by Councillor Nickel were *not* retaliatory—but were truthful and aimed at shedding light on the immense expenditure that this Integrity Commissioner and certain members of Council seem to be willing to spend on baseless investigations into his behaviour. The claim that the investigation has cost taxpayers over \$50,000.00 is also truthful and meritorious.

Further details follow:

- The budget for the Office of the Integrity Commissioner is \$150,000.00 per reporting

period (from September 3 to September 3 of each year). From 2019 to 2020, this office spent a total of \$132,473.57. The Integrity Commissioner's report was brought to Council on October 19, 2020, wherein the commissioner states that she had 20 complainants, of which only 12 ended in an investigation. At least ten of these complaints were in relation to Councillor Nickel's complaints last year – **which have already been dismissed without sanction** (September 2, 2020);

- Prior to this, there was another annual report made on September 24, 2019. The office budget was \$185,000.00, but the Investigator spent \$132,164.01. (It is noteworthy that, of the six complaints that went to an investigation, at least two were made against Councillor Nickel.)

Based on this information, it is evident that a large majority of the annual budget of the Integrity Commissioner was spent on investigations against Councillor Nickel. In the name of transparency, the public has a right to know where this money is being spent. It is therefore up to Edmonton voters to make a decision as to whether or not they agree or disagree with where the money is being spent during the next election period.

Further Matters:

Of further concern to Councillor Nickel is the arbitrary decisions by the Integrity Commissioner to Investigate Councillor Nickel but not other members of Council for attacks against him. One such example of this was a tweet by Councillor Paquette wherein he stated that Councillor Nickel was a "pig". The Integrity Commissioner received a complaint about this but curiously decided not to investigate, suggesting again a reasonable apprehension of bias as against Councillor Nickel which, respectfully, further discredits the findings as against him as the rules are not being applied equally as against all members of council.

Conclusion:

Councillor Nickel seeks a dismissal of each and every one of the subject complaints.

All of which is respectfully submitted,

GUARDIAN LAW GROUP LLP



JONATHAN DENIS, Q.C

Partner

Former Alberta Minister of Justice, Solicitor General, and Attorney General