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Via Email: integrity.commissoner@edmonton.ca

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

Attention: Office of the City Clerk

Dear Ms. Pytel:

Re: Councilor 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. In essence, this vote is about how the provisions in the *Code of Conduct* concerning decorum and respectful communication ought to be interpreted. In the view of the Commissioner, the provisions of the *Code* extend to police the tone of communications. Councillor Nickel argues that this goes too far and for a clearer and more limited standard.

The second aspect about which the parties disagree is the nature and extent of the requirement for accuracy in communications imposed by the *Code of Conduct*. The Commissioner takes the position that to the extent that any statement is not strictly and technically true, that there is a violation. Conversely, Councillor Nickel takes the position that so long as the statement is substantively true, that glossing over a technicality is not a violation of the *Code of Conduct*.

Ultimately, Edmonton City Council is 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 view 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.

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The Backdrop--a metaphor:

The political realm is the epitome of the "marketplace of ideas" and is essential for our democracy itself. It is the crucible in which those ideas are tested, and the forge in which they are refined and honed. Just as in a physical blacksmith's forge, things get heated. As in a forge, ideas get hammered. A blacksmith cannot be gentle with his/her metal and still do a good job. So too, a politician cannot be too gentle with ideas and concurrently be effective for his/her constituents.

There are, of course, limits. Just as blacksmiths should reserve their blows for the iron, politicians should reserve their attacks for ideas. Personal attacks are not appropriate. Likewise, vulgar language is not appropriate. Just as in the forge, sparks will fly, and those working at the forge will inevitably be splashed and burned with the detritus that is ejected from a well struck blow. As long as the blow is aimed at the metal, this is acceptable. Politicians, like blacksmiths, accept such injuries as occupational hazards.

The Code of Conduct:

It is in this context that City Council passed a *Code of Conduct* with respect to how politicians are expected to comport themselves. In that *Code of Conduct*, two obligations of councillors are identified. The first is the obligation of accuracy, which is set out in the *Code* at Part A (1)(d), Part B(1)(a), Part B(1)(c), and Part B(1)(e). The relevant sections are set out below:

Part A: Representing the Municipality

- (1) While carrying out their duties, Councillors must:
- d) accurately represent and respect decisions made by Council while preserving the value of fair comment and differences of opinion.

Part B: Communications

- (1) Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will:
- a) ensure their communications accurately reflect the facts of Council's decisions.
 - c) ensure that all communications are accurate and not issue any communication that the Councillor knows, or ought to have known, to be false.
 - e) not issue any communications that mislead Council or the public about any matter. (S2. Bylaw 19142, February 3, 2020)

The second obligation is that of respect. This obligation is variously set out in the *Code* at: Part A(1)(e), Part B(1)(d), Part E(1), and Part E(3). The relevant sections are below:

Part A: Representing the Municipality

- (1) While carrying out their duties, Councillors must:
- e) communicate respectfully with members of the public, Councillors, City Employees, and Councillor's employees.

Part B: Communications

- (1) Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will:
- d) ensure that all communications issued by, or on behalf of, the Councillor, including social media, are respectful and do not discriminate, harass, or demonstrate disrespect toward any person.

Part E: Respectful Interactions

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.

3. Councillors must not use any harassing, offensive, discriminatory, disrespectful, or unparliamentary language about Council, a Councillor, City employees, Councillor's employees, or the public.

The Statements in Question:

The Integrity Commissioner has outlined a number of statements that it particularly objects to, and helpfully underlines those portions which it finds to be disrespectful within the meaning of the Code:

- More bike lanes during a pandemic!?! I wish this was a joke but it isn't...

Our mayor and some on Edmonton city council have completely lost grip on what is important right now...

You think we would be taking things seriously right now and use vital city resources and the power of our office properly...

- Have the mayor & some councillors completely checked out on reality?
- Right now, every resident in Edmonton is watching their spending carefully.

Andrew Knack, why can't you?

- Every dollar we spend wisely might mean another worker getting their job back at the City of Edmonton very soon. Does that mean anything to you?
- I get it, you have no idea what to do in this situation, so you are reverting to what you know.
- I'm sure when you suggest more tax increases shortly it will be no big deal...
- Your most recent flavour of the week is more bike lanes.
- At some point, we will need every dollar at our disposal to bring this city back to life. To re-hire those people I mentioned above.
- I hope you haven't forgotten about them already.
- My solution to the current problem is to be very careful with spending right now. We should only spend what we absolutely must.
- Somehow this isn't a solution for you. I get it. It's not flashy. It's not exiting.
- Well I'm sorry saving money and spending wisely isn't your current priority.

Analysis:

Respectfulness:

In interpreting these sections, one of the most important touchstones that must guide you is the *Charter of Rights and Freedoms*. Even where the constitutionality of a law is not directly being challenged, it has long been a principle that a law must always be interpreted in a manner

consistent with the constitution. The principles of freedom of speech then, are an important interpretive aid.

This is not just the Councillor Nickel's opinion. It is well supported by the case law. For example, Randy Pepper, delegate of Brampton Integrity Commissioner Cameron is often quoted as saying:

Freedom of expression is a fundamental right in Canada so the Code must be interpreted in a manner consistent with this fundamental right. Based on the law set out below, I cannot find that the Code should be interpreted to appoint the Integrity Commissioner as a speech referee in the political arena. (Emphasis added)

Political speech is the most dearly protected of all forms of speech, and it is expressly permitted for those engaged in political debate to use hyperbole or satirize their opponents. For example, Councillor Sprovieri of Brampton, Ontario, once suggested that the mayor views on fluoridation were as follows:

I'll just continue poisoning babies and illegally mass-drugging a million people with a one-size-fits-all tooth-damaging industrial fluoride acid in the name of oral health.

The Mayor complained that this violated the city's decorum provisions, which are the corollary to the respect obligations contained in Edmonton's *Code of Conduct*. In deciding that this communication did not violate the *Code* the Integrity Commissioner noted that it was "not [his] place to determine how Councillor Sprovieri should or should not articulate his position on fluoridation."

It should seem obvious that if suggesting your opponent poisons babies is not disrespectful within the meaning of the *Code*, then what Councillor Nickel said cannot be either.

The case law on this point is very consistent. Rhetorical questions that seem to attack the character of a political opponent have likewise been held to be permissible. For example, "Do we seriously want staff to act like a military organization?" and "We are independent elected representatives, not part of a dictator party structure (Canada) or the Politburo, are we?" have been considered, and ruled to be within the bounds of the *Code of Conduct* in Ontario.¹ Even words such as "dictator" and "politburo" are not considered indecent or insulting.

The Integrity Commissioner's role in relation to policing comments on matters of "freewheeling debate on matters of public interest" is "very limited."² Even the use of "inflammatory language to incite the public to put pressure on other council members" is not a violation of the *Code*. Rather, "trying to motivate people to support one's viewpoint (or trying to motivate people to oppose a contrary viewpoint) is part of the democratic process."

One is allowed and expected to criticize one's political opponents, using strong language, and in such situations, it is not appropriate to try and muzzle the other side by using the Integrity Commissioner. As the Integrity Commissioner said in respect to the "dictator" comments:

... With great respect, I note that this – responding to what the other side says – is how politicians traditionally handle criticism. If an unfair or inaccurate criticism is made in the course of political debate, then political debate offers its own remedies to address those inaccurate or misleading comments. Specifically, the other side has the ability to correct the record, to provide context, to counterattack, and to defend the conduct.

87. In my view, utilizing the tools of political debate to respond to unfairness and inaccuracy in political debate is far more appropriate than having Integrity Commissioners police the truth and fairness of political speech: *Re Maika*, [2018 ONMIC 11](#), at para. [139](#).³

¹ *Linton v Kitras*, 2020 ONMIC 1 (CanLII) at 42

² *Linton v Kitras*, 2020 ONMIC 1 (CanLII) at 79

³ *Ibid.* at 86

Given the foregoing, what does the *Code* rule to be out of bounds? Surely it must be something? And yes, there is something, and that something is directly attacking only the person, rather than the ideas.⁴ Such instances are however, rare. There is good reason for this rarity. Politicians are allowed and expected to criticize each other on their records, and such criticism, no matter how strident, is not a violation of the *Code*.

As Mr. Giorno once again said, in *Gerrits v. Currie*, 2020, ONMIC 6:

46. The Supreme Court of Canada has recognized the “interdependence” between democratic governance and freedom of political speech -- in particular the freedom to criticize a governing record:

such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack, from the freest and fullest analysis and examination from every point of view of political proposals.^[4]

47. The *Code of Conduct* does not prevent one politician from criticizing the record of another politician. To mistake substantive criticism of a record in office with a personal attack is to misunderstand how democracy works. Everyone, elected officials included, is free to look back on what has occurred, and to oppose, to argue that better was possible, to make the case for a different result.

48. I do not believe it is the place of an Integrity Commissioner to interfere in political debate of this nature.

In summary, we respectfully submit that it is wholly inappropriate, both on a principled basis, and based on the existing case law, for the Integrity Commissioner to sanction Councillor Nickel for what he said.

Accuracy

Similarly with respect to accuracy, when it comes to political debate, the Integrity Commissioner is not the best mechanism for ensuring it. Many of the passages quoted above have also addressed that issue. Moreover, the Supreme Court has endorsed the following passage on the subject:

The essence of the market-place of ideas is that control and regulation of expression is intolerable because we can trust no government to know the truth. Those who purport to legislate the truth invariably turn out to be tyrants. The market-place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth.

Hence the justification for the widest freedom of political speech stems not only from some abstract search for truth, but also from the tangible goal of preserving democracy.

Given the foregoing, the theoretical ability of the Integrity Commissioner to “fact check” political speech is necessarily limited. But beyond that, there are also practical limits. In this case, the practical limits of the Integrity Commissioner’s powers also come in to play.

Firstly, in context, the role of the Integrity Commissioner is not to make determinations about whether anything said by a councillor is right or wrong. When Council Members send emails, “they use the language of ordinary people and not of legal drafters or judges. It would be inappropriate therefore to pick apart the wording of a Council Members [writings] as if it were a legal contract or judicial decision.”⁵ Moreover, it is not expected that the interpretation or understanding of the member must be correct every time, failing which they will be subject to

⁴ *McGillis v Hart*, 2013 ONMIC 7 (CanLII)

⁵ *Greatrix*, *infra* at 164.

sanction. That would be an unfair standard to which councillors ought not to be held.⁶ Rather, what is appropriate, is for the Integrity Commissioner to determine whether the member reasonably believes that the utterance is accurate.

In this case, the Integrity Commissioner noted that at a council meeting, it was Councillor Knack who brought up the issue of needing more space for pedestrians and cyclists to socially distance, and that the matter was referred to the administration. It is entirely reasonable for Councillor Nickel to infer from this that the implementation of this idea involved Councillor Knack. The mere fact that his suggestion did not get embodied in a formal council vote, and that it was implemented administratively does not detract from the fact that he was the progenitor of the idea, and it is entirely reasonable for Councillor Nickel to believe that Councillor Knack supported the idea and was involved with administration in its implementation. For Councillor Nickel to therefore publicly espouse the belief that Councillor Knack was involved in “putting in” the “bike lanes” is thus entirely reasonable. It is unfair to Councillor Nickel to sanction him for failing to clarify in his post that *technically* it was administration that implemented this idea, which originated from, and was advocated for by Councillor Knack.

Additional Items:

It is noteworthy for consideration that, on April 21, 2020 at or around two minutes and 13 seconds into the interview, Councillor Knack commented on the Ryan Jespersen show, in reference to the cartoons shared by Councillor Nickel, that *“I don’t care about a picture that was shared about me. That’s not a big deal.”*⁷

Conclusion:

The pith and substance of our argument is surmised by Evelyn Beatrice Hall in 1906:

“I disapprove of what you say, but I will defend to the death your right to say it.”

The Integrity Commissioner has proposed sanctioning Councillor Nickel for simply doing his job as a public figure. Passing the resolution proposed by the Integrity Commissioner would be counter to the goals of promoting political engagement and proper discourse. Even if council members are opposed to Councillor Nickel’s politics, and even if they do not like him personally, a restriction of political speech of the nature proposed is far too dangerous for any councillor to go along with. This is because councillor Nickel’s speech does not cross the line. It is not close to the line. In fact, it is well within the confines of passionate plainspoken speech of the kind that is expected of politicians engaging the public. If the counsel holds that this kind of speech crosses the line, that is in effect a step which moves the line to a very strange and confusing place. If the line moves to this point, then it will be very difficult to know what does not cross it. At that point, the true transgression could simply become holding an unpopular view.

Politics can be complicated, but it does not have to be. In fact, it is the duty of politicians to engage both their supporters, and their detractors in ways that facilitate dialog on the issues of the day. To do that effectively, plain, direct and forceful language can and should be used. Sometimes, pictures can and should be used to get a point across quickly to busy constituents. Sometimes, as well, details need to be glossed over in order to effectuate political engagement. We all know this. Councillor Nickel has engaged his constituency in the same ways as politicians do every day across this country. This is democracy at work. Censuring this work would do a disservice to the service of everyone in this deliberative body.

In conclusion, the attempt at sanctions as against Councillor Nickel is a colorable attempt to restrict free speech and public discourse. Further, any such sanction against Councillor Nickel would create a very dangerous precedent and may verily result in a chilling effect on a Councillor’s

⁶ *Greatrix v. Williams*, 2018 ONMIC 6 (CanLII) at 148, 164, and 169.

⁷ Ryan Jespersen show, online archive: https://omny.fm/shows/ryan-jespersen-show/edmonton-councilors-mayor-administration-criticize?in_playlist=ryan-jespersen-show!podcast.

ability to speak freely and effectively represent his/her own constituents. Consequently, we also submit that the proposed sanctions must be rejected in their entirety.

All of which is respectfully submitted.

Yours very truly,

GUARDIAN LAW GROUP LLP



JONATHAN DENIS, Q.C

Partner

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Encl.

c.c.: client