

**Acting Integrity Commissioner**

**Report to Council on an Inquiry Respecting the Conduct of  
a Member of Council**

**and**

**Report to Invest North Bay Development Corporation on an  
Inquiry Respecting the Conduct of One of its Members**

**December 11, 2020**

<b><u>Table of Contents</u></b>	<b><u>Page(s)</u></b>
Introduction	3
The Complaint	3-4
The Allegations Associated with the Alleged Breach	4-6
Defences Raised to the Complaint	6
A. Whether the Code of Conduct Applies Retrospectively	7-11
B. Whether the Complaint was Made in Time	11-15
C. Whether INBDC is a “Local Board”	15-18
D. Whether the Complainants have Standing	19
E. Mootness of the Complaint	20-21
Analysis of the Complaint	21
The Inquiry	21-22
The Facts Relevant to the Complaint	22-37
The Code of Conduct	37-40
The Rule Prohibiting “Improper Use of Influence”	40-47
Result	48
Publication	48
Recommendations	48-51
Appendix “A”	53
Appendix “B”	54

## Introduction

- (1) With the passage of Bill 68 on May 30, 2017, amendments to the *Municipal Act, 2001* (the “*Act*”) focused on accountability and transparency to ensure the maintenance of public confidence in the decisions made by members of municipal councils and their local boards.
- (2) The amendments required municipalities to establish codes of conduct to provide rules to guide the ethical conduct for members of municipal councils and their local boards.
- (3) The requirement for municipalities to establish a code of conduct came into force as of March 1, 2019.
- (4) Pursuant to By-Law 2019-16 passed on February 26, 2019, City Council enacted a Code of Conduct for Members of Council of the Corporation of the City of North Bay and Certain Local Boards (the “Code of Conduct”).
- (5) The amendments to the *Act* also required municipalities to appoint an Integrity Commissioner who reports to Council and who is responsible, among other things, for performing, in an independent manner, investigations of allegations of breach of the code of conduct by members of Council and the municipality’s local boards.
- (6) In accordance with its statutory obligation, in January 2019, the City appointed Mr. Guy Giorno as its Integrity Commissioner.

## The Complaint

- (7) In June 2020, Mr. Giorno received a complaint, (the “Complaint”), from two members of the public, (the “Complainants”), alleging that a Member of Council and a Member of a Local Board had breached the Code of Conduct.

- (8) For legitimate reasons, Mr. Giorno determined that he could not act as Integrity Commissioner with respect to the Complaint. Pursuant to s. 223.3 of the *Act*, he issued to me a delegation of his powers and duties under Part V.1 of the *Act*.
- (9) I accepted that delegation. Consequently, I became Acting Integrity Commissioner for the City of North Bay for the sole purpose of investigating the Complaint and reporting my findings with respect to it.

### **The Allegations Associated with the Alleged Breach**

- (10) The Complainants have made the following allegations:
- that William Ferguson, a principal in the firm of TWG Communications, was Mayor Allan McDonald's campaign manager in the municipal elections conducted in 2010, 2014, and 2018;
  - that Mr. Ferguson may have made a financial contribution to one or more of Mr. McDonald's election campaigns;
  - that Mr. McDonald may have paid TWG Communications for advertising undertaken during his election campaigns;
  - that Mr. Ferguson and Mr. McDonald were personal friends and business or professional associates;
  - that Mr. McDonald recruited Mr. George Burton to sit as a member of Invest North Bay Development Corporation ("INBDC");
  - that Mr. McDonald is also a member of board of directors of INBDC;

- that, in September 2015, Mr. Ferguson was the chair of the Board of Governors of Canadore College, and chair of its executive committee, when the College negotiated a five-year extension of Mr. Burton's contract as its President at an agreed stipend of \$1.2 million for the contract period;
- that Mr. Burton and Mr. Ferguson were personal friends and business or professional associates;
- that, in September 2016, the City, on behalf of INBDC, issued a Request for Proposals (the "RFP") to interested marketing firms for the development of a marketing strategy to foster economic growth in the City;
- that TWG Communications responded to the RFP with a proposal;
- that the City and INBDC established a committee to review and evaluate the proposals received in response to the RFP;
- that both Mr. McDonald and Mr. Burton sat on the proposal review committee, that neither of them disclosed the personal and business or professional relationship that each enjoyed with Mr. Ferguson, and that they should have recused themselves from participating in the RFP review process, but failed to do so;
- that, when the board of INBDC voted to accept the proposal of TWG Communications, again Mr. McDonald and Mr. Burton failed to disclose the personal and business or professional relationship that each enjoyed with Mr. Ferguson, and that they should have recused themselves from discussion and voting on the proposal, but failed to do so;

- that Mr. Burton made a public presentation to City Council on May 31, 2017 on behalf of INBDC requesting an allocation of municipal funds to INBDC in the amount of \$1 million, when he knew those funds would be committed to TWG Communications, without disclosing the personal and business or professional relationship he enjoyed with Mr. Ferguson;
- that Mr. McDonald voted in favour of the Council resolution presented later at the same Council meeting that supported the request for an allocation of \$1 million to INBDC made by Mr. Burton without disclosing the personal and business or professional relationship he enjoyed with Mr. Ferguson; and
- that, in September 2018, INBDC entered into a two-year contract with TWG Communications for the agreed amount of \$1.2 million, plus HST, and that both Mr. McDonald and Mr. Burton had earlier voted in favour of awarding that contract to TWG Communications without disclosing the personal and business or professional relationship that each of them enjoyed with Mr. Ferguson.

(11) The Complainants claim that Mr. McDonald and Mr. Burton, (the “Respondents”), breached the provisions of Articles 13.1 (a), (b), and (c) of the Code of Conduct.

### **Defences Raised to the Complaint**

- (12) Counsel for the Respondents have raised five defences, any one of which they say act as a complete bar to the hearing of the Complaint filed by the Complainants against their respective clients.
- (13) I propose to address those defences before dealing with the merits of the alleged breach of the Code of Conduct.

**A. Whether the Code of Conduct applies retrospectively to conduct that occurred before it was adopted**

- (14) The alleged breaches of the Code of Conduct under my review occurred:
- (i) in October 2016, when both Respondents sat on an INBDC review committee to evaluate responses to an RFP which had invited proposals to develop a marketing strategy for the promotion of economic growth in North Bay;
  - (ii) in January 2017, when both Respondents voted at an INBDC board meeting to invite TWG Communications to proceed with Phase I of their proposal;
  - (iii) in May 2017, when the Respondent Mr. Burton made a presentation to City Council requesting the amount of \$1 million to fund the marketing campaign, and when the Respondent Mr. McDonald voted at the same Council meeting to approve that request;
  - (iv) in June 2018, when both Respondents voted at an INBDC board meeting in support of a motion that TWG Communications be instructed to proceed with the marketing strategy outlined in their proposal dated September 28, 2016; and
  - (v) in September 2018, when the Respondent Burton signed the contract with TWG Communications.
- (15) North Bay City Council adopted the Code of Conduct for Members of Council and Certain Local Boards on February 26, 2019, well after the dates of the events that form the subject matter of the Complaint.

- (16) Counsel for both Respondents argue that the *Act* does not state anywhere that it, or any code of conduct, applies retroactively.
- (17) In her text *Sullivan on the Construction of Statutes* LexisNexis Canada Inc., (6<sup>th</sup> ed.) 2014) at para. 25.50, the author states:

It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law...[T]he fundamental principle on which rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary.

- (18) The terms “retroactive” and “retrospective” can be confusing. They are often used interchangeably in relation to statutory interpretation. E.A. Driedger, in “Statutes: Retroactive Retrospective Reflections” (1978), 56 *Can. Bar Rev.* 264 at pp. 268-69, set out these definitions:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates *backwards*. A retrospective statute operates *forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event.

- (19) Over time, Canadian jurisprudence developed a presumption against the retroactive application of legislation. In *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 S.C.R. 473 (S.C.C.), the Supreme Court of Canada held that the presumption against the retroactive application of legislation can be rebutted by express words or by necessary implication.



What is required is some sufficient indication that the legislation is meant to change the law for the past as well as the future.

- (20) On the one hand, the Code of Conduct does not specifically state that complaints about conduct that occurred before February 26, 2019 will not be accepted or considered. On the other hand, there is nothing in the language of the Code of Conduct that suggests that North Bay City Council intended that it have retrospective operation.
- (21) Part V.1 of the *Act* is silent on the issue.
- (22) The City Solicitor presented a report to City Council on February 19, 2019 which informed the Council of the requirement for the establishment of a code of conduct, the principles on which it was based, the process of bringing an alleged breach of the code to the attention of the Integrity Commissioner for review, and possible sanctions in the event of a contravention. There is no mention in his report about retrospective application of the Code of Conduct.
- (23) However, those facts are not fully determinative of the issue. In her text referred to in paragraph (17) above, Ruth Sullivan states:

It is presumed that the legislature does not intend legislation to be applied retrospectively as defined by Driedger, unless the legislation is beneficial or its purpose is to protect the public. At the end of his 1978 article, Driedger provided the following summary of his understanding of retrospectivity and how it differs from retroactivity:

1. A retroactive statute is one that changes the law as of a time prior to its enactment.
2. (1) A retrospective statute is one that attaches new consequences to an event that occurred prior to its enactment.  
(2) A statute is not retrospective by reason only that it adversely affects an antecedently acquired right.

- (3) A statute is not retrospective unless the description of the prior event is the fact situation that brings about the operation of the statute.
3. The presumption does not apply unless the consequences attaching to the prior event are prejudicial ones, namely a new penalty, disability or duty.
  4. The presumption does not apply if the new prejudicial consequences are intended as protection for the public rather than as a punishment for the prior event.
- (24) In this case, the possible sanctions for a breach of the Code of Conduct are not new. They are consistent with sanctions already available under the *Act*.
- (25) During legislative debate on Bill 68, (Legislative Assembly of Ontario, 2016), Minister of Municipal Affairs, Bill Mauro, discussed political accountability and integrity at the local level and stated:

In order to provide greater consistency in the level of accountability and integrity across Ontario's governments, we are proposing to require codes of conduct in all municipalities...Municipal representatives are expected to perform their roles with integrity and meet the highest standards of conduct.

- (26) Those comments make it abundantly clear that the codes of conduct mandated by the amendments to the *Act* are focused primarily on the protection of the public by fostering transparency and accountability, and ensuring the maintenance of public confidence in the decisions made by members of municipal councils and their local boards.
- (27) At p. 275 of his 1978 article, Driedger stated:
- In the end, resort must be had to the statute. If the intent is to punish or penalize a person for having done what he did, the presumption [against retrospective application] applies because a new consequence is attached to a prior event. But if the new punishment or event is intended to protect the public, the presumption does not apply.

- (28) In *Association des policiers provinciaux du Québec v. Sûreté du Québec*, QCCA 1087 at paras. 17, 96-98, two police officers were dismissed under legislation that required an officer found guilty of a strictly indictable criminal offence to be dismissed automatically. Even though the offences occurred before the legislation came into force, the Quebec Court of Appeal upheld the officers' dismissal because the purpose of the legislation was to promote the reputation of the force and protect the public from persons less worthy of public confidence by ensuring that they no longer serve as police officers.
- (29) Even though the actions alleged in the Complaint took place before the Code of Conduct was enacted, I conclude that the purpose of the Code is to promote transparency, accountability, and the integrity of Members of City Council and its local boards, and to protect the public by ensuring that persons unworthy of public confidence can be sanctioned for their failure to abide the rules of conduct.
- (30) For these reasons, I find that the presumption against the retrospective application of the Code of Conduct does not apply. The defence advanced by the Respondents in that regard must therefore fail.

#### **B. Whether the Complaint was made within the prescribed time**

- (31) Counsel for both Respondents argue that the Complaint was not filed in time and that, accordingly, I lack jurisdiction to investigate it.
- (32) I am conducting an inquiry under s. 223.4 of the *Act* which sets out the procedure to be followed when a complaint alleges a contravention of the code of conduct applicable to a member of council or a member of a local board. Counsel for the Respondents concede that s. 223.4 does not specify the time within which a complaint must be filed.
- (33) However, they rely on the provisions of s. 223.4.1 of the *Act*, which sets out the procedure and rules to be followed when an Integrity Commissioner conducts an inquiry resulting from a complaint filed under s. 5.1 or 5.2 of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50.

- (34) The general purpose of the *Municipal Conflict of Interest Act* is to prohibit any member of a council or local board, who has a direct or indirect pecuniary interest in a matter under consideration, from participating in the decision-making process dealing with that matter.
- (35) The allegations in the Complaint do not state or suggest that either of the Respondents had a direct or indirect pecuniary interest in the contract that INBDC awarded to TWG Communications, or in that firm.
- (36) Section 223.4.1(4) of the *Act* provides that “an application may only be made within six weeks after the applicant became aware of the alleged contravention”. I am not persuaded by that argument because I am not conducting an inquiry under s. 223.4.1 of the *Act*.
- (37) Section 223.4 of the *Act* does not specify a time limit for filing a complaint. The Code of Conduct does not establish time limits for making a complaint. I reject the submission that, by way of analogy to s. 223.4.1(4), s. 223.4 requires the Complainants to have filed their Complaint within six weeks after they learned of the alleged contravention.
- (38) In the event my findings concerning a time period for filing the Complaint are not correct, the limitation period defence must nevertheless fail. Assuming for the sake of argument that the Complainants were required to file their Complaint within six weeks after they became aware of the alleged contravention, I find that the Complaint was still filed on time.
- (39) The Complainants did attend the Council meeting on May 30, 2017 when the Respondent Mr. Burton made a presentation to Council requesting funding for INBDC in the amount of \$1 million. However, they were not aware until May 10, 2020, after discovering an online media report published on April 10, 2020, that those funds were intended for a marketing agency contract with a local firm, nor were they aware until that time that each of the Respondents enjoyed a personal and business or professional relationship with one of the principals of that marketing

agency. There is no evidence that they had any knowledge of the allegations they make in their Complaint prior to May 10, 2020.

(40) The application of a prescribed time period applicable to the Complainants must be measured on the basis of discoverability, and will be found to commence from the date on which a reasonable person with the abilities and in the circumstances of the Complainants first ought to have known of the matters which form the subject matter of their Complaint.

(41) In that regard, I make the following findings that the Complainants did not know, and could not reasonably be expected to know, until May 10, 2020 that:

- both Respondents had a personal and business or professional relationship with William Ferguson;
- William Ferguson was a principal of the firm known as TWG Communications;
- William Ferguson was a member and Chair of Canadore College Board of Governors;
- William Ferguson was Chair of the Executive Committee of that Board at the time the Respondent Mr. Burton's substantial employment contract with Canadore College as its President was negotiated and renewed in 2015 for a period of 5 years;
- William Ferguson was the Respondent Mr. McDonald's campaign manager for the office of mayor in each of the 2010, 2014, and 2018 municipal elections;
- the Respondent Mr. McDonald had paid significant amounts of money to TWG Communications for advertising expenses incurred in each of those elections;

- INBDC had issued the RFP to interested marketing agencies in September 2016 for a marketing program to promote economic growth in North Bay;
- both Respondents had served on the review committee, which recommended the proposal submitted by TWG Communications;
- both Respondents had voted in favour of INBDC selecting the proposal submitted by TWG Communications;
- the request for funding in the amount of \$1 million the Respondent Mr. Burton had made to City Council on May 30, 2017 was intended to fund the contract INBDC had awarded, or intended to award, to TWG Communications; and
- both Respondents had never disclosed to City Council or INBDC the personal and business or professional relationship each enjoyed with William Ferguson.

(42) If there was a prescribed time period of six weeks applicable to the Complaint, it did not begin to run until May 10, 2020. The Complainants filed their Complaint on June 2, 2020, well within the six-week time limit.

(43) In the alternative, counsel for the Respondents rely on the provisions of the *Limitations Act*, S.O. S.O. 2002, c. 24, s. 4 which provides:

5. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

(44) However, regard must also be had to the opening sections of the *Limitations Act* which provide:

1 In this Act,...

“claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission...

2(1) This Act applies to claims pursued in court proceedings other than...

- (45) The Complaint which I am investigating is not a claim to remedy an injury, loss, or damage. In addition, the inquiry which I am conducting is not a court proceeding.
- (46) I conclude that the provisions of the *Limitations Act* do not apply to the Complaint which I am investigating. Even if the provisions of that statute did apply, the rule of discoverability would be invoked and the two-year limitation period would not commence until May 10, 2020.
- (47) For those reasons, I reject the defence that the Complainants failed to file their Complaint within the prescribed time.

**C. Whether Invest North Bay Development Corporation (INBDC) is a “Local Board”**

- (48) By Letters Patent issued on October 15, 2015, INBDC was incorporated as a corporation without share capital pursuant to s.203 of the *Act* to provide one or more economic development services. The central object of the corporation is to promote and sustain economic growth in the City of North Bay.
- (49) City Council adopted a Code of Conduct for Members of Council of the Corporation of the City of North Bay and Certain Local Boards on February 26, 2019.
- (50) Article IV (k) of the Code of Conduct defines “local board” as follows:

“local board” means a school board, board of directors of a children’s aid society, committee of adjustment, conservation authority, court of

revision, land division committee, municipal service board, public library board, board of management of an improvement area, board of health, police services board, planning board, district social services administration board, trustees of a police village, board of trustees of a police village, board or committee of management of a long-term care home, or *any other board, commission, committee, body or local authority established or exercising any power or authority under any general or special Act and in respect of any of the affairs or purposes, including school purposes, of one or more municipalities or parts thereof*, but does not include a committee of management of a community recreation centre appointed by a school board or a local roads board; [*italics added*]

(51) Section 1 (1) of the *Act* defines “local board” as follows:

“local board” means a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or *any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities*, excluding a school board and a conservation authority; [*italics added*]

(52) Section 223.1 of the *Act* provides:

“local board” means a local board other than...

(f) a corporation established in accordance with section 203.

(53) Section 21 (1) of Ontario Regulation 599/06 states:

A corporation is not a local board for the purposes of any Act.

(54) Counsel for the Respondents submit that INBDC is not one of the entities listed under the definition of “local board” in the Code of Conduct or in the *Act*, and the issue is whether INBDC falls within the general language of those definitions (which I have transcribed in italics).



- (55) As I understand the argument, even if INBDC does fall within the general language of those definitions, given the provisions of s. 21 (1) of Ontario Regulation 599/06, it does not matter; that language is determinative of the defence advanced.
- (56) In the event I conclude they are correct, counsel for the Respondents submit I would have no jurisdiction to conduct an inquiry concerning a complaint about the activities of INBDC, or any of its members.
- (57) However, a closer examination of Ontario Regulation 599/06 reveals the following provisions:
- 9 (1) If a municipality establishes a corporation for the sole purpose of providing one or more economic development services, the municipality may also designate the corporation as a designated economic development corporation.
- (2) Despite section 21 of this Regulation, if a municipality designates a corporation under subsection (1), the corporation is a local board of the municipality for the purposes of section 326 of the Act.
- (3) Economic development services provided by and for the purposes of the corporation designated by a municipality under subsection (1) are prescribed as special services for the purposes of clause 326 (1) (a) of the Act.
- (4) In this section, “economic development services” means, (a) the promotion of the municipality for any purpose, including by the collection and dissemination of information and the development of economic development strategic plans...
- (58) I find that INBDC was incorporated for the sole purpose of providing one or more economic development services, as defined in s. 9(4) of the Regulation. Accordingly, I find that s. 9 of Ontario Regulation 599/06 over-rides the provisions of s. 21 (1).

- (59) I therefore conclude that INBDC is a local board, and that the Code of Conduct applies to its members.
- (60) I take comfort in this conclusion in the fact that the concern for transparency and accountability was shared by the City and by the citizen volunteers who would ultimately become the first directors of the development corporation. The minutes of the City of North Bay Economic Development Corporation Advisory Board meeting held on March 12, 2015 indicate there was discussion and concern about transparency and accountability in the operations of the proposed development corporation. In their Confidential Report to Council dated April 19, 2015 in which they recommended the establishment of INBDC, the City Solicitor and Chief Administrative Officer stated: “As a municipal corporation, the issue of “control, transparency and accountability will be important...””.
- (61) In addition, s. 21(2) of Ontario Regulation 599/06 provides: “Despite subsection (1), a corporation shall be deemed to be a local board for purposes of...*the Municipal Conflict of Interest Act*...”. When enacting Bill 68 which amended the *Act*, the Legislature’s stated intention was to promote transparency and accountability in the way municipalities and their local boards conduct their business, with the ultimate goal of ensuring public confidence in the process of local government.
- (62) In my view, it would be inconsistent if the members of INBDC were found to be subject to an inquiry by the Integrity Commissioner for an allegation of breach of the provisions of the *Municipal Conflict of Interest Act*, but were found not to be subject to an inquiry by the Integrity Commissioner for an alleged breach of the Code of Conduct. In that regard, I note that the “catch-all” phrase in the definition of “local board’ in the *Municipal Conflict of Interest Act* is similar to the wording of the definition of that term in the *Act*.

**D. Whether the Complainants have standing to initiate the Complaint**

- (63) Counsel for the Respondent Mr. Burton submitted that INBDC is a corporation without share capital, and the only parties who have standing to raise issues related to such a corporation are its officers and directors. Because neither of the Complainants are an officer or a director of INBDC, he argued the Complaint against Mr. Burton must fail.
- (64) In support of that position, counsel relied on the decision of Granger J. in *Re London Humane Society*, 2010 ONSC 5775 (S.C.J.). The issue in that case was who should properly be considered to be current members of the Society for voting and all other purposes.
- (65) In my view, that decision is not on point, and the findings of the learned judge are not relevant.
- (66) Section 223.4 (1) (a) of the *Act* states that a request about whether a member of council or of a local board has contravened the code of conduct applicable to the member may be made by “council, a member of council or a member of the public”.
- (67) The Complainants are members of the public. I find the *Act* gives them status to file the Complaint.
- (68) In addition, Article 14.1 of the Code of Conduct provides:
- A person who believes that a member has contravened any provision of this Code of Conduct may give to the Integrity Commissioner the person’s complaint which must be in writing and must set out the particulars of the alleged contravention.
- The Complainants have satisfied all of those requirements.
- (69) I therefore reject the defence of lack of standing.

**E. Whether the case Against the Respondent George Burton is now moot**

(70) Counsel for the Respondent Mr. Burton submitted that, even if I determine that INBDC is a local board, Mr. Burton is no longer a “member” as defined in Article IV (l) of the Code of Conduct. That section provides that:

In this Code of Conduct... (l) “Member” means each member of the Council and each member of local boards of the City.”

(71) Counsel advised that, as of September 15, 2020, Mr. Burton is no longer an officer or director of INBDC. In other words, he is no longer a member of INBDC. Counsel submitted that the Complaint is now moot as against Mr. Burton and that, as a consequence, I no longer have jurisdiction over him.

(72) Generally speaking, courts only have authority to resolve disputes. Legal actions cannot be brought or continued after the matter at issue has been resolved. Where there is no live issue to resolve, the matter is said to be “moot”. Courts generally will decline to decide a case which raises a merely abstract or hypothetical question.

(73) It should be noted that the inquiry I have undertaken is not a court proceeding.

(74) In the event I were to find that Mr. Burton did contravene the Code of Conduct, I have no authority to penalize or sanction him. Section 223.4(6) of the *Act* gives exclusive authority to INBDC to impose any of the available legislated penalties. I agree that, in the circumstances of this case, in the event I were to be of the opinion that Mr. Burton contravened the Code of Conduct, the issue of penalty is moot.

(75) However, the issue before me is whether Mr. Burton contravened Article 13.1 of the Code of Conduct by reason of activities he engaged in between 2016 and 2018, when he was a director and President of INBDC. That issue is not moot.

(76) The defence of mootness must therefore fail.

### **Analysis of the Complaint**

(77) Having rejected all of the defences advanced by the Respondents, I turn now to the merits of the complaint.

### **The Inquiry**

(78) Upon accepting the delegation of responsibility for this file from Integrity Commissioner Guy Giorno, I proceeded to undertake an investigation of the Complaint. During the course of my investigation, I reviewed:

- the Letters Patent and by-laws of INBDC;
- the minutes of all meetings conducted by INBDC;
- certain of the minutes of City Council during the time period captured by the Complaint;
- copies of related Council and INBDC resolutions passed during the time period captured by the Complaint;
- the RFP issued by INBDC for a marketing plan;
- the four proposals received in response to that RFP;
- the notes and chart prepared by the City Purchasing Manager during the evaluation of the four proposals by the INBDC proposal review committee;
- the contract awarded to TWG Communications;
- the conflict of interest policy adopted by INBDC on February 28, 2017;
- the financial statements for INBDC for the years 2016, 2017, and 2018;
- the presentation by the Board chair of INBDC to City Council on May 30, 2017;
- the Financial Statement-Auditor's Reports filed by the Respondent Mr. McDonald following the 2010, 2014 and 2018 municipal elections;

- various reports made by Senior Staff to City Council during the time period captured by the Complaint;
  - various emails exchanged between Senior Staff;
  - the contract with Integrity Commissioner Guy Giorno;
  - City of North Bay Procedural By-Law No. 2017-01; and
  - various online and print media news reports.
- (79) Throughout my investigation, with the able assistance of the City Clerk, I made numerous requests for information from a number of members of City Senior Staff. Without exception, I received immediate cooperation, and full and candid responses to my requests.
- (80) I also interviewed a member of the Board of INBDC, the City Purchasing Manager at the time INBDC issued the RFP for a marketing plan, and the City Manager of Economic Development.
- (81) The facts related to the substance of the Complaint I am investigating are not complex or contentious. In the course of the inquiry, I obtained all the information necessary for me to render a determination of whether there has been a breach of the Code of Conduct as alleged in the Complaint. As a result, I did not find it necessary to exercise the powers available to me under sections 33 and 34 of the *Public Inquiries Act*.

### **The Facts Relevant to the Complaint**

- (82) My investigation revealed the following facts:
- In 2014, the Respondent Mr. McDonald recruited a number of business leaders and professionals to sit on the City of North Bay Economic Development Advisory Board. The Respondent Mr. Burton was one of those recruits.
  - In a confidential report to Council dated April 19, 2015, the City Solicitor and CAO recommended that Council adopt the recommendation of the Economic Development Advisory Board to establish INBDC as a not-

for-profit corporation reporting to City Council, whose primary object was to promote and sustain economic growth in North Bay.

- The City Solicitor prepared the application for incorporation. Letters patent were issued to INBDC on October 19, 2015.
- Upon incorporation, INBDC had a board of directors of 14 persons, comprised of the Mayor and two members of Council, the CAO of the City of North Bay, and ten other volunteer members.
- From the outset, the Respondent Mr. Burton became a director, and served as the President, and co- Chair (ultimately Chair) of INBDC. As mayor of the City, the Respondent Mr. McDonald also served as a director.
- In 2016, the INBDC Board held 11 meetings. The early meetings focused on the terms of an operating agreement with the City and an asset transfer policy.
- At the INBDC Board meeting held on April 26, 2016, the City Solicitor made a thorough presentation on the topic of conflict of interest. He suggested that INBDC adopt a conflict of interest policy. A copy of his presentation was attached to the minutes of that meeting.
- On July 26, 2016, the Respondent Mr. Burton presented a draft marketing Request for Proposal (“RFP”) to INBDC board members for their consideration and comment. The draft RFP appeared to be a copy of a request for proposals for a marketing plan issued by a group of Northern Ontario Community Colleges seeking to encourage and attract students to attend those institutions. The board passed a motion at that meeting to move forward with the RFP.
- Both respondents attended that meeting.

- On July 29, 2016, the City and INBDC entered into an Operating Agreement (the “Operating Agreement”) for a term of five years.
- Under the terms of the Operating Agreement, INBDC agreed to market and promote the City for business and investment opportunities in an effective, responsible, and efficient manner. The City agreed to provide office space and staff support.
- The Operating Agreement further provided that the Manager of the Economic Development Department and the Managing Director of Community Services would attend INBDC meetings as ex-officio members of the board without voting rights.
- On August 9, 2016, following consultation with INBDC board members, the Respondent Mr. Burton provided the draft RFP to City staff to issue through the Purchasing Department.
- The Purchasing Manager, (Paul Valenti), received the draft RFP from the Manager of Economic Development, (Erin Richmond). He applied the City’s template for RFPs to what he received, and developed a request for proposals.
- In the process of developing requests for proposals, Mr. Valenti’s practice was to reach out to local firms, in advance of posting, to inform them that he would soon be issuing an RFP for goods or services that they might be able to provide.
- Mr. Valenti spoke to four or five local firms about the subject RFP he was about to issue, one of those firms being TWG Communications. He undertook those contacts without direction from anyone else.
- At that time, Mr. Valenti did not know either of Mr. Margaritis or Mr. Ferguson, the two principals of TWG Communications.



- On September 7, 2016, Mr. Valenti issued/posted the RFP for the development and implementation of a marketing and promotion plan for the City of North Bay. The closing date for submissions was September 28, 2016.
- Mr. Valenti's normal practice was to allow a four-week period from the date of posting to the closing date to allow interested proponents sufficient time to consider, prepare and file a proposal. He did not recall why the closing date was only three weeks after the posting date, but was adamant that he was not under pressure from any member of the INBDC board to shorten the response period.
- Mr. Valenti received four proposals; one of those proposals was submitted by TWG Communications.
- All INBDC board members were invited to attend a meeting on October 20, 2016 for a review of the four proposals received. Four board members responded positively to that invitation, but only three of them attended the review meeting, two of them being the Respondents to the Complaint. Erin Richmond and Mr. Valenti also attended the meeting.
- Mr. Valenti viewed his role at the proposal review meeting as one of guiding the process of evaluation.
- The proposals received were evaluated on the basis of four criteria:
 

(i)	Qualifications and experience	20
(ii)	Knowledge of economic development	30
(iii)	Work plan and implementation	30
(iv)	Financial Points (cost)	<u>20</u>
	Total Score	100 points
- Mr. Valenti provided a guide to the review committee that awarded scores for a criterion under consideration on the following basis:

Excellent – 100% of maximum allowable score

Very good (meets all key requirements) – 75 % of maximum allowable score

Fair (lacks in some area) – 60 % of maximum allowable score

Missing key requirement – 45% of maximum allowable score

Does not meet key requirement – 30% of maximum allowable score

- The three INBDC board members and Ms. Richmond evaluated each of the four proposals on the basis of applying scores from that guide to each of the four criteria of evaluation. The scores they assigned to each of the criteria were arrived at on a consensus basis.
- The total costs submitted by the four proponents ranged between \$200,000 and \$731,000.
- The total cost attributed to the TWG Communications proposal was in the amount of \$500,000 to \$600,000, when in fact the total bid cost was \$1.1 million. Notwithstanding that divergence in total costs, each of the four proponents was assigned a score of 15 out of 20 on the cost criteria.
- Mr. Valenti explained that the RFP did not set out a budget amount by reason of the fact the actual scope of the work that INBDC wished to undertake had not yet been resolved. For that reason, the review committee chose to evaluate the costs criterion on the basis of the hourly rates quoted.
- The hourly rates quoted by each of the proponents were evaluated on the basis of whether they were consistent, market price, and fair. On that basis, each of each of the four proponents was assigned a score of 15 out of 20 on the cost criteria.
- At the conclusion of the evaluation process, the proposal submitted by TWG Communications received the highest score.

- The consensus of the review committee was that TWG Communications was clearly the most qualified proponent.
- Mr. Valenti made notes of the review, but did not prepare or present a report to the INBDC board with a recommendation.
- Within a few days of that meeting, Mr. Valenti prepared typewritten notes of the meeting (Appendix “A”) and a chart outlining and comparing the scores attributed to each of the four proponents (Appendix “B”).
- Mr. Valenti had not met the Respondent Mr. Burton before the proposal review committee met on October 20, 2016.
- During the evaluation of each of the four proposals received, Mr. Valenti did not sense that any member of the committee was applying pressure in favour of the proposal submitted by TWG Communications.
- At the INBDC board meeting held on October 25, 2016, Mr. Valenti provided an overview of the RFP review process, presented his chart (Appendix “B”) comparing the evaluations of the four proposals received, and discussed next steps. The minutes of that meeting contain the following Action item:

Paul Valenti to extend invitation to most qualified proponent to allow the proponent to provide more detail to the marketing proposal and provide opportunity for the Board members to ask questions.
- Both Respondents attended that meeting.
- TWG Communications was the only proponent invited to an interview. None of the other proponents were short-listed for an interview.

- At the INBDC board meeting held on November 29, 2016, Mr. Valenti introduced Theo Margaritis and Bill Ferguson from TWG Communications; they provided a high-level overview of their proposal in the event INBDC decided to move on the marketing project.
- Later during that same meeting, the INBDC board passed the following motion:
  - Motion by George Burton, seconded by Jason Corbett to request \$1,000,000 from North Bay City Council to fund the marketing campaign. Carried.
- INBDC did not formally share the contents of that motion with City Council. However, Mayor McDonald and Councillors Shogren and Vaillancourt were in attendance at that meeting.
- There is no reference in that motion that the purpose of the money requested was to fund a successful investment.
- The INBDC board passed the following motion at its meeting held on January 31, 2017:

Motion by Daryl Vaillancourt, seconded by Derek Shogren to advise TWG Communications to proceed with Phase 1 of their proposal to start the research aspect of their marketing plan. (See below the outline of TWG's proposal).

Project Elements – Year One

Research Budget - \$45,000

- Market research
  - Local market analysis
  - Geographic segmentation
  - Competitive analysis
  - Campaign analytics and tracking
- Both Respondents attended that meeting.

- The minutes of the INBDC board meeting held on February 28, 2017 indicate that Chair Burton would be the point of contact with TWG Communications as they move ahead with Phase 1 of their proposal to start the research aspect of the marketing plan.
- At that same meeting, the INBDC board passed Motion 004-2017 which accepted a number of policies including a conflict of interest policy.
- Commencing with the board meeting in June 2017, it appears that INBDC began to follow the provisions of that policy - there are notations in the minutes of subsequent INBDC meetings where the Chair inquired about whether any member had a conflict with respect to any item on the agenda.
- The minutes of the INBDC board meeting held on April 25, 2017 contain the following note under item 5:

Former Chamber of Commerce property. Sale to close June 1, 2017. A staff report will be prepared with respect to the transfer of the funds from the sale (\$1,000,000) to the Invest North Bay Development Corporation.

Chair Burton to present to Council at the May 16, 2017 Council meeting in support of the request for funding. All Board members are encouraged to attend if their schedules permit. George will be spokesperson, and media requests should be referred to George.

Action Item:

Keith and John to draft staff report for the May 16<sup>th</sup> Council meeting in this regard.

- John Severino prepared the first draft of the requested report. At the time he prepared his draft, he was in possession of a Power Point presentation outlining what Chair George Burton was going to say to City Council on May 30, 2017 when making the request for funding to INBDC in the amount of \$1 million.

- The respondent Mr. Burton had prepared that Power Point with the assistance of Erin Richmond. The presentation outlined the requested investment budget as follows:

Investment incentives fund	\$250,000
Equity investment fund	\$250,000
Marketing project	\$500,000

- There was no INBDC board resolution authorizing the request for funding broken down in that manner. The only INBDC board resolution in existence at that time was to request \$1 million from City Council to fund the marketing campaign (November 29, 2016).
- John Severino and Erin Richmond were regular attendees at INBDC board meetings. They stated that the INBDC board frequently discussed the need to have flexibility to respond to investment incentives and equity investment, although there is nothing in the minutes of the INBDC board meetings held in 2016 or 2017 about any such discussions.
- John Severino's draft Report to Council dated May 19, 2017 contained the following recommendation:
  - That Council provides Invest North Bay Development Corporation \$1,000,000 to support future equity investments and marketing initiatives.
- In the Background section of that draft report, Mr. Severino stated:
  - To support an equity investment fund and marketing initiatives, the DC is requesting \$1MM from the City.
- John Severino submitted his draft Report to Council to CAO Keith Robicheau who, in turn, passed it on to CFO Margaret Karpenko for her input.

- Margaret Karpenko had not attended any INBDC board meetings. She was not familiar with any INBDC board decisions, motions or minutes of meetings. She expressed concern and asked for more definition and clarity on the meaning of “future equity”. She was able to determine that INBDC wanted quick access to funds should an opportunity arise.
- Margaret Karpenko was focused on protecting the City’s interests by ensuring that proper controls were established and in place before any funds requested by INBDC were released.
- The Respondent Mr. Burton, acting as Chair of INBDC, made a presentation to City Council on May 30, 2017. His written presentation, filed with Council, did not mention that the request for funding in the amount of \$1 million was intended or required to pay for the development and implementation of a marketing and promotion plan proposed by TWG Communications.
- A print media report quoted Mr. Burton’s concluding remarks to Council:

The ask is for Council to allocate one million dollars to Invest North Bay...We need the flexibility to respond to opportunities as they arise.
- Again, there was no mention that the requested funding was intended to pay for the marketing and promotion plan proposed by TWG Communications.
- The City did not maintain an audio or video recording of that presentation to Council.
- The report from Senior Staff to City Council dated May 19, 2017 was presented to and considered by Council at that same meeting on May 30, 2017.

- In that report, the authors, CAO Keith Robicheau, CFO Margaret Karpenko, and Managing Director – Community Services John Severino, made the following recommendation:

That Council allocate up to \$1,000,000 from the Property Development Reserve (99535R) to be assigned by Invest North Bay Development Corporation upon notification to the City's Chief Administrative Officer and Chief Financial Officer by Board Resolution of a successful investment pursuant to the terms of the Operating Agreement between the Corporation of the City of North Bay and Invest North Bay Development Corporation and within the discretion of the Board.

- Margaret Karpenko was satisfied that the amendments to the wording of the recommendation originally proposed by John Severino provided proper controls for the release of funds to INBDC when requested.
- On page 2 of that report, the authors stated:

To support a future equity investment and future marketing initiatives, the DC is requesting \$1 million from the City...

- There was no mention in the Report to Council about the transfer of \$1 million to INBDC from the sale of the Chamber of Commerce property.
- The Report also did not mention that the funds requested in the amount of \$1 million were intended to pay for the marketing plan proposed by TWG Communications which, if undertaken, had a price-tag in excess of \$1 million.
- Later during the same meeting, Council passed Resolution no. 2017-216 which was identical in wording to the recommendation contained in the Report to Council received from Senior Staff earlier that evening.



- The Respondent Mr. McDonald voted in favour of that resolution.
- At the INBDC board meeting held on June 7, 2017, the auditors for INBDC recommended that an agreement be put in place with respect to the \$1 million contribution from the City. There is no mention of such an agreement in the minutes of any subsequent INBDC board meeting. The City Clerk has confirmed that no such agreement exists.
- At the INBDC board meeting held on October 31, 2017, Treasurer Paul Waqué and Erin Richmond presented a financial report and advised that “the million dollars approved by City Council will be made available as required from the city reserve account”.
- William Ferguson and two associates from TWG Communications made a presentation to the INBDC board of directors on February 27, 2018. Board members requested a breakdown of what TWG had accomplished within the approved budget of \$45,000. A subcommittee, which included the Respondent Mr. Burton, was formed to discuss approach and next steps.
- Both Respondents attended that meeting.
- At that same meeting, the Respondent Mr. Burton declared a conflict of interest when the manager of North Bay Jack Garland Airport made a request for funding and the board subsequently passed a motion for funding in the amount of \$295,000 for a two-year project focused on increasing business and growth at the airport.
- At its board meeting held on June 26, 2018, INBDC passed motion 007-2018:

That Invest North Bay Development Board of Directors advises TWG Communications to proceed with the Marketing Strategy as outlined in their proposal dated September 28, 2016.

- Both Respondents attended that meeting.
- On September 21, 2018, INBDC entered into a written contract with TWG Communications for the development and implementation of a marketing and promotion plan for the City of North Bay for the sum of \$1.2 million, plus HST. The Respondent Mr. Burton, and the board treasurer, executed that agreement on behalf of INBDC.
- During the period between October 2015, when INBDC was incorporated, and September 2018 when INBDC entered into the written agreement with TWG Communications for the marketing and promotion plan, the INBDC board met on 23 occasions.
- During that specific period, Erin Richmond was the City's Manager of Economic Development, and an ex-officio member of the INBDC board without voting rights. She attended all but three of those INBDC board meetings. She also attended and participated in the proposal evaluation committee's work on October 20, 2016 when the four proposals received in response to the RFP were evaluated.
- She confirmed that the scoring of the four proposals received in response to the RFP was done on a consensus basis, that no member of the evaluation committee appeared to be advocating or placing undue emphasis on the proposal submitted by TWG Communications, and that the consensus of the committee was that TWG's proposal was clearly the best of the four proposals reviewed by a wide margin.
- She also confirmed that whenever the TWG communications proposal was discussed at INBDC board meetings, no member of the board appeared to be unduly advocating that proposal.
- Ms. Richmond attended the INBDC board meeting on November 29, 2016 when (a) Mr. Margaritis and Mr. Ferguson made their in-depth presentation promoting the proposal made by TWG Communications,

and (b) when the INBDC board passed the motion to request \$1 million from Council to fund the marketing campaign.

- John Severino was the Managing Director of Community Services, and an ex-officio member of the INBDC board without voting rights. With the exception of the meeting held on June 28, 2016, he attended 22 of the 23 INBDC board meetings held between October 2015 and September 2018.
- Mr. Severino was present at the INBDC board meeting held on November 29, 2016 when the motion was passed to request \$1,000,000 from North Bay City Council to fund the marketing campaign.
- His explanation for not referring to that motion in his draft Report to Council (dated May 19, 2017) was that the INBDC board had not yet decided whether to engage the services of TWG Communications to the full extent of its proposal. That explanation is verified by the facts that it was not until (a) June 26, 2018 that the board passed a motion instructing TWG Communications to proceed with its proposal dated September 28, 2016, and (b) September 21, 2018 that INBDC signed a written contract with TWG Communications for the price of \$1.2 million, plus HST.
- Mr. Severino confirmed that he did not have any discussions with either of the Respondents about or concerning the contents of the Report to Council dated May 19, 2017 which he had drafted.
- William Ferguson is a principal in the firm of Theodore William Inc., the marketing agency located in North Bay that carries on business as TWG Communications.
- In the municipal elections conducted in North Bay in 2010 and 2014, Mr. Ferguson acted as campaign manager for the Respondent Allan McDonald, who was elected mayor on both occasions

- The Financial Statement-Auditor's Report filed by the Respondent Mr. McDonald pursuant to the Municipal Elections Act for the 2010 municipal election reveals that he paid TWG Communications the sum of \$26,366.25 for advertising and marketing related expenses. That amount represents 93% of Mr. McDonald's total election expenses.
- The Financial Statement-Auditor's Report filed by the Respondent Mr. McDonald pursuant to the Municipal Elections Act for the 2014 municipal election reveals that he paid TWG Communications the sum of \$22,600.00 for advertising and marketing related expenses. That amount represents 91% of Mr. McDonald's total election expenses.
- Mr. Ferguson also acted as Mr. McDonald's campaign manager for the office of mayor in the 2018 municipal election.
- I conclude, on a balance of probabilities, that between and during the years 2010 to 2018, the Respondent Mr. McDonald enjoyed a personal and business or professional relationship with William Ferguson.
- The Respondent Mr. Burton has been President of Canadore College since 2010.
- William Ferguson became a member of the Board of Governors of Canadore College in 2010.
- In 2015, he was Board Chair, as well as Chair of the Executive Committee.
- In September 2015, Mr. Ferguson announced that the Board of Governors of Canadore College had awarded a five-year contract extension to Mr. Burton as President. The value of that extension over the five years was well in excess of \$1million.
- Mr. Ferguson's words of praise for Mr. Burton included: "We are very fortunate to have George at the helm of Canadore...He's done an

excellent job...George's dedication and commitment to success is a driving force and a prime motivator for all who work with him..."

- From as early as June 2016, Mr. Ferguson and the Respondent Mr. Burton were, and continue to be, members of the Board of Directors of the Canadore College Foundation whose primary object is to provide leadership in meeting the long-term development and fundraising objectives established by the College Board of Governors to benefit students, programs, and applied research at the College.
- (83) It is reasonable to infer that the President of a community college works closely on a regular basis with the Chair of the Board of Governors and the Chair of the Executive Committee.
- (84) I conclude, on a balance of probabilities, that between and during the years 2010 to 2018, the Respondent Mr. Burton enjoyed a personal and business or professional relationship with William Ferguson.
- (85) Throughout the history of interaction between TWG Communications and INBDC with respect to TWG's proposal to develop and implement a marketing and promotion plan for the City of North Bay, neither of the Respondents disclosed the existence of a personal and business or professional relationship with William Ferguson. The Respondent Mr. Burton did not declare a conflict of interest at any INBDC meeting to which I have referred. Similarly, the Respondent Mr. McDonald did not declare a conflict of interest at any INBDC board meeting, or City Council meeting, to which I have referred.

## **The Code of Conduct**

- (86) Section 223.2 (4) of the *Act* provides:
- The Minister may make regulations prescribing one or more subject matters that a municipality is required to include in a code of conduct.

(87) Section 1 of Ontario Regulation 55/18 provides:

1. For the purposes of section 223.2 of the Act, the following are the prescribed subject matters that a municipality is required to include in the codes of conduct for members of the council of the municipality and of its local boards:

1. Gifts, benefits and hospitality.
2. Respectful conduct, including conduct towards officers and employees of the municipality or the local board, as the case may be.
3. Confidential information.
4. Use of property of the municipality or the local board, as the case may be.

(88) Those four topics are not exclusive. Beyond the subject matter of those four prescribed topics, the Legislature has left it up to municipalities to decide on the content and style of their codes of conduct for members of council and local boards.

(89) The Complainants in the matter which I am investigating say that the conduct of the Respondents contravenes Article 13.1 (a), (b), and (c) of the Code of Conduct, which reads as follows:

13.1 No member shall use the influence of his or her office for any purpose other than for the lawful exercise of his or her official duties and for City purposes. Without limitation, no Member may:

- (a) use his or her office or position of influence or attempt to influence the decision of any other person, for the Member's private advantage or that of the Member's parent, child, spouse, Staff, friend or associate, business or otherwise; or
- (b) attempt to secure preferential treatment beyond activities in which Members normally engage on behalf of their constituents as part of their official duties; or

- (c) hold out the prospect or promise of future advantage through the Member's supposed influence with Council, in return for any action or inaction.

(90) In their Complaint, the Complainants say that the Respondents have also contravened the Statement of Principles specified in Article II of the Code of Conduct. I have determined that I will not conduct an inquiry under Article II because it merely contains a statement of principles which are guides to interpretation. The stated principles cannot form the basis of a complaint because they do not constitute a rule of conduct.

(91) However, since the Statement of Principles does inform the manner in which the Code of Conduct should be interpreted, I deem it informative to set them out here, (Article II):

Improving the quality of municipal administration and governance can be best achieved by encouraging high standards of conduct on the part of all municipal officials. In particular, the public is entitled to expect the highest standards of conduct from the members that they elect to local government. In turn, adherence to these standards will protect and maintain the City's reputation and integrity.

The principles of that underline this Code of Conduct are as follows:

- (a) Members must serve and be seen to serve their constituents in a conscientious and diligent manner;
- (b) Members must be committed to performing their functions with integrity, avoiding the improper use of the influence of their office, and conflicts of interest;
- (c) Members are expected to perform their duties in office and arrange their private affairs, in a manner that promotes public confidence and will bear close public scrutiny;
- (d) Members must recognize and act upon the principle that democracy is best achieved when the operation of

government is made as transparent and accountable to the public as possible; and

- (e) Members shall seek to serve the public interest by upholding both the letter and spirit of the laws of Parliament and the Ontario Legislature, as well as the laws and policies adopted by the Council.

### **The Rule Prohibiting “Improper Use of Influence”**

- (92) The Complainants submit that the Respondents breached Article XIII of the Code of Conduct which creates the rule of “No Improper Influence”. This is what they say in their Complaint:

The prior relationship between Mr. Burton and Mr. McDonald, as outlined previously, would at the very least show a perceived bias towards Mr. Ferguson’s bid...The perception that preferential treatment would be shown to Mr. Ferguson cannot be ignored. It is abundantly clear that Mr. Burton and Mr. McDonald had no business remaining on the bid selection committee. It has terrible optics of influence peddling and smacks of cronyism...

Mr. McDonald used his position in office to approve the board members of Invest North Bay Development Corporation. The Mayor of the City of North Bay and Council has veto over board member selection. By using his position of influence, Mr. McDonald can stack the board members of Invest North Bay Development Corporation and its committees in his favour and use his influence to sway board members for contract approvals.

Mr. McDonald, Mr. Burton and Mr. Ferguson have been viewed by the public to use their positions of influence to loot the public coffers. Their collective history and actions are seen to violate the integrity principles of the Code of Conduct for council members and local boards. Their decisions are not in



the best interests of the public and do not hold up against close public scrutiny.

- (93) The first point the Complainants raise is essentially an allegation of the existence of a conflict of interest. I will return to that assertion.
- (94) With regard to the second point, while it is true that the Respondent Mr. McDonald did recruit the original members of the Economic Development Advisory Board, who subsequently became some of the first Directors of INBDC, the Operating Agreement and INBDC By-law No. 1 both provide that all directors of INBDC are to be approved by City Council.
- (95) With respect to the third point, the allegation is mere speculation and conjecture. There is simply no evidence to support it.
- (96) Depending on the wording of a rule of conduct, the finding that each of the Respondents enjoyed a personal and business or professional relationship with William Ferguson may be evidence of a non-pecuniary interest that arose from those relationships that would be considered by a reasonable person, apprised of all the circumstances, as being likely to influence the Respondents' decisions.
- (97) However, the issue I must resolve is whether some or any form of conflict of interest falls within the scope of the meaning to be assigned to the rule prohibiting improper use of influence. The Complainants submit that the Principle set out in Article II (b) of the Code of Conduct supports consideration of the existence of a conflict of interest as establishing improper use of influence.
- (98) With respect, I disagree. The Principle set out in Article II (b) of the Code of Conduct reads as follows:

The principles that underline this Code of Conduct are as follows: ...

(b) Members must be committed to performing their functions with integrity, avoiding the improper use of the influence of their office, and conflicts of interest.

- (99) That is the sole reference in the Code of Conduct to conflict of interest. The term “conflicts of interest” does not modify or expand on the improper use of influence. Rather, properly read and interpreted, this principle encourages members to avoid the improper use of the influence of their office, and to avoid conflicts of interest.
- (100) In my view, the scope of the rule against improper use of influence is restricted to prohibiting a member from engaging in conduct such as (a) contacting any official charged with making an independent regulatory decision or enforcing municipal by-laws or other laws enforced by the municipality, or (b) contacting a member of any tribunal regarding any matter before it, if the intent is to influence improperly the decision of that official or tribunal to the private advantage of oneself, family, or friends.
- (101) For example, having regard to a member of the INBDC board, it would be improper for a board member to speak to the Chief Building Official on behalf of a friend to request that he/she exercise his/her discretion in waiving or disregarding the failure of that friend to call for an inspection of electrical wiring before the walls of the building which is subject to a building permit were closed in. Another example might be for an INBDC board member to approach a member of the Committee of Adjustment on behalf of a friend to seek a favourable decision on a minor variance application in the face of significant opposition from the applicant’s neighbours.
- (102) I am satisfied that there is no direct evidence, and no circumstantial evidence from which a reasonable inference can be drawn, that either of the Respondents improperly used the influence of their respective offices when: (a) they participated in the evaluation of proposals on October 20, 2016; (b) they voted at the INBDC board meeting on January 31, 2017 in favour of a motion instructing TWG Communications to proceed with

Phase I of their proposal, and (c) they voted at the INBDC board meeting on June 26, 2018 in favour of a motion authorising TWG Communications to proceed with the full implementation of their proposal dated September 28, 2016.

(103) I have noted a number of shortcomings related to the request made by INBDC to City Council for funding in the amount of \$1 million:

- The motion passed by the INBDC board on November 29, 2016 to request \$1 million from City Council to fund the marketing was never formally communicated to City Council;
- Although the Report to Council dated May 19, 2017, authored by the Chief Administrative Officer, the Chief Financial Officer and the Managing Director of Community Services, stated that INBDC is requesting \$1 million from the City “to support a future equity investment fund and future marketing initiatives”, the recommendation to Council was that Council allocate up to \$1 million from the Property Development Reserve fund to INBDC “upon notification... of a successful investment”.
- On May 30, 2017, the Respondent Mr. Burton made a presentation to City Council to request funding for INBDC. His Power Point presentation, filed with Council, ignored the contents of the motion passed by the INBDC board on November 29, 2016 (to request \$1 million from City Council to fund the marketing campaign), and did not mention that the request for funding in the amount of \$1 million was intended to pay for the development and implementation of a marketing and promotion plan proposed by TWG Communications.
- There was no INBDC board resolution authorizing the requested budget which the Respondent Mr. Burton presented to City Council, namely:

Investment incentives fund	\$250,000
Equity investment fund	\$250,000

Marketing project

\$500,000

- There is no video or audio recording of what transpired at that Council meeting. Media reports of the meeting quote the Respondent Mr. Burton as having said: “The ask is for Council to allocate one million dollars to Invest North Bay... We need the flexibility to respond to opportunities as they arise.”
- There is no record of the Respondent Mr. Burton, or anyone else on behalf of INBDC, having informed Council that the intended use of the funding requested in the amount of \$1million was to pay for the marketing and promotional plan proposed by TWG Communications.
- Later, at the same Council meeting held on May 30, 2017, Council passed a resolution which contained the verbatim recommendation set out in the Report to Council from Senior Staff which made no mention of the real intent of the use of the funds requested, even though the Managing Director of Community Services had been present at the INBDC meeting on November 29, 2016 when the INBDC board passed the motion to request \$1 million from Council to fund the marketing campaign.
- While I accept Mr. Severino’s explanation for not mentioning that motion (confirmed by Erin Richmond) because (a) the board had not yet decided whether to proceed with the full extent of the TWG proposal, and (b) the INBDC board had frequently discussed the need to have flexibility to respond to investment incentives and equity investment, the fact remains there is nothing in the minutes of the INBDC board meetings held in 2016 or 2017 about any such discussions.

(104) City Council adopted the recommendation contained in the Report to Council by Senior Staff. Notwithstanding the shortcomings in that Report, I am satisfied that there is no direct evidence, and no circumstantial evidence from which a reasonable inference can be drawn,

that either of the Respondents played any role or interfered in any way with its preparation, content, or lack of content.

- (105) Corporate by-laws contain the rules and regulations that govern a corporation and its directors and officers. Corporate resolutions document business and operational decisions made by a corporation's board of directors. Because of their flexibility and legal status, resolutions are the primary documentation source for major decisions made outside of a corporation's by-laws. Resolutions are functional documents that authorize actions that officers or managers must take in the daily operation of the corporation's business. They provide a paper trail of the major decisions made by the board of directors.
- (106) The motion passed by the INBDC board of directors on November 29, 2016 to request \$1 million from City Council to fund the marketing campaign was a major decision for the corporation. While the investment budget set out in the Respondent Mr. Burton's presentation to Council on May 30, 2017 was not authorized by an INBDC board resolution, that fact does not establish contravention of the rule against improper use of influence set out in Article XIII of the Code of Conduct.
- (107) Likewise, the fact that the Respondent Mr. McDonald voted to approve the resolution approving funding for INBDC in the amount of \$1 million later at that same meeting, does not establish contravention of the rule against improper use of influence set out in Article XIII of the Code of Conduct.
- (108) In summary, I find there is no direct evidence, and no circumstantial evidence from which a reasonable inference can be drawn that either of the Respondents:
- (a) used his office or position of influence, or attempted to influence the decision of any other person, for his own private advantage or that of TWG Communications;

(b) attempted to secure preferential treatment for TWG Communications beyond activities in which a member of Council or a member of INBDC would normally engage as part of his official duties; or

(c) held out the prospect or promise of future advantage through his supposed influence with Council or INBDC in return for any action or inaction.

(109) There is only one reference to conflict of interest in the Code of Conduct. The term “conflict of interest” is not defined in the Code of Conduct. In those circumstances, it is reasonable to infer that the only meaning to be ascribed to that term is a direct or indirect pecuniary interest as defined in the *Municipal Conflict of Interest Act*. The Complainants do not allege that either of the Respondents had a direct or indirect pecuniary interest in TWG Communications, or in the marketing contract INBDC awarded to that firm.

(110) As I understand it, the Complainants submit that I should investigate issues of conflict of interest in a broad and comprehensive manner. They argue that the existence of an apparent or perceived conflict of interest constitutes proof that the rule against improper use of influence has been contravened.

(111) With respect, I do not agree. In the absence of specific mention of conflict of interest in the rule, I conclude that the plain meaning of the words “improper use of influence” does not contemplate the existence of an apparent, real, perceived, potential, or indirect conflict of interest as proof that the rule against improper use of influence has been contravened.

(112) As noted earlier, *Ontario Regulation 55/18* prescribes four topics that every code of conduct must contain. Beyond those topics, municipalities are free to develop their codes of conduct in any manner they wish.

(113) The City’s Code of Conduct addresses the four prescribed topics. It also includes a rule prohibiting improper use of influence. Several other

municipalities in Ontario have developed codes of conduct in a similar fashion.

(114) However, some municipalities have gone even further in their codes of conduct. In addition to a rule prohibiting improper use of influence, they have also included a rule requiring members not to participate in the decision-making process associated with their office when they have:

- an apparent and or real conflict of interest (Ottawa);
- a disqualifying interest in a matter that, by virtue of the relationship between the member and other persons associated with the matter, would cause reasonable persons fully informed of the facts to believe that the member could not participate impartially in the decision-making process related to the matter (Thunder Bay, Owen Sound, Guelph, Aurora); and
- a non-pecuniary interest that is non-financial in nature but that arises from a relationship with a person or entity that would be considered by a reasonable person, apprised of all the circumstances, as being likely to influence the member's decision (Kingston).

(115) As noted earlier, the Complaint alleging breach of the rule in Article XIII of the Code of Conduct which prohibits improper use of influence is essentially based on allegations of apparent or perceived conflict of interest.

(116) While members are subject to the provisions of the *Municipal Conflict of Interest Act*, the Code of Conduct does not contain a rule requiring members to avoid conflicts of interest of any description. When enacting the Code of Conduct, North Bay City Council did not legislate such a rule.

**Result**

- (117) There is no direct evidence, and no circumstantial evidence from which a reasonable inference can be drawn, that either of the Respondents have contravened Article XIII of the Code of Conduct.
- (118) The Complaint is therefore dismissed.

**Publication**

- (119) Section 223.6(2) of the *Act* provides that, if the Integrity Commissioner reports to the municipality or a local board his or her opinion about whether a member of council or of a local board has contravened the applicable code of conduct, the Commissioner may disclose in the report such matters as in his/her opinion are necessary for the report.
- (120) In my opinion, all the content of these reasons is necessary.
- (121) Section 223.6(3) of the *Act* stipulates that the City of North Bay and INBDC shall ensure that this report is made available to the public.

**Recommendations**

- (122) The contract that the City has with Integrity Commissioner Guy Giorno includes a mandate that he determine whether a member of Council or a Local Board has violated the code of conduct, and that he provide individual investigative reports concerning a complaint and recommendations to Council or the Local Board with respect to a complaint, including and not limited to appropriate penalties, if applicable, for its consideration.



- (123) With respect to my investigation of the Complaint, I have found that there has been no breach of the Code of Conduct. However, I do have some recommendations for consideration of Council arising from my investigation.
- (124) **Code of Conduct Complaint Protocol** - Most Ontario municipalities that have adopted a code of conduct for members of council and local boards have developed a code of conduct complaint protocol. This does not appear to have been done in North Bay. Such a protocol would be of assistance to members of council and local boards, as well as to members of the public and the Integrity Commissioner. It would deal with such things as how complaints are to be prepared, where they are filed, how they are processed, how they are investigated by the Integrity Commissioner, and what occurs at the end of an investigation. In addition, it would inform members about the procedure for them to follow to obtain advice from the Integrity Commissioner concerning the interpretation of and compliance with the Code of Conduct. I recommend that City Council invite Integrity Commissioner Giorno to develop a Code of Conduct Protocol.
- (125) To avoid any confusion, Integrity Commissioner Giorno has developed a Protocol for Handling Confidential and Privileged Information of the City. That Protocol addresses a separate issue and does not provide direction in the areas described in the preceding paragraph.
- (126) **Effective Date of Code of Conduct** – In the event there is concern about my ruling on the defence of retrospective application of the Code of Conduct, if it chooses to do so, Council could amend the Code of Conduct to state that the Code became effective as of February 26, 2019, and that no complaints about conduct that occurred before the effective date will be received or considered. That effective date could be reinforced by a similar statement in the Code of Conduct Complaint Protocol, in the event Council decides to adopt one.

(127) **Is INBDC a Local Board?** – In the event there is any concern about the correctness of my decision on the issue of whether INBDC is a “local board”, and in the event Council is of the view that INBDC should be deemed to be a local board for the purpose of being subject to the Code of Conduct, I recommend that Council instruct the City Solicitor to take whatever steps are necessary to achieve that result. I would be pleased to discuss the matter with the City Solicitor.

(128) **Conflict of Interest** - Given (a) my decision that the rule against improper use of influence does not contemplate or include conduct amounting to conflict of interest, and (b) the interest in and concern for ensuring transparency and accountability expressed, as noted earlier, by both Council and the INBDC board, Council may have some interest in amending the Code of Conduct to include a rule requiring members to avoid conflicts of interest outside of the scope and application of the *Municipal Conflict of Interest Act*. In such event, I recommend that the City Solicitor discuss any proposed amendment with Integrity Commissioner Giorno.

Having regard to the Conflict of Interest Policy adopted by INBDC in February 2017, I note the following shortcomings:

- The policy makes no allowance for an inquiry to be initiated by a member of the public.
- It does not provide any oversight by an outside, independent person such as an Integrity Commissioner.
- The policy contains definitions of “actual conflict of interest”, “perceived conflict of interest”, and “potential conflict of interest”. While the policy requires members to disclose any actual, potential, or perceived conflicts of interest at the opening of each meeting, it only requires members to avoid actual or potential conflicts of interest.

Members are not required to avoid perceived conflicts of interest.

- The jurisdiction of your Integrity Commissioner is limited to a complaint filed under a code of conduct adopted pursuant to Part V.1 of the *Act*. Your Integrity Commissioner has no jurisdiction to rule on any alleged contravention of the conflict of interest policy INBDC appears to have followed since June 2017.
- Section 223.3 (1) of the *Act* provides that the Integrity Commissioner is responsible for performing in an independent manner the functions assigned by the municipality with respect to any of the following:
  2. The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and local boards.

A review of the contract that the City has with Integrity Commissioner Guy Giorno reveals that City did not assign that function to him. In the event the INBDC conflict of interest policy is amended to make provision for investigation of complaints by the Integrity Commissioner, then I recommend that Council assign that specific responsibility to him pursuant to the above-noted statutory provision.

(129) I would be pleased to attend a meeting of City Council and/or a meeting of INBDC, when this report is considered, to answer any questions relating to its content.

Respectfully submitted

*George Valin*

The Honourable George Valin  
Acting Integrity Commissioner  
City of North Bay

---

**APPENDIX "A"****Notes Made by Purchasing Manager Paul Valenti**

---

- Assist INB in the is process
- Publicly issued RFP on Merx – nationally recognized public private procurement website
- Advertised on our City website
- Reached out to 5 local marketing vendors – those who have shown interest in City projects
- RFP closed on Sep 28<sup>th</sup>
- Proposals evaluated by George Burton, Steve Deacon, Erin Richmond, Mayor MacDonald and myself.
- Evaluation considered
  - o Qualifications/experience
  - o Knowledge of business recruitment/expansion/economic development sector
  - o Workplan and project implementation
  - o Total project cost
- 4 proposals received – 2 Toronto, 1 West, 1 local
- TWG provided the highest ranked proposal – clearly the most qualified of those who submitted
- TWG presented budget cost of \$500,000 – 600,000
- Wide range of pricing 200,000 – 731,000
- Questions around budget through process – consciously made decision to let the proponents outline the costs of such a campaign
- Options are
  - o Do nothing
  - o Clarify the scope and negotiate agreement
  - o Present to board

## APPENDIX "B"

Chart Made by Purchasing Manager Paul Valenti

RFP Evaluation Scoring Summary						
Invest North Bay Marketing and Promotion Plan RFP						
Criteria	Points	DASH	Eist Marketing	Grapevine	TWG	
Qualifications and Experience	20	9	12	6	15	
Knowledge of the Business recruitment and expansions /economic development sector	30	9	9	9	18	
The Detailed Work Plan and Project Implementation	30	18	18	15	22.5	
<b>Subtotal</b>	<b>80</b>	<b>36</b>	<b>39</b>	<b>30</b>	<b>55.5</b>	
Total Cost (excl. HST)	\$	\$ 731,400.00	\$ 200,000.00	81,000+	500,000 - 6	
Financial Points	20	15	15	15	15	
<b>Total Score</b>	<b>100</b>	<b>51</b>	<b>54</b>	<b>45</b>	<b>70.5</b>	