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COURT OF QUEEN'S BENCH OF MANITOBA

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THE CITY OF WINNIPEG,	)	MICHAEL G. FINLAYSON
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	)	
CASPIAN PROJECTS INC., CASPIAN CONSTRUCTION INC., ARMIK BABAKHANIANS, SHAUN ANDRE BABAKHANIANS, JENIK BABAKHANIANS, TRIPLE D CONSULTING SERVICES INC., PAMELA ANDERSON, 4816774 MANITOBA LTD. operating as MOUNTAIN CONSTRUCTION, PAUL R. LAMONTAGNE, FABCA PROJECTS LTD., FABCA-PMG PROJECTS LTD., FABCA WARDLAW LTD., FABCA KING EDWARD LTD., GREGORY CHRISTO FIORENTINO, PETER GIANNUZZI, MARIA ROSA FIORENTINO, DUNMORE CORPORATION, OSSAMA ABOUZEID, ADJELEIAN ALLEN RUBELI LIMITED (also known as A.A.R.), PETER CHANG, GRC ARCHITECTS INC., PATRICK DUBUC, 8165521 CANADA LTD. operating as PHGD CONSULTING, 2316287 ONTARIO LTD. operating as PJC CONSULTING, FSS FINANCIAL SUPPORT SERVICES INC., PHIL SHEEGL, 2686814 MANITOBA LTD., JAGS DEVELOPMENT LTD., BROOKE HOLDINGS LTD., LOGISTIC HOLDINGS INC., JAW ENTERPRISES INC., ABC LTD., DEF LTD., GHI LTD., JKL LTD.,	)	ROBERT L. TAPPER, Q.C. SARAH R. McEACHERN BRIAN E. ROACH for the defendants Phil Sheegl, FSS Financial Support Services Inc. and 2686814 Manitoba Ltd.

JOHN DOE I, JOHN DOE II, JOHN DOE III,
JOHN DOE IV, JOHN DOE V, JOHN DOE VI,
JOHN DOE VII, and JOHN DOE VIII,

defendants.

JUDGMENT DELIVERED:
March 15, 2022

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JOYAL C.J.Q.B.

I. INTRODUCTION

[1] The plaintiff, the City of Winnipeg (the "City") and the defendants, Phil Sheegl, FSS Financial Support Services Inc., and 2686814 Manitoba Ltd. ("268") (collectively referred to as the "Sheegl defendants"), have brought cross-motions for summary judgment in respect of the City's claim.

[2] Both the City and the Sheegl defendants — for starkly different reasons — contend, that based on a proper application of the relevant sections of the ***Queen's Bench Rules*** in respect of summary judgment and the governing jurisprudence, this Court is indeed in a position to achieve a fair and just adjudication of the issues using this summary judgment forum. The parties say that the adjudication of the issues is possible on the basis of the evidence (or as the Sheegl defendants say, lack of evidence) produced on these potentially dispositive motions.

[3] The City asserts that based upon the facts this Court can find in respect of the evidence adduced on this motion, and based upon the law that can be applied to those facts, the allegations in its claim have been made out on a balance of probabilities and that there remains no genuine issue(s) requiring a trial.

[4] The Sheegl defendants take the position that the City has failed to tender any admissible evidence or evidence worthy of weight so as to persuasively support the claim the City has brought against them. The Sheegl defendants insist that in the absence of any admissible, reliable or persuasive evidence from the City, and given their own

responding evidence and explanations, there remains no genuine issue(s) regarding a trial and that it is in the interest of justice that this proceeding be brought to a conclusion.

II. ISSUES

[5] As it relates to the potentially dispositive cross-motions brought by the parties, the issues that require this Court's determination are as follows:

1) Is this an appropriate case for a potentially dispositive determination on summary judgment; and

2) If this is an appropriate case for a potentially dispositive determination on summary judgment, are either the City or the Sheegl defendants entitled to summary judgment?

[6] For the reasons that follow, I have determined that the summary judgment forum in the circumstances of this case will provide a process that can achieve a fair and just adjudication of the issues. In other words, I am of the view that the Court will be in a position to make the necessary findings of fact and apply the governing law to the facts so as to achieve a just result.

[7] As I explain below, I have also determined that based on the evidence and the law, the allegations upon which the City's action against the Sheegl defendants is based, have been proven on a balance of probabilities and there remains no genuine issue for trial.

[8] As it relates to the corresponding cross-motion brought by the Sheegl defendants, that motion for summary judgment ought to be dismissed.

III. BACKGROUND AND CONTEXT

[9] On January 6, 2020, the City commenced a complex multi-party action against various defendants, including the Sheegl defendants, in respect of an alleged fraudulent scheme (the "scheme"). The scheme was allegedly perpetrated on the City by the named defendants in the course of the redevelopment of the former Canada Post Building located at 266 Graham Avenue in Winnipeg. That redevelopment was for use as the Winnipeg Police Services Headquarters (the "WPSHQ project").

[10] Included as various named defendants in the City's claim are contractor principals and consultant principals who, the City alleges, controlled and directed the contractors and consultants who perpetuated the fraudulent scheme. Included amongst the named defendants are: Caspian Projects Inc. ("Caspian"), Armik Babakhanians ("Armik"), Armik's son Shaun Andrew Babakhanians ("Shaun"), Jenik Babakhanians, Triple D Consulting Services Inc., and Pamela Anderson ("Anderson") (collectively referred to as the "Caspian defendants"). Also included amongst the named defendants are the earlier identified Sheegl defendants.

[11] As I note below, the claim against the Sheegl defendants was severed and the other named defendants all await trial.

[12] The general theory that underlies the City's entire claim is that the Sheegl defendants received secret commissions and benefits from the Caspian defendants to arrange for Caspian to be provided improper procurement advantages and more specifically, to arrange for Caspian to be awarded the WPSHQ contract. The City alleges that the contractor defendants and the consultant defendants conspired to defraud and

did defraud the City through a scheme primarily related to the alteration or creation of invoices containing misrepresentations. These were allegedly submitted to the City (or used to support progress requests submitted to the City) and paid by the City.

[13] At the relevant time, Sheegl was an officer of the City for whom certain fiduciary duties existed. The City's claim contends that as a result of Sheegl's actions, he breached his fiduciary duty. The City further alleges that Armik intended to influence Sheegl with a payment of $327,200 and that Sheegl was in fact influenced by that payment. The City says that it suffered damage in the amount of that payment. In those circumstances, the City submits that the elements of the civil tort of bribery have been committed.

[14] On June 9, 2020, this Court granted an order for leave to amend the statement of claim. The amended statement of claim was filed on July 15, 2020.

[15] On July 6, 2020, this Court granted an order to sever the City's claim against the Sheegl defendants (the "severed action") from the City's claim against the remaining defendants.

[16] The essence of the City's claim in the severed action is that prior to and during the WPSHQ project, Sheegl, as the deputy chief administrative officer ("DCAO"), and later as the chief administrative officer("CAO") of the City:

(a) was complicit or acquiesced in, or was a midwife for the birth of the scheme to defraud the City and thereby obtain monies under false pretenses;

(b) that he provided improper procurement advantages to the other defendants, in exchange for the payment of secret

commissions paid to Sheegl or his related companies, FSS and 268, none of which payments were ever disclosed to the City; and

(c) that he breached his contractual and fiduciary duties to the City by, amongst other things: providing improper procurement advantages in exchange for payment of secret commissions; by engaging in outside business or undertakings with the Caspian defendants for his personal gain that influenced or were likely to influence his impartiality; by failing to keep confidential any information he obtained in the performance of his duties; and by generally failing to carry out his duties loyally, honestly, diligently and in good faith, in the best interests of the City.

[17] Essential to the City's theory in respect of the allegations contained in its claim is the contention that Sheegl was a key player in the early development stages of the WPSHQ project. In particular, Sheegl was described as the project's "main executive sponsor" and named as a member of the project's "Executive Sponsor Committee" and "Steering Committee", which was to provide overall management to the project.

IV. POSITION OF THE PARTIES

A. *Position of the City*

[18] The City submits that the evidence is overwhelming in support of the City's claim against Phil Sheegl for bribery.

[19] The City submits that Sheegl's answer to the City's bribery claim is that money paid by Armik/Caspian ("Caspian"), Mountain Construction ("Mountain")/Logistic Holdings Inc. ("Logistic") to Sheegl/FSS Financial Support Services Inc. ("FSS") related to a real estate transaction. The City argues that the problem with Sheegl's answer and position is that even if this is a non-fiction, *bona fide* real estate transaction of the type asserted (which the City vehemently denies), Sheegl's conduct in connection with it (at the time he was an executive officer of the City) necessarily means that he breached his duty of trust, good faith and loyalty to the City and that he acted in a way wherein his interest and those of the City directly conflicted. In that connection, the City asserts that the measure and type of damages for these breaches are the same as they are for bribery.

[20] The City's position on the bribery allegation relies heavily on the reasoning in ***Enbridge Gas Distribution Inc. v. Marinaccio***, 2012 ONCA 650, wherein Laskin J.A. at paragraph 33 for a unanimous Ontario Court of Appeal, held that bribery is irrebuttably presumed once the elements are established. These elements say the City have been satisfied in the present case:

> For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.

The City submits that Sheegl was manifestly the agent of the City. Armik knew Sheegl was the agent of the City. Neither Armik nor Sheegl disclosed the payment to the City.

[21] The City also contends that Sheegl as the director of the City's department of Planning, Property and Development ("PB&D"), deputy chief administrative officer and the chief administrative officer was in a fiduciary relationship with the City and was bound to act honestly, in good faith, without conflict of interest and in the best interests of the City.

[22] While in a fiduciary relationship with the City, it is the position of the City that between December 2010 and October 2013, Sheegl used his influence to assist Armik/Caspian by or in:

a) obtaining an extension for the bid deadline on RFP 833-2010 (as defined below) related to the Phase 1 contract (also defined below);

b) having the bonding requirements on RFP 833-2010 reduced;

c) being awarded the Phase 1 contract;

d) severing Caspian's joint venture with Akman Construction, and Caspian retaining the Phase 1 contact;

e) having the City hire Abouzeid as the City's project director;

f) sidelining the City's project manager Aziz;

g) having the City terminate its contract with AECOM;

h) having the City contract with AAR;

i) having the City increase the budget for the WPSHQ project;

j) ensuring the WPSHQ project was done through a GMP without competitive bids; and

k) having the City award the GMP contract for the WPSHQ project to Caspian.

[23] The City alleges that Sheegl did the above by:

a) meeting with Caspian representatives, but not meeting with representatives of the other bidders on RFP 833-2010;

b) sending internal confidential emails to Armik/Caspian;

c) communicating confidential information to Armik/Caspian;

d) never disclosing to the City his ongoing shared investment with the Akmans; and

e) never disclosing to the City payments and other benefits received from Armik/Caspian.

[24] The City maintains that when the secret payments totaling $327,200 by Armik/Caspian were revealed in the media in 2017, Sheegl fabricated a story suggesting that they related to a "handshake deal" wherein Sheegl and Sam Katz ("Katz") sold an interest in Arizona real estate to Armik. It is the position of the City that this "fairytale", as it is described by the City and the need to concoct it, are in fact evidence of Sheegl's consciousness of guilt for accepting payment for all the services rendered by him to or for Armik/Caspian.

[25] The City expresses disbelief that on the evidence presented, the Sheegl defendants could seriously argue in their motion and in their opposition to the City's motion that they breached no duty to the City, received no improper benefit and caused no harm to the City. In taking that position, the City says that the Sheegl defendants are impliedly contending that it is acceptable for the CAO of a public body to receive secret payments

from a person who at the same time is seeking a very large contract from that public body.

[26] The City was unyielding in its appropriate contention that it is well established that a fiduciary is not permitted to put himself in a position where his interest and his duty may conflict. Throughout its submissions, the City impugned what is says was Sheegl's lamentable and opportunistic understanding of his fiduciary duties and at one point invoked Sheegl's examination for discovery, where according to the City, Sheegl actually appeared to be saying that because one of his alleged co-conspirators Katz, was aware of the July 2011 $200,000 payment, he had satisfied his disclosure obligation.

[27] The City's submissions and evidence included an explanation that in October 2013, various councillors became upset with the conduct of Sheegl in the context of events not related to issues in this cause. It was apparent that Sheegl could not continue as CAO. In that context, a claim against the City was threatened by Sheegl and under that threat, $250,000.00 was paid to him in return for a release. The City emphasizes that at that time, the City was unaware of the alleged bribe and unaware of the alleged litany of breaches by Sheegl in respect of his duties of good faith and trust. The City makes the obvious point that had the City been aware of those breaches, nothing would have been paid. Indeed, had the City learned earlier of his alleged malfeasance in office, he would have been terminated for cause. Accordingly, part of the City's submissions and its claim against Sheegl addresses:

a) the "repayment" of what the City says is the bribe in the sum of $327,200, with interest;

b) the repayment of the $250,000.00 severance payment made by the City to Sheegl in 2013, with interest;

c) punitive damages; and

d) costs on a lawyer and client basis.

B. *Position of the Sheegl Defendants*

[28] The Sheegl defendants allege that not only is there no basis for the granting of summary judgment in favour of the City, but further and instead, they allege that there is no genuine issue requiring a trial with respect to the severed action wherein the City is making its claims against the Sheegl defendants.

[29] The Sheegl defendants have maintained from the outset, that given their allegation that the City's claim is ill founded, an expensive and delayed trial has never been the appropriate forum by which the Sheegl defendants should have to seek their vindication in respect of the City's claim.

[30] The Sheegl defendants impugn both the factual and legal basis for the allegations upon which the City has proceeded.

[31] The Sheegl defendants note that in the course of these summary judgment proceedings, the City has filed as its principal source of evidence, three affidavits of Mr. Michael Jack, the chief administrative officer of the City of Winnipeg (the "Jack affidavits"). The Sheegl defendants argue that in many instances, the Jack affidavits adduce hearsay and double hearsay to support nothing but a speculative claim. The Sheegl defendants say that Mr. Jack has little to no direct knowledge of the facts at issue and they impugn the City's failure to call those witnesses that they say would have had

such direct knowledge. These other witnesses were not called by the City despite the fact that the Sheegl defendants suggest that many of the key witnesses in this matter remain employed with the City.

[32] In impugning the evidentiary basis for the City's claim, the Sheegl defendants argue that the City has failed to produce even one affidavit from an individual who has personal knowledge surrounding the WPSHQ project and that it is not sufficient for the City to maintain that the facts of the alleged "scheme" are wholly within the knowledge of the defendants, such so as to excuse the City from producing an individual with knowledge. The Sheegl defendants go further in attacking the evidentiary foundation of the City asserting that the Jack affidavits only include selections of emails "parsed out to insinuate wrongful intent upon Mr. Sheegl and his co-defendants to which Mr. Jack has no knowledge". They further contend that Mr. Sheegl is not a party to many of these emails yet Mr. Jack has produced the emails to establish the truth of their contents. In short, it is the position of the Sheegl defendants that the Jack affidavits are, for the most part, entirely hearsay and in some instances, double hearsay and they are seriously prejudicial to the position of Sheegl as it relates to a largely circumstantial claim in relation to the City's allegations.

[33] Insofar as the City alleges that Mr. Sheegl used his position of trust and the discretion and power derived therefrom to provide procurement advantages to his co-defendants in exchange for kickbacks to himself and/or his companies (and thereby breached his fiduciary duties to the City), the Sheegl defendants respond by saying that

such a claim and related allegations are demonstrably false and not supported by the evidence (even the inadmissible evidence) adduced on this motion.

[34] While it is conceded that Sheegl was in a fiduciary relationship to the City in the course of his tenure as DCAO and CAO, the Sheegl defendants argue that the City is unable to establish that Babakhanians' investment in the Arizona real estate project of Tartesso was a kickback received by Sheegl for "procurement advantages", and thus Sheegl did not breach his fiduciary duty to the City. The Sheegl defendants maintain that the impugned $327,200 payment related to a *bona fide* real estate transaction about which Sheegl had made adequate disclosure to the extent disclosure was required.

[35] The Sheegl defendants' position in respect of all of the allegations brought by the City is summarized and accurately reflected at paragraphs 2 and 3 of their supplementary brief filed September 24, 2021:

> The City has presented its allegations in a broad manner that is inconsistent with the direct evidence before this Court. That strategy, combined with the parsing out [of] email communications results in a narrative of conjecture and speculation. The separation of the conjecture and speculation from the direct evidence becomes necessary to determine that inference drawn by the City is incapable of belief. The inherent difficulties associated with the sheer amount of "circumstantial evidence" (which is largely isolated sentences taken from emails and intertwined with the City's wishful narrative) is compounded with its use of hearsay evidence. Unlike the direct evidence relied upon by the Sheegl Defendants, the circumstantial evidence involves a logical gap between the proven fact and the fact sought to be proved.
>
> As highlighted by the City's submission on the co-conspirators' exception to the inadmissibility of hearsay, the City's claim cannot be made out. The City's allegations have recklessly expanded to individuals who are not a party to the proceeding without any basis in evidence. The City consistently confuses its own argumentative conjecture for direct evidence. Respectfully, the City's argumentative narrative is not fact, nor is it the appropriate evidentiary basis for which summary judgment to be granted against the Sheegl Defendants.

V. EVIDENCE ADDUCED ON THE CROSS-MOTIONS

[36] The evidence adduced on these cross-motions includes the following:

- Affidavit of Michael Jack, sworn May 27, 2021
- Affidavit of Phil Sheegl, sworn May 31, 2021
- Affidavit of Michael Jack, sworn June 3, 2021
- Affidavit of Phil Sheegl, sworn July 16, 2021
- Affidavit of Michael Jack, sworn July 23, 2021
- Transcript of the cross-examination of Phil Sheegl dated August 3, 2021

VI. THE SHEEGL DEFENDANTS' OBJECTIONS AND CONCERNS IN RELATION TO MUCH OF THE CITY'S EVIDENCE

[37] It is a constant theme throughout the submissions of the Sheegl defendants that the City's evidence is impugnable for reasons relating to its insufficiency, its quality and its inadmissibility. Some of those objections/concerns are matters for the argument on the merits and others, for reasons relating to the protection of the integrity of the evidentiary foundation, require preliminary attention.

[38] While the criticisms (valid or not) respecting sufficiency go to the persuasive burden borne by the City and the criticisms respecting the quality of the evidence go largely to the attribution of weight, the frequent assertions respecting the use of hearsay are a different order of criticism. Those latter criticisms must trigger for this Court, a more assertive gatekeeper function that need be employed to clarify or determine the validity of such assertions and general commentary (respecting the alleged hearsay), which as mentioned, appear throughout the submissions of the Sheegl defendants.

Typical of those submissions in this regard is paragraph 4 of the Sheegl defendants' September 19, 2021 legal brief:

> In the course of these summary judgment proceedings, the City has filed three affidavits of Mr. Michael Jack, chief administrative officer of the City of Winnipeg ("the Jack affidavits"). In many instances, the Jack affidavits adduce hearsay and double hearsay to support a speculative claim. Mr. Jack has little to no knowledge of the facts at issue. This, despite many of the key witnesses remaining employed with the City. In the premises [*sic*], the material facts are as stated in the affidavits filed Mr. Phillip Sheegl ("the Sheegl affidavits"), as the only instance of a reliable first-hand account of the matters in dispute.

[39] In addressing the concerns raised by the Sheegl defendants with respect to the purported hearsay evidence, I discuss below whether the impugned evidence is in fact hearsay and/or whether it is even being adduced for a hearsay purpose (the truth of the declaration). Where *prima facie* hearsay is being relied upon by the City, I will also address whether the hearsay in question is nonetheless admissible and usable (for the Court's assessment on these cross-motions) based on either the principled exception to the hearsay rule and/or more traditional exceptions to the hearsay rule.

A. ***The Sheegl Defendants' Objections and Concerns About What They Say is the City's Failure to Present Direct Evidence***

[40] Before addressing what the Sheegl defendants allege is the hearsay contained in the three Jack affidavits, I must briefly address some additional concerns raised by the Sheegl defendants, including a matter in respect of which the Sheegl defendants say gives rise to an adverse inference. These additional concerns (additional to the objections respecting the so-called inadmissible hearsay) all relate to the City's alleged failure to adduce and rely upon more of what the Sheegl defendants say is the "available" and "better" direct evidence.

[41] The Sheegl defendants argue that an adverse inference should be drawn from the City's failure to adduce "direct" evidence in support of its motion. They assert that such an inference should be drawn from the fact that the City did not produce affidavit evidence from the City employees who are included in the email correspondence attached to the affidavits of Michael Jack, and from the fact that affidavit evidence was not filed from the City employees with whom Sheegl spoke about the alleged real estate transaction (Tartesso) and other matters.

[42] In considering this issue as raised by the Sheegl defendants, it need be said at the outset that some of their (the Sheegl defendants) more sweeping comments about the absence of "direct" evidence seem to ignore the obvious: that statements or communications from a party (like Sheegl) or potentially, his alleged co-conspirators, are in law, direct evidence. That well-accepted postulate provides a prism through which many of the Sheegl defendants' criticisms about the nature and quality of the evidence should be viewed.

[43] As it relates to Tartesso, the City does not deny that Sheegl may have spoken at various times to other City employees about the land development project known as Tartesso and about which I say more later. Whatever was said by Sheegl about Tartesso was, as the City submits and as I later explain, insufficient for the purpose of satisfying Sheegl's disclosure responsibilities as a fiduciary. Apart from that issue (about which Sheegl himself could call witnesses if he so chose) the City is right to ask why would they call City employee "X" to simply confirm that Sheegl mentioned something about a land development project in Arizona called "Tartesso"? As the City argues, whatever

knowledge a City employee may have after being told something by Sheegl about Tartesso is completely immaterial to the issues in this case. To repeat, if based on Sheegl's own knowledge, the Court is wrong about the potential materiality of those witnesses or that evidence, Sheegl himself could have adduced them himself.

[44] As it relates to other matters in respect of which the Sheegl defendants argue that the City should have been obliged to call direct evidence (from City employees), I am again of the view that any such City employees have little to add to the record in respect of any of the matters the City chose to address through other evidence. As it relates to some of the operational decisions that will be mentioned when I more fully set out the evidence, whether it be in relation to the extension of time for bids on Phase 1, the reduction of the bond requirement, the hiring of Ossama Abouzeid/Dunmore, putting aside of Aziz and the termination of AECOM, there is no doubt that many City employees may have played a role or had knowledge of what occurred in connection to these matters. But as the City again asks, so what? The City has never suggested that Sheegl decided each of these matters by himself, without input from or knowledge of others. The City accuses the Sheegl defendants of attacking a straw man and notes that the City does not dispute that there were many persons and various committees involved in decision making concerning the WPSHQ project. Indeed, the City stresses that the evidence adduced by it has not been selective. It underscores that the involvement of other City representatives is plain to see on all of the emails that have been adduced into evidence. Yet, irrespective of the mention and potential involvement of others, the City asserts that it was Sheegl himself who unethically and improperly exerted his influence

to move events towards ends sought by and beneficial to Caspian. In respect of those things that he did, there is no material or relevant information that a City employee could add to the existing record that would assist the Court on the relevant issues that need be adjudicated on this motion.

[45] The governing case as it relates to the need to draw an adverse inference, is the judgment from the British Columbia Court of Appeal in ***Singh v. Reddy***, 2019 BCCA 79. In that case, the court noted that an adverse inference should only be drawn in circumstances where the evidence of the person who was not called could have been superior to other similar evidence (at paragraph 8). The court in ***Singh*** indicated that one of the factors to be considered is "[w]hether the witness has key evidence to provide or is the best person to provide the evidence in question" (at paragraph 10).

[46] Based on my examination of the totality of the evidence, I have no reason to determine that the City has not adduced the best evidence available. There is simply no reason (that has been advanced) to believe or evidence to suggest that current recollections of City employees would provide better evidence than that which is contained in their contemporaneous emails. Accordingly, I agree with the City that the notion that there is any adverse inference to be drawn from the City not having obtained and filed affidavits from City employees is not supportable.

[47] Before turning to the Sheegl defendants' arguments respecting the City's reliance on inadmissible hearsay, I wish to briefly make some additional points in respect of the Sheegl defendants' other criticisms concerning the absence of direct evidence from the City as presented through the affidavits of Michael Jack.

[48] I note that in a case such as this involving the claim being prosecuted by the City, it is reasonable to assume that Sheegl and his alleged co-conspirators have direct knowledge of the material facts at issue. If there is direct evidence that assists the Sheegl defendants in the face of what its counsel implies is unfair, selective, and opportunistic use of circumstantial evidence, that direct knowledge and any supporting documentation could have been brought to bear on the material facts at issue by the Sheegl defendants themselves. As noted, I have seen and heard nothing that would cause me to believe that the City has inappropriately ignored or failed to present material and relevant evidence — circumstantial or direct.

[49] I also note that it should not be a surprise that in cases of fraud or conspiracy or alleged common designs, it is often the case that the proof presented is circumstantial by nature and that such evidence will require the Court to draw inferences. It will only be in very rare cases that allegations such as fraud or conspiracy will be proven by direct evidence (see ***R. v. Banayos and Banayos***, 2017 MBQB 114, at paragraph 72, aff'd 2018 MBCA 86; and ***R. v. Neves***, 2000 MBQB 126.

[50] In their frequent invocation of words like "speculative" and "conjecture", the Sheegl defendants ignore or de-emphasize that in law, circumstantial evidence is not *apriori* inferior to direct evidence. They also with some of their misplaced criticisms, ignore or de-emphasize the potentially enveloping and cumulative force of sufficient circumstantial evidence — particularly when combined with direct evidence that may come from the words spoken, written or typed by a party in communication with others.

Inferences drawn from the evidence, whether circumstantial or direct, or both together, cannot be properly characterized as speculative or conjectural.

[51] It is a common place to state that conspirators or participants in a common design will rarely broadcast their intentions beyond their inner circle. The City suggests that this explains to a large extent the absence of the type of direct evidence that the Sheegl defendants insist upon. Further, the City submits that the reluctance of co-conspirators to broadcast their intentions is reflected in and demonstrated by a review of the significant email correspondence between Sheegl, Armik, Shaun, and Abouzeid as contained in the Jack affidavits. In this regard, the City points to the various blind copied and forwarded "confidential" / "for your eyes only" emails, and clandestine meetings and telephone calls that were organized. The suggestion being, that Sheegl and his alleged co-conspirators went to significant lengths to control the flow of information and to otherwise conceal their dealings with one another. In so doing, according to the City, they were attempting to avoid an incriminating paper trail.

[52] Part of the City's response to the Sheegl defendants' criticisms and concerns about the City's "circumstantial" evidence is to invoke the absence of an incriminating paper trail as an explanation as to why the Sheegl defendants have themselves produced virtually no email correspondence between Sheegl, Armik and his alleged co-conspirators. In that regard, the City insists that it is categorically inaccurate to suggest, as the Sheegl defendants do, that "the emails in which the City alleges misconduct by Mr. Sheegl were largely obtained from the City's servers". In fact says the City, a review of the emails contained in the Jack affidavits show that the emails sent and received by Sheegl were

primarily sent to/from his personal email account (the Winnix email account) to which the City had no access. In addition, as paragraphs 20 – 21 of the first Michael Jack affidavit and paragraph 8 of the second Michael Jack affidavit indicate, virtually all of the emails contained in the Jack affidavits were provided by the RCMP to the City pursuant to this Court's order pronounced on August 7, 2020 and consists of those seized documents by the RCMP from Caspian's corporate offices pursuant to a search warrant executed in or around December 2014 from Sheegl's alleged co-conspirators Abouzeid/Dunmore.

[53] It is important to acknowledge that most, if not all of the emails upon which the City relies to show Sheegl's alleged improper conduct were sent to and from Sheegl's Winnix email account, an account to which Sheegl still has access given that he was seemingly able to produce two emails from 2018 and 2019 between himself, Armik and Anderson. These are the only two emails between Sheegl and Armik that the Sheegl defendants have produced and they are found at Exhibits 120 and 121 of Michael Jack's first affidavit.

[54] It is necessary to observe that pursuant to ***Court of Queen's Bench Rule*** 30.02, the Sheegl defendants did in fact have a duty to disclose and produce (subject to any claims of privilege) "every relevant document" in their possession, control or power. As the City points out, that would have included any emails between Sheegl (at his Winnix email account) and any of the other defendants in the City's action during the period of the WPSHQ project, which, based on the Jack affidavits, would consist of hundreds upon hundreds of emails. As the City later argues, if the alleged real estate transaction invoked

by the Sheegl defendants was *bona fide*, one would have thought that any emails sent to or from Sheegl (at his Winnix email account) in relation to that transaction would have or ought to have been produced — either as part of the disclosure and production obligations or as part of putting one's "best foot forward" on this motion. As earlier noted, apart from any emails in relation to that transaction, of the hundreds of emails that were clearly exchanged between Armik and Sheegl during the material time as demonstrated by the enumerable attachments to the Jack affidavits, only two have been produced that are supposed to relate to the real estate transaction. This fact and the absence generally of any emails produced by the Sheegl defendants should be remembered when considering the Sheegl defendants vehemently expressed concerns about the City's selective and incomplete use and choices of parsed emails and their overall concerns about the supposed absence of more direct evidence.

[55] Insofar as the City alleges that the Sheegl defendants were in clear breach of the disclosure obligations, they point to Sheegl's cross-examination on August 3, 2021, when he was asked about any emails between himself and Armik pertaining to the real estate land deal that pre-dated 2018. In that respect, he stated that he had exchanged "numerous emails" with Armik and Anderson, but that "I can't provide them because I'm not a computer geek and I can't do the research". When asked whether he had produced any of those emails, Sheegl stated, "I don't have the ability to produce emails".

[56] In the face of the Sheegl defendants' own criticisms respecting the absence of direct evidence coming from the City, it need be noted that there was and is a positive duty on the Sheegl defendants to make their own best efforts to identify and disclose all

documents relevant to the matters at issue in these proceedings and to identify and account for those documents that are no longer in their possession or control (see ***C.S. v. Canada (Attorney General)***, 2000 SKCA 96, at paragraph 24. It is far from clear that they have done so.

[57] To summarize, while much of this discussion about the nature of the City's evidence should play out in the parties' arguments on the merits and my connected analysis, I can state that at this stage, that there is nothing inappropriate, *prima facie* inadequate or necessarily unpersuasive about the nature of the City's evidence and the manner in which that evidence was presented and/or relied upon by the City in its argument on this motion. I wish to underscore that I have seen and heard nothing that would cause me to believe that the City has failed to present material or relevant direct evidence that it otherwise ought to have adduced.

B. ***The Sheegl Defendants Objections and Concerns About the Alleged Hearsay***

[58] I will now turn to what the Sheegl defendants object to as the City's reliance upon inadmissible hearsay in the three affidavits of Michael Jack.

[59] I do not intend to spend more time than necessary addressing the Sheegl defendants' objections and concerns about the alleged hearsay contained in the three Jack affidavits. That said, given the general and sweeping nature of the Sheegl defendants' submissions and commentary about the City's hearsay evidence, some time need be spent clarifying and confirming the admissible evidence.

[60] For the reasons that follow, I have concluded that the supposed hearsay evidence as described by the Sheegl defendants is in many instances not hearsay either because

of the purpose for which the communications or declarations are presented or because the communication or declaration in question is from a party or because the communication was made to a party (Sheegl) much like an admissible "statement or declaration made in the presence of a party" or "a statement made in the presence of an accused." Where there is a communication or declaration in this case that is in fact properly characterized as hearsay, most such communications are admissible pursuant to any number of exceptions to the hearsay rule. Those exceptions will be identified below as the documents in the possession of a party exception, the principled exception to the hearsay rule and the co-conspirators exception to the hearsay rule.

1. *Hearsay*

[61] Out-of-court statements, declarations, communications made by a non-party, tendered for their truth, are *prima facie* hearsay and are, subject to an exception, inadmissible.

2. *Statements, Declarations or Communications Not Tendered for Their Truth*

[62] Having closely examined the evidence contained in the Jack affidavits, it is my view that even if the emails contained in those affidavits consist of some hearsay evidence, that evidence, where not otherwise saved by an exception to the hearsay rule, can in most instances be considered as not being tendered for a hearsay purpose. In other words, it is not being tendered for its truth. In such instances, that evidence will not be considered for its truth.

[63] Hearsay consists of out-of-court statements, declarations or communications from a non-party tendered for the truth of their contents. If an out-of-court statement is

tendered for the purposes of its truth, it is as mentioned, presumptively inadmissible unless it fits within an exception to the general rule against hearsay. If, however, the statement is not introduced for the truth of its contents, but for some other reason, it is not hearsay and is admissible. Put simply, the distinction between hearsay and non-hearsay evidence usually turns on the purpose for which the out-of-court statement, declaration or communication is being adduced (see R***. v. Khelawon***, 2006 SCC 57, at paragraph 56).

[64] Where an out-of-court statement is introduced not for its truth, but simply for the fact that the statement was made by that person, that statement is not hearsay and only becomes so "when the words are relied upon ... to establish some fact narrated by the words" (see ***R. v. Vallee***, 2018 BCSC 892, at paragraph 317). More specifically, in the context of an alleged conspiracy or an alleged common design, the statements made by conspirators as to their agreement are not hearsay because the statement itself, and not the facts narrated by it, is material. As noted by Cromwell J. in ***R. v. Smith; R. v. James***, 2007 NSCA 19 (***Smith***), aff'd 2009 SCC 5 (at paragraph 191):

> [191] Thus, it is particularly important in conspiracy cases to consider, in light of the purpose for which out of court acts and statements are adduced, whether for that purpose, the evidence is hearsay or not. Evidence may not be hearsay for the purpose of showing the existence of an agreement, but may be hearsay for the purpose of showing membership.
>
> [emphasis added]

[65] Given the above, as it will be seen in the next section of this judgment where I outline the evidence upon which the City relies, some of the statements contained in the email evidence may be seen as not being tendered for a hearsay purpose. The City argues for example, that Sheegl's statement to Armik, that he was about to send him a

copy of a "confidential email" and that "its [*sic*] part of my strategy to get this done for you" does not necessarily constitute hearsay. The City submits that the fact that Sheegl is stating that he has a strategy to "get this done for [Armik]", is material since it speaks to the existence of some agreement between them to do so. In a similar way, the City suggests that Sheegl's email to Shaun identifying the names of the other bidders on RFP 833-2010 is not being adduced for the proof of the contents (the identity of the bidders) but is being adduced for the purpose of showing that Sheegl made that statement. In respect of what the City argues in this connection, its rationale may be technically correct, however, it seems somewhat unnecessary as in my view, these identified emails all involved Sheegl (a party on this motion) and accordingly they are more simply characterized (and/or admitted for their truth) as statements from a party.

[66] In discussing non-hearsay statements, declarations or communications, I also note and agree with the City's submission that an out-of-court statement introduced as circumstantial evidence implying a state of mind or belief at the time or to otherwise show a party's knowledge of or connection to the matters to which the documents relate, does not constitute hearsay (see ***R. v. Bridgman***, 2017 ONCA 940, at paragraph 72) or if it is hearsay, it is an exception to the rule. As was stated in ***Smith***, "[t]he intention of alleged co-conspirators is relevant and in certain circumstances, their statements of intention may be admitted under a hearsay exception" (at paragraph 199).

[67] To the extent that there is a separate and more specific and distinct justification in relation to potential hearsay statements, declarations and/or communications in the context of the alleged conspiracy or common agreement, I address that evidence in the

context of my discussion of the co-conspirator's exception to the hearsay rule later in this section.

[68] In the meantime, I note that statements like Armik's comment that "once they [the City] are out of the way then Phil will take over from there will be smooth sailing" and that "Phil and Sam are pulling for us" are relevant and admissible as circumstantial evidence showing Armik's state of mind and belief at the time. A similar rationale applies to Shaun's statement that "Phil assured us [that Caspian will get through Barb D'Avignon and Phase 1]".

[69] I accept the City's submission that except where a hearsay exception applies (as discussed below) the email correspondence between and among Sheegl's co-conspirators in which Sheegl is not involved is not being adduced for the truth of their contents, but for a non-hearsay purpose, including evidence implying the co-conspirator's state of mind, belief, intentions or knowledge of and complicity in the matters to which the emails relate. With that said, some of that same correspondence and the declarations therein are admissible for their truth pursuant to the identified exceptions.

3. *The Documents in Possession Exception*

[70] Having reviewed thoroughly the evidence and specifically, the emails in question, it is my view that even if and when the emails attached as exhibits to the Jack affidavits constitute hearsay, these emails are subject to the exception to the general rule against hearsay in that they fall within the "documents in possession" rule.

[71] In ***R. v. Russell*** (1920), 51 D.L.R. 1 at 5-6, [1920] 1 W.W.R. 624 (Man. C.A.), the Manitoba Court of Appeal noted as follows [***Russell*** cited to D.L.R.]:

> The conspiracy may be proved by circumstantial evidence, by the detached acts of the persons accused, including their written correspondence, entries made by them, and by documents in their possession relating to the main design. "On this subject it is difficult to establish a general inflexible rule, but each case must, in some measure, be governed by its own peculiar circumstances": Taylor on Evidence, 10th ed., page 418, par. 591.
>
> Counsel for the accused objected to the reception in evidence of a great number of documents mentioned in Schedule "C" to the fifth question. It would take too much space to discuss these one by one. They can be divided into 3 classes:-
>
> 1. Documents found in the hands of the accused; 2. documents found in the hands of persons whom the Crown charges with being parties to the conspiracy; 3. documents found in the hands of other parties which would shew the extent of the propaganda.
>
> The documents belonging to the first class are clearly admissible. Writings found in a man's hands are *prima facie* evidence against him. It will be inferred that he knows their contents and has acted upon them. If they refer to the conspiracy they will be important to shew complicity and intention: *Rex v. Horne* Tooke (1794), 25 How. St. Tr. 1 at 120; Taylor on Evidence, pars. 593, 594, 812.
>
> Documents coming under the second class are admissible if they were intended for the furtherance of the conspiracy. Documents found in the hands of parties to the conspiracy and relating to it become evidence against the accused: *Rex v. Hardy* (1794), 24 How. St. Tr. 199, 452, 475; *Reg. v. Connolly* (1894), 25 O.R. 151. The parties to the conspiracy may never have seen or communicated with each other yet by the law they may be parties to the same common criminal agreement, with the same consequences to each other from acts done by one of them or documents found in possession of one of them: *Reg. v. Parnell* (1881), 14 Cox C.C. 508, 515; *Reg. v. Murphy* (1837), 8 C. & 1. 297.
>
> As to the third class, I think that documents found in the hands of third parties are admissible in evidence if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda as one of the purposes of the conspiracy: *Rex v. Wilson* (1911), 21 Can. Cr. Cas. 105; *Rex v. Kelly* (1916), 27 Can. Cr. Cas. 140, 27 Man. L.R. 105, affirmed in 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282; *Reg v. Connolly*, 25 O.R. 151, 164, 176.
>
> [emphasis added]

[72] Respecting the first class of documents identified by the court in ***Russell*** (at page 5), I note that the Sheegl defendants have produced no correspondence whatsoever

for the relevant period during which the conspiracy is alleged to have taken place. The City is well to remind the Court that the Sheegl defendants have attempted to explain away their non-disclosure by suggesting that "I can't provide them because I am not a computer geek". It is clear from the data seized by the RCMP from the Caspian servers in or around December 2014 that hundreds of emails were exchanged between Armik and Sheegl. Notwithstanding this fact, the Sheegl defendants have produced only two email exchanges between Sheegl, Armik and Anderson between May 2018 and February 2019.

[73] I agree with the City when they argue that given that the Sheegl defendants have acknowledged that "numerous emails" between Sheegl and Armik are in their possession but have not been produced, the emails sent to or from Sheegl's Winnix email account — and which are attached as exhibits to the Jack affidavits — should be presumed to be in the Sheegl defendants' possession and should fall within the first class of documents outlined in ***Russell***. Accordingly, any emails sent by Sheegl from the Winnix email account should, depending upon their nature and contents, constitute *prima facie* evidence that can be used against him.

[74] Under the ambit of the "documents in possession rule", a large number of the documents/emails to which the City makes reference are documents admissible against the parties in possession (the Caspian defendants and Abouzeid and as it relates to the Winnix emails, the Sheegl defendants) as original circumstantial evidence of their contents to show their knowledge of the documents' contents and their connection or

complicity in matters to which the documents relate (see ***R. v. Raaman***, 2020 ONSC 1673, at paragraph 14.

[75] Pursuant to the documents in possession rule, if there is in fact evidence to suggest the party in possession has recognized, adopted or acted upon the documents found in possession, those documents may be admitted as an exception to the hearsay rule for the truth of their contents (see ***Raaman***, at paragraph 15). It is also important to note that in this connection, adoptive admissions can occur "where the accused expressly or impliedly asserts to the truth of the statement". This can be done as noted in ***Raaman*** "by a variety of means, including words, actions, conduct or demeanour" (at paragraph 16).

[76] In respect of the documents in possession rule, the City argues for example that when, on May 26, 2011, Armik tells Sheegl that Caspian needs to be in control of the design team and cost control, Sheegl's response ("agreed!!") can be taken as an adoptive admission or be admitted as an exception to the hearsay rule. In this context, the City underscores that because Sheegl's response was sent from his Winnix email account, the email continues to be in his possession. Moreover, his response constitutes an adoption "by words" of Armik's statement.

[77] In considering the potential use of the email evidence adduced through the Jack affidavits and the purpose for which they can be tendered, I note as well that in addition to a party being able to "adopt" a statement by words, a party may also be deemed to have adopted a statement by his or her actions. In this regard, even a party's silence can amount to an adoption of a statement in circumstances where the party would

reasonably have been expected to have replied to the statement or where the circumstances called out for a reply (see ***Bridgman***, at paragraph 83). An example of this situation (in the impugned evidence) would be in relation to the forwarding by Shaun to Sheegl (at Sheegl's Winnix email account) of an email, with the comment, "my letter was written knowing full well we as gentlemen have committed each other to get this done" [*sic*]. It is open to the City to argue that with that email, it was incumbent upon Sheegl to provide a reply and say that there was no such commitment. Not having provided such a reply, it is then open to the City to argue that Sheegl can be seen to have adopted the statement by his silence. In a similar way, Armik told Sheegl "you helped this project greatly by firing AECOM design team". In respect of the potential use of that evidence, it is open to the City to say that it is admissible and useable for an argument suggesting that Armik's email called out for a reply from Sheegl (particularly if it was untrue). The response that did come from Sheegl was simply, "thanks my friend".

4. *The Principle Exception to the Hearsay Rule*

[78] Even if the emails attached as exhibits to the Jack affidavits constitute hearsay, these emails may also be relied upon pursuant to the principle exception to the general rule against hearsay.

[79] In ***Khelawon***, the Supreme Court of Canada set out the twin criteria of necessity and reliability. Where those criteria have been satisfied, hearsay may be admitted.

[80] In ***Fawley et al. v. Moslenko***, 2017 MBCA 47, the Manitoba Court of Appeal confirmed that these two criteria are not "separate thresholds; rather, they 'work in

tandem'" (at paragraph 99). In other words, where there is a strong necessity for the hearsay evidence, less reliability is required to satisfy the principled approach.

[81] In ***Fawley***, the Manitoba Court of Appeal considered what is required to meet the criteria of necessity and reliability (see paragraphs 100 and 105). As it relates to necessity, the court noted that "necessity means the hearsay evidence is reasonably necessary, not absolutely necessary", and that the criteria will be met when "there is no other way to present evidence of similar value at trial" (at paragraph 100). This seems consistent with the Supreme Court's approach in ***Khelawon*** where it stated that "[t]he necessity criterion is given a flexible definition" (at paragraph 78). As it relates to reliability, the court in ***Fawley*** noted that "[r]eliability means 'the hearsay statement was made in circumstances which provide sufficient guarantees of its trustworthiness'" and that the focus should be on "threshold reliability, not ultimate reliability" (at paragraph 105).

[82] In the present case, the City argues that the evidence adduced from the Jack affidavits is necessary because the only persons who have direct knowledge of the scheme perpetrated against the City are Sheegl and his co-conspirators, who are adverse in interest and unlikely to be forthcoming in respect of their involvement in a fraudulent scheme. In this regard, I take note of the Ontario Superior Court of Justice judgment in ***R. v. Khiar***, 2015 ONSC 286, where at paragraphs 25 to 27, the court considered the application of the necessity criterion in facts similar to those in the present case:

> [25] In *R v Wilder*, 2003 BCSC 1840, at paras 680-681, the British Columbia Supreme Court reasoned that, "it is a remote possibility that a co-conspirator will confess to a court... Therefore, this is an appropriate circumstance where hearsay may be admitted more on the basis of expediency or convenience than on the basis of necessity." This type of expediency – i.e. where the co-conspirator will

> predictably be uncooperative if called to testify – suffices to fill the necessity criterion.
>
> [26] This application of necessity was confirmed in *R v Lam*, [2005] AJ No 307 (QB), at para 38, where Burrows J., quoting David Layton, "*R. v. Pilarinos*: Evaluating the Co-conspirators or Joint Venture Exception to the Hearsay Rule", (2002) 2 CR (6th) 293, at 310, found that, "[c]ourts have thus defined necessity fairly widely to include cases where evidence of the same value cannot be obtained from the declarant." He went on to reason, at para 41, that, "[e]ven if the out-of-court declarants recorded in these wiretap calls were brought to Court to testify, it is unlikely that their evidence could ever approach the quality of the wiretap."
>
> [27] That reasoning describes a scenario that is indistinguishable from the case at bar. There is no reason to think that Mr. July's testimony will be tendered cooperatively, or that it will be helpful in discerning the essence of the intercepted conversations; quite the contrary. Mr. July is at the centre of the conspiracy in which the Defendant is alleged to have participated. The wiretaps and surveillance that led to the Defendant's arrest were, according to the police officers who have testified, originally aimed at Mr. July. It is highly unlikely that, even if he could be brought before the court, his evidence of his own conversations will be as valuable as the transcripts of the intercepted communications.
>
> [emphasis added]

[83] The City also argues that the same reasoning should apply to any suggestion by the Sheegl defendants that the City would have been required obtain affidavit evidence from Armik, Shaun, Abouzeid, or any other co-conspirators. Leaving aside the simple fact that these individuals are named as defendants in the City's action and would therefore be adverse in interest to the City, I agree with the City that it is unlikely that these individuals would be in any way cooperative or would admit their involvement in the scheme alleged by the City. This reasoning on necessity was confirmed in the context of determining the admissibility of declarations made by a co-conspirator in ***R. v. N.Y.***, 2012 ONCA 745 (at paragraph 95):

> [95] Whether the "far superior" nature and quality of co-conspirators' declarations in furtherance of the conspiracy are sufficient in themselves to meet the requirements of the co-conspirators' exception or to overcome necessity concerns need not be addressed in this case. The combination of that consideration with the second ground for the trial judge's decision that necessity

> concerns had been met – the declarants would likely be uncooperative witnesses – is sufficient, in my view.
>
> [emphasis added]

[84] As was noted by the Ontario Court of Appeal in ***N.Y.***, "while declarants in conspiracy cases may be physically available to testify, the true quality of their evidence is not likely to be" (at paragraph 96).

[85] In addressing the second criterion of reliability, I note that the email exchanges between Sheegl and his alleged co-conspirators constitute what can be considered a contemporaneous record of the communications that passed between them. In that sense while somewhat distinct from the earlier cited judgment in ***Khiar***, in ***Khiar***, the evidence took the form of communications intercepted and transcribed by the RCMP, the Court's reasoning on reliability is nonetheless applicable to the email correspondence between Sheegl and his alleged co-conspirators. In ***Khiar***, the court found that the wiretap transcripts at issue were reliable not only because they accurately recounted what was said (which is often unlikely when a witness is asked to do so years after the fact), but also, because they provided a contemporaneous record for which "the parties would have had little or no motivation to make things appear other than they actually were" (at paragraph 29).

[86] On the issue of reliability, the Nova Scotia Court of Appeal recently addressed the issue of "inherent reliability" respecting written communications like emails. In ***R. v. Potter***, 2020 NSCA 9, the court noted as follows (at paragraphs 547 and 548):

> [547] The inherent reliability of written communications is persuasively described by the British Columbia Supreme Court in *R. v. MacKay*, quoting the Ontario Court of Appeal in *R. v. Bridgman* dealing with text messages in the context of drug transactions:

> [54] It is hard to imagine how a cross-examination would probe any serious issues about perception, memory, narration or sincerity in relation to the above statements. They were committed to a permanent electronic record. ...
>
> [55] The quantity of the messages, repeating patterns of requests for different types of drugs, only enhances their threshold reliability: *Baldree* [*R. v. Baldree*, 2013 SCC 35], at para. 71. The majority in *Baldree* relied upon a passage taken from I.H. Dennis, *The Law of Evidence*, 4th ed. (London: Thomson Reuters/Sweet & Maxwell, 2010), at p. 708, to make the point that one or two callers might be mistaken, "or might even have conspired to frame the defendant as a dealer, but it defied belief that all the callers had made the same error or were all party to the same conspiracy".
>
> [56] This court has previously accepted that where there are multiple drug calls, threshold reliability may be enhanced: *R. v. Malcolm-Evans*, 2016 ONCA 28, at para. 7; see, also, *R. v. Belyk*, 2014 SKCA 24, 433 Sask. R. 195, at paras. 24-25. The principle is simple. The more people who write to someone about obtaining drugs, the less likely it is that the declarants are all suffering from the same misperception, wrongly remembering something, engaged in unintentionally misleading behaviour or all knowingly making false statements.
>
> [57] Although every hearsay question is informed by its own facts, one statement about obtaining drugs may be explained by some alternative explanation – a wrong number, a wrong impression or a wrong understanding. But multiple statements that have the same theme may render implausible any explanations other than that the originators of the communication are asking for drugs.
>
> [548] We cannot see any basis in principle for distinguishing email communications in a stock market manipulation conspiracy and fraud case from text messages in a drug trafficking case.
>
> [emphasis added]

[87] As it relates to reliability, the City is correct to remind the Court that in terms of the affidavits filed by Sheegl in respect of these cross-motions, the Sheegl defendants have demonstrated in the affidavits that Sheegl's recollection of the events at issue, is often either sketchy or selective. The City points to his recall of a dinner meeting between himself, Armik, Shaun, and Katz on October 1, 2010. Despite that recollection, he does not recall the nature of the dinner meeting. Nonetheless and somewhat paradoxically,

Sheegl is "confident that we did not discuss the WPSHQ project or any other business arrangement" (see Sheegl's affidavit sworn July 16, 2021, at paragraph 10). As the City realistically contends, this Court could expect the same sort of selective recall on the part of the alleged co-conspirators in a case like the present had they or were they to provide evidence on this motion. Accordingly, it is suggested and I agree, that it is infinitely more reliable in the context of a case such this one, to permit the use of the contemporaneous record created by the voluminous email correspondence exchanged between Sheegl, Armik, and the other alleged co-conspirators.

[88] Based on the above, I am persuaded that the emails attached as exhibits to the Jack affidavit are also admissible under the principled exception insofar as they do satisfy the twin criteria of necessity and reliability.

5. *The Co-Conspirators Exception to the Hearsay Rule*

[89] In addition to the application of any of the other earlier mentioned exceptions to the hearsay rule to some or all of the challenged evidence, the co-conspirators exception to the hearsay rule also has application to some of the evidence as contained in the emails attached to the Jack affidavits.

[90] For its part, the co-conspirators exception to the hearsay rule provides that the acts done or words spoken in furtherance of a common design or conspiracy may be given or produced in evidence against (all parties to the conspiracy or common design) upon the satisfaction the test first set out in ***R. v. Carter***, [1982] 1 S.C.R. 938.

[91] The three-stage inquiry for determining whether the acts and/or declarations of a co-conspirator are admissible against another party to the conspiracy involves the following analysis:

1) Based on all of the evidence, is there proof of the existence of conspiracy beyond a reasonable doubt?
2) If the answer to the first question is yes, is the accused probably a member of the conspiracy based on the evidence directly receivable against the accused?
3) If the answer to the second question is yes, the acts and declarations of co-conspirators in furtherance of the objects are receivable as evidence against each conspirator to determine if he is guilty beyond a reasonable doubt.

[92] If at either one of the first two stages the answer is no, the co-conspirators exception to the hearsay rule is not applicable (see ***Carter***, ***R. v. Mapara***, 2005 SCC 23; and ***R. v. Contois***, 2019 MBQB 1, aff'd 2020 MBCA 89).

[93] The three-stage inquiry set out above has been, in most instances, considered in the criminal context. A modified version of the ***Carter*** test was considered and applied in a civil case in the British Columbia Court of Appeal judgment in ***ICBC v. Atwal***, 2012 BCCA 12. The words beyond a reasonable doubt were substituted with the words "on a balance of probabilities". The court set out the modified version of the test and inquiry as follows (at paragraph 30):

[30] The test for the admissibility of evidence under the co-conspirator's exception to the hearsay rule in the context of a civil case was articulated by Mr. Justice Groberman in *I.C.B.C. v. Sun*, 2003 BCSC 1059, 18 B.C.L.R. (4th) 338:

> [35] The test for admissibility of evidence under the co-conspirators' exception to the hearsay rule in a civil case, then, is [a] modified version of the [*R. v. Carter*, 1982 CanLII 35 (SCC), [1982] 1 S.C.R. 938] test. I would express it as follows:
>
> 1. The trier of fact must first be satisfied on the balance of probabilities that a conspiracy alleged in the Statement of Claim in fact existed.
>
> 2. If an alleged conspiracy is found to exist, then the trier of fact must review all the evidence that is directly admissible against the defendant and decide whether it shows a reasonable likelihood that the defendant is a member of that conspiracy.
>
> 3. If the trier of fact concludes that there is a reasonable likelihood that the defendant is a member of that conspiracy, then the trier of fact must go on to decide whether the plaintiff has established such membership on the balance of probabilities. In this last step, the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the specific conspiracy under consideration as evidence against the defendant on the issue of his or her liability.
>
> 4. The trier of fact must conduct his analysis separately not only for each defendant, but also for each conspiracy that may include a given defendant.

[94] In ***R. v. Duncan***, 2002 CanLII 26206, (2002), 168 Man. R. (2d) 184 (MBPC), the court reviewed the governing principles arising out of each stage of the ***Carter*** test.

[95] At the first stage of the ***Carter*** test, the court must be satisfied of the existence of a conspiracy, i.e., that there was an agreement and intention to achieve a particular object, which agreement and intention must be proved as against at least two persons (see paragraph 23). There is no requirement that all conspirators must personally commit or intend to personally commit the acts that they all agreed should be committed (see

paragraphs 26-27), nor is it necessary that the conspiracy be proven by direct evidence. Rather, proof of the conspiracy is proved based on all of the evidence, including hearsay, and can be inferred by the words, conduct and/or actions of the parties either together or severally (see ***Duncan***, at paragraphs 32 and 34).

[96] In the present case, when I apply the principles to the facts, I am in agreement with the City that there is ample evidence to show such an agreement between Armik, Sheegl, Shaun, and Abouzeid. That agreement (as set out at paragraphs 83(b) and 90(b) of the City's amended statement of claim) relates to the allegation that Armik, Sheegl, and their co-conspirators conspired to induce the City to award the Phase 1 contract and the GMP contract to Caspian by providing Sheegl with secret commissions in exchange for improper procurement advantages. That evidence showing such an agreement includes the following:

(a) On December 15, 2010, after Sheegl blind copied Armik on an email to the City advocating for the bid bonding to be lowered (as requested by Armik), Armik thanked Sheegl, stating "YOU ARE MY MAN I WILL DO YOU PROUD"and telling him that Caspian "will bring this under cost control" such that the WPSHQ project will be Sheegl's legacy "for many years to come you have myword on it". (First Mike Jack Affidavit, Exhibit 18);

(The City comments that at this point Caspian had not even formally submitted a bid in respect of the Phase 1 contract. Despite this,

Armik is treating the award of the Phase 1 and GMP contracts to Caspian as a *fait accompli.)*

(b) I note the City's submission that even Armik appeared to appreciate the questionable nature of his dealings when, on the same day, he tells his son Shaun: "Integrity well when we deal with politicians that tends to be compromised to a certain extent" (First Mike Jack Affidavit, Exhibit 18);

(c) On December 16, 2010, Sheegl sent Armik an email stating that he was about to send Armik "a blind copy of a confidential email Please be careful with it, its part of my strategy to get this done for you" (First Mike Jack Affidavit, Exhibit 19). Within a minute, Sheegl forwarded Armik a copy of an email wherein Sheegl continued to advocate for the bonding to be lowered;

(d) On January 17, 2011, Armik told Abouzeid that Caspian was putting together a proposal for the WPSHQ project, that he would appreciate Abouzeid's help and that "Sheegl is on it" (First Mike Jack Affidavit, Exhibit 25);

(e) On January 26, 2011, Armik reminded Sheegl that Caspian "really wanted this project", to which Sheegl stated "I know and I will do everything I can to help us all succeed here together (First Mike Jack Affidavit, Exhibit 29). It would appear that by Sheegl's own words,

there is clearly a common purpose and a common intention to get Caspian the WPSHQ project;

(f) On February 7, 2011, Armik and Shaun exchange emails wherein they stated that "Phil and Sam are pulling for us" and that "Phil assured us [that Caspian would get through Phase 1]" (First Mike Jack Affidavit, Exhibit 32). Armik and Shaun both make reference to a prior commitment by Sheegl and Katz to get Caspian the WPSHQ project;

(g) On February 17, 2011, Armik sent an email to himself which appeared to be written as an aide memoire in respect of a conversation between himself and Sheegl that took place on the same day. In that email, Armik reiterated the details of his and Sheegl's agreement as follows: "Phil said he will get approval for 126m However I think he wanted 2+2 for sam and phil but the rest for us" (First Mike Jack Affidavit, Exhibit 39); and

(h) On February 24, 2011, Shaun forwarded his email exchange with Aziz to Sheegl wherein he commented on a "gentlemen's" agreement between himself, Armik and Sheegl. In particular, Shaun stated: "My letter was written knowing full well we as gentlemen have committed each other to get this done" (First Mike Jack Affidavit, Exhibit 45).

[97] At the second stage of the ***Carter*** test, the Court is required to consider whether there is a reasonable likelihood that the defendant (in this case, the party, Sheegl) was a member of the conspiracy. This can be established using only evidence directly

admissible against Sheegl, and without using hearsay. In ***Duncan***, the court explained that this may consist of the party's own conduct, circumstantial evidence generally, comments made by him and evidence in possession (see ***Duncan***, at paragraph 42). Although the Court is required to consider direct evidence, the facts need not and cannot be looked at in isolation. Instead, consideration should be given to the larger context, including "the picture provided by the acts and declarations of the alleged co-conspirators" (see ***Duncan***, at paragraph 43).

[98] In examining the evidence that would inform the inquiry at the second stage of the ***Carter*** test, I note that there is direct evidence before the Court to show that Sheegl was a member of the conspiracy.

[99] Direct evidence suggesting Sheegl's membership in the conspiracy or common design would involve amongst other things, Sheegl's own comments and in particular, the emails of December 16, 2010 and January 26, 2011. By Sheegl's own words, in December 2010, he had already had and was in the process of carrying out, "a strategy to get this [the WPSHQ project] done for you [Caspian]". I agree with the City that this comment must be considered in the larger context of Armik's, Shaun's, and Richard Akman's ("Richard") belief that "Phil and Sam are pulling for us" and that "Phil assured us that [Caspian would get through Phase 1]".

[100] In addition, when examining direct evidence, I look at Sheegl's conduct. As the City has argued, the emails repeatedly show Sheegl advocating for and/or agreeing with the exact outcomes desired by Armik/Caspian.

[101] Based on the evidence that I can examine in respect of the second stage of the ***Carter*** inquiry, I have no difficulty concluding that there is more than sufficient evidence "directly admissible" against the Sheegl defendants to show Sheegl's membership in the conspiracy.

[102] Finally as it relates to the third stage of the ***Carter*** test, once the Court satisfies itself that a conspiracy did exist and that the defendant was a member thereof, the acts and declarations of the members of the conspiracy done or uttered in furtherance thereof will be admissible against not only the actor or declarant but against all members of the conspiracy (see ***Duncan***, at paragraph 45).

[103] The "in furtherance" requirement is met when the act or declaration is made for the purpose of advocating the objects of the conspiracy. The Nova Scotia Supreme Court considered what acts and declarations will fall within the "in furtherance requirement" in ***R. v. Colpitts***, 2018 NSSC 40, at paragraph 675, aff'd 2020 NSCA 9.

> [675] The hearsay exception does not apply to all acts and declarations of co-conspirators; it applies only to statements made in furtherance of the conspiracy. Notwithstanding its prominence in conspiracy jurisprudence, there is no precise legal definition of the term "in furtherance". Courts have interpreted it broadly to include acts taken or declarations made to report, advance, or conceal the alleged conduct. As noted in Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence* (Thomson Reuters Canada: Online, WestlawNext Canada) at 7:170.20.40:
>
> > The rule only permits the use of acts and declarations made in furtherance of the common enterprise of the accused and declarant. A statement which is pure narrative, divorced from the operation of the common unlawful enterprise, is not made "in furtherance" of the design. Statements made to report back or within the design itself are, however, made in furtherance of the objects of the common enterprise. Similarly, statements or acts taken to preserve or conceal the existence of the design are done "in furtherance" of the design.
> >
> > Reassurances and updates given by one member to another in the context of an ongoing enterprise have been held to be "in furtherance" of the

> common design. Similarly, declarations "consisting of instructions and a report" were in furtherance of the conspiracy where the declarant uttering them was unaware that the conspiracy had been effectively terminated by the police. Acts done to avoid detection and prosecution, such as concealing a dead body, may also be within the objectives of the conspiracy and thus evidence of these acts may be admissible where the common enterprise is established.
>
> Where a substantive offence is alleged to have been committed as a result of a common design, hearsay statements admissible against the accused must similarly be "in furtherance" of the common design to be admitted. A statement is in furtherance of the common enterprise if it has the purpose of "advancing the objectives" of the common enterprise, and is thus distinct from mere narrative.
>
> [emphasis added]

[104] In respect of my analysis concerning the third stage of the ***Carter*** test, I am satisfied that there are a number of emails contained in the Jack affidavits that meet the "in furtherance" requirements. Accordingly, having satisfied the first and second stages of the ***Carter*** test, I am of the view that any statements made by Sheegl, Armik, and other co-conspirators as contained in the emails attached to the Jack affidavits, for the purpose of advancing the objects of the conspiracy, are made in furtherance of a conspiracy and are admissible as against Sheegl as an exception to the hearsay rule.

[105] So what emails contained in the Jack affidavits satisfy the requirements of the third stage of the ***Carter*** test in that they are statements made in furtherance of a conspiracy?

[106] To respond to the above question, the City helpfully provided as an attachment to their written brief dated September 15, 2021, at Tab 7, a table that identifies those emails that the City says and which, after close examination and full consideration, I agree were sent in furtherance of the conspiracy. Therefore, the statements and declarations in those emails should be admitted as an exception to the general rule against hearsay.

Having carefully reviewed those emails identified at Tab 7 of the City's September 15, 2021 brief, I am in full agreement with the City's position and analysis and adopt the full contents of that table as representing emails sent in furtherance of the object of the agreement. For convenience, I attach the City's table as an appendix to this judgment.

[107] I note again that many of the emails identified in the above-mentioned table prepared by the City and now attached to this judgment as an appendix, reveal a "state of mind" just as they include email statements by a party (Sheegl) and statements that are otherwise admissible as part of the earlier discussed exceptions.

VII. THE ADMISSIBLE EVIDENCE TO BE CONSIDERED BY THE COURT ON THE CROSS-MOTIONS

[108] In addressing the objections and concerns raised by the Sheegl defendants in respect of the City's evidence, I have reviewed carefully all of the evidence, including the affidavit evidence of Michael Jack and Phil Sheegl. To the extent that the Sheegl affidavits provide responding, clarifying and/or explanatory evidence, it has been considered and where relevant will be mentioned below and discussed in my analysis.

[109] I set out immediately below, the relevant and admissible direct and circumstantial evidence that is largely adduced through the three affidavits of Michael Jack, which evidence, advances the City's theory and from which the City asks this Court to draw the required inferences and find the necessary facts which the City says, establishes on a balance of probabilities, the cause of actions in bribery and breach of fiduciary duty.

[110] To be clear, the evidence from the three Michael Jack affidavits, to the extent that it is set out below, is, subject to the purpose and intended use of the evidence, admissible circumstantial and direct evidence for any of the applicable reasons I provided in the

earlier paragraphs. Accordingly, that evidence can and will be considered on these cross-motions together along with any relevant responding explanations and attempted clarifications provided in the evidence of Phil Sheegl from either of his two affidavits.

[111] In or around 2005, an Arizona company, 2005 R.E. Investments II LLC ("RE Investments"), in which Sheegl's company Winnix Properties Corporation ("Winnix") had (and has) a one-third interest, purchased a 24-acre piece of vacant land in a master-planned community called Tartesso, located in Buckeye, Arizona ("Tartesso") for $376,000 (in U.S. funds).

[112] In respect of the one-third interest held by Winnix, it agreed to hold that interest in trust as nominee, agent and bare trustee for (i) Richard Akman's company, Randar Enterprises Ltd. ("Randar"), which held a 12.5 percent interest, (ii) Daniel Akman's company, Tri-Crest Corporation ("Tri-Crest"), which held a 12.5 percent interest, (iii) Irwin and Susan Micflikier, who held a 25 percent interest, (iii) Katz's company Duddy Enterprises L.L.C. ("Duddy"), which held a 25 percent interest, and (iv) Winnix, which held a 25 percent interest. This agreement is reflected in the Declaration of Bare Trust and Agency Agreement dated December 15, 2005 entered into between Winnix, Randar, Tri-Crest, the Micflikiers and Duddy.

[113] In his examination for discovery on April 19 and 20, 2021 (the "Sheegl examination"), Sheegl acknowledged that the $376,000 paid by Winnix to acquire its one-third interest in the 24-acre Tartesso land was contributed by all the investors at that time such that the investors collectively purchased the equivalent of slightly less than eight acres for $376,000 (U.S.), or $47,000 per acre.

[114] In or around April 2008, Sheegl was hired by the City as the Director of Property, Planning & Development ("Director of PP&D"). In or around November 2008, Sheegl was appointed DCAO for the City.

[115] Pursuant to Sheegl's employment agreements as Director of PP&D and DCAO and subsequently, his employment agreement as CAO for the City, Sheegl acknowledged, as he must, that he was in a fiduciary relationship with the City and that he had a duty to "act honestly, in good faith, without conflict of interest and in the best interests of the City". He also agreed that he would abide by the City's Code of Conduct for Employees (the "Code of Conduct"), which required him to "avoid situations in which [his] personal interest conflicts, or appears to conflict, with the interests of the City in their dealings with persons doing or seeking to do business with the City."

[116] The Code of Conduct also required that any conflicts of interest, whether actual or potential, were required to be disclosed in writing to the City. In the case of a CAO or DCAO, the disclosure of the conflict or potential conflict was to be made in writing to the Clerk of the Executive Policy Committee ("EPC").

[117] In or around November 2009, the City approved the purchase of the former Canada Post Building located at 266 Graham. Sheegl as Director of PP&D and then as DCAO was closely involved in that transaction and, ultimately, the purchase and sale agreement submitted to City Council for its approval was signed by Sheegl as DCAO.

[118] Sheegl was also a key player in the early development stages of the WPSHQ project. In particular, Sheegl was described as the project's "main executive sponsor"

and was named as a member of the project's "Executive Sponsor Committee" and "Steering Committee", which was to provide overall management of the project.

[119] On or about August 19, 2010, the City awarded the contract for professional consulting services for the design and development of the WPSHQ project (the "Design Contract") to AECOM.

[120] In or around September 2010, Armik, the principal of Caspian, arranged a meeting with Katz and Sheegl for October 1, 2010 "to discuss a possible business arrangement".

[121] On or about November 18, 2010, the City issued Request for Proposal No. 833-2010 ("RFP 833-2010") for construction management services for the design and development of the WPSHQ project (the "Phase 1 contract"). On the same day, Sheegl directed his assistant to forward the RFP 833-2010 posting to Armik.

[122] A further meeting was arranged between Sheegl and Armik on or about December 10, 2010. In an email from Armik to his son Shaun, Peter Giannuzzi ("Giannuzzi") and Anderson, Armik directed them to "have the place ready and welcome him" as "he [Sheegl] could be Caspian friend [*sic*] for long time to come".

[123] In a series of emails dated December 15, 2010, Armik asked Sheegl to extend the bid submission deadline and to lower the bonding requirements for RFP 833-2010. Sheegl then in his dealing with the City advocated for granting Armik's request going so far as to blind copy Armik on an internal confidential City email to DCAO Alex Robinson ("Robinson"). Of note are Armik's comments to Shaun upon receipt of Sheegl's email to Robinson wherein he stated, "Integrity well when we deal with politicians that tends to

be compromised to a certain extent." Also of note is the fact that the bid submission deadline was extended (to January 6, 2011) within hours of Armik's request.

[124] On or about December 16, 2010, while continuing to advocate for the bonding requirements to be lowered as per Armik's request, Sheegl told Armik he was about to send Armik a blind copy of a confidential email and to be careful with it as "its [*sic*] part of my strategy to get this done for you". Within a week, on or about December 24, 2010, the City extended the bid submission deadline to January 18, 2011. Then, on or about January 12, 2011, after Sheegl (among others) recommended it, the City lowered its bonding requirements for RFP 833-2010.

[125] On or about January 17, 2011, Armik asked Ossama Abouzeid ("Abouzeid"), the principal of Dunmore Construction ("Dunmore"), to help him with respect to Caspian's proposal for the WPSHQ project and mentioned, "Phil Sheegl is on it". Abouzeid agreed to help Armik.

[126] On or about January 18, 2011, four bids were received in respect of RFP 833-2010, including a bid submitted by Caspian and Richard Akman's company, Akman Construction Ltd. ("Akman") as a joint venture ("CAJV"). On or about January 21, 2011, at 11:18 a.m., Sheegl conveyed confidential City information to Shaun, namely the identity of the other bidders on RFP 833-2010. After thanking Sheegl for his help, three minutes later at 11:21 a.m., Shaun then disclosed the identity of the other bidders to Armik, who then (at 12:58 p.m.) offered Abouzeid "[his] take on this project" and asked Abouzeid to convey this "take" to the City.

[127] On or about January 26, 2011, Armik asked Sheegl if there was any news on RFP 833-2010 and reminded him that "we really want this project". Sheegl assured Armik via email that, "I know and you know I will do everything to help us all succeed here together". In the Sheegl examination, Sheegl acknowledged having sent the above-mentioned email.

[128] On or about January 27, 2011, Sheegl reported to Armik, "I think we have some good news". This email was sent by Sheegl on the same day that a meeting was arranged between himself and two other City representatives to discuss "the results of the RFP evaluations" for RFP 833-2010. On February 2, Sheegl emailed Shaun, telling him that he wanted to "update you and prepare you for the questions that will be asked for clarification".

[129] Between February 4 and 8, 2011, Armik, Shaun and Richard Akman of Akman repeatedly referred to Sheegl's ongoing efforts to assist the CAJV in getting the Phase 1 contract, including statements to the effect that Sheegl had assured Caspian that it would get the Phase 1 contract, that Sheegl and Katz were "pulling for" them and that Sheegl "just want[ed] us [Caspian] to take over this project to bring it home". They also referred to instances where Sheegl appears to have disclosed confidential City information to the CAJV without authorization, including a statement by Armik that "phil gave me the issues which I told our group". Of note is Armik's concern about the City's "controls over their emails" — specifically, when Richard asked about any developments on RFP 833-2010, Armik responded, "Exchanged emails, but you [*sic*] the damn controls over their emails one cannot say much".

[130] In that same period of time, Armik and Sheegl appear to have exchanged multiple telephone calls, including a telephone conversation on or about February 8, 2011 to "update [Sheegl on] the #s before meeting".

[131] On or about February 10, 2011, the City awarded the Phase 1 contract to the CAJV. This is unlikely to have come as any surprise to Armik, however, since the day before (after Armik had asked for good news) Sheegl reassured him, "It is all good we are good to go."

[132] On or about February 17, 2011, Armik sent an email to himself at 5:54 p.m., which appears at least in part to be a memorandum summarizing a phone call or discussion between himself and Sheegl on February 17, 2011 wherein he states, "Phil said he will get approval for 126m However I think he wanted 2+2 for sam and phil but the rest for us ... This will remain confidential for ever".

[133] When, during the Sheegl examination, Sheegl was asked about this memorandum, Sheegl claimed he could not recall ever telling Armik that he would get approval for $126 million. As for what the reference to "2+2 for sam and phil but the rest for us" meant, Sheegl suggested that it related to an arrangement for Jets tickets. This suggestion is challenged by the City as "confabulation" in that the purchase of the Atlanta Thrashers hockey team was not announced until May 31, 2011 and tickets were not sold until June 1, 2011. It is also difficult to square with the fact that when, on May 31, 2011, Armik and Sheegl discussed the announcement, they gave no indication whatsoever of having any previous arrangement in place between them. As to why the supposed arrangement for Jets tickets would need to "remain confidential for ever [*sic*]" or why the

arrangement would be sandwiched between discussions relating to the WPSHQ project, the City reminds this Court that Sheegl could offer no explanation.

[134] Between February 23 and 25, 2011, Shaun forwarded his email correspondence with AECOM and the City's Project Manager, Abdul Aziz ("Aziz") to Sheegl, Armik and DCAO Deepak Joshi ("Joshi"), with comments such as "please, this stays here" and "I'm sending this to you in confidence". In particular, in an email dated February 23, 2011, Shaun forwarded Sheegl and Joshi his email to AECOM, with the comment, "so far as anyone else is concerned outside our circle, we are just playing the role of a CM plugging along".

[135] On various occasions, Armik expressed his dissatisfaction with the AECOM design team and with the City's project manager for the WPSHQ project, Abdul Aziz. After expressing his concerns about Aziz on or about March 11, 2011, Armik told Sheegl that he was "preparing a team for the project already with some new hungry blood to go forward". That "team" would have included what the City characterizes as Armik's inside man Abouzeid, who had already agreed to help Armik in his dealings with the City. It is also noteworthy that after Armik's repeated complaints about AECOM, on or about March 19, 2011, Sheegl explored the option of making changes to AECOM's design contract, including asking for a discussion with the City's legal team because, "I [Sheegl] think we may have an out". During the Sheegl examination, Sheegl acknowledged his reference to having "an out" meant a way for the City to get out of its contract with AECOM.

[136] Between April 4 and 6, Sheegl and Armik attempted to arrange meetings and calls between themselves, but Armik repeatedly called for discretion. For instance, on April 4, after Sheegl proposed a call, Armik stated, "Richard Akman was here I could not talk." It should be noted that at this time, Richard was the principal of Caspian's joint venturer. It is the City's suggestion that Sheegl is colluding with Armik in attempting to conceal information or discussions from one of the parties (Akman) with whom the City had a contract. On the same day, when Armik warned Sheegl that Richard intended to call Sheegl, Armik warned him, "Whatever you do please do not tell him the numbers yet" — a request with which Sheegl seemed ready to comply. On April 5, in arranging an in-person meeting, Armik told Sheegl, "I would rather see you off site somewhere." The next day, on April 6, Armik proposed a "talk" with Armik, but added the phrase, "No email."

[137] The apparent need for discretion and clandestine meetings continued into late April and early May 2011. When, on April 27, Armik proposed another call with Sheegl because "some players [were] acting up", he added, "We have to be careful I really don't want Abdul [Aziz] know I am visiting you there". On May 1, after Sheegl suggested a meeting at Kristina's on Corydon, Armik asked, "Can we meet somewhere not so public please." On May 2, Shaun forwarded Caspian's proposal for the later phases of the WPSHQ project to Sheegl with the comment, "Confidential for your eyes only."

[138] I note again that on March 11, 2011, Armik advised Sheegl that he was preparing a "team ... with some hungry new blood" to assist with the project. By May 4, 2011, Armik's "team" was apparently being assembled with Sheegl's help. In particular, on

May 4, after proposing yet another meeting, Armik mentioned, "Ossama [Abouzeid] needs a contract", to which Sheegl replied, "Ossama will get what I promised him ... he knows it is a process to get a contract and my word is always good." Armik then tells Sheegl, "I never question your word".

[139] I pause to note that it is the submission of the City, that by this point in time, Sheegl had abetted the arrangements for: (i) the bid submission deadline for RFP 833-2010 to be postponed (twice); (ii) the bonding requirements for the RFP to be lowered; (iii) the Phase 1 contract to be awarded to the CAJV; and (iv) the installation of Armik's inside man, Abouzeid, as project director for the WPSHQ project.

[140] The City also insists however, that based on the admissible evidence, that is not the only assistance Sheegl provided to Armik. The City also points to the fact that Sheegl also assisted Armik in controlling the flow of information relating to the WPSHQ project and in particular, the GMP price for the later phases of the project. On May 5, 2011, after asking Sheegl, "Have you told Abdul that [*sic*] not to talk cost", Armik complained to Sheegl about Richard Akman and Abdul having "loose lips left right and centre". The next day, on May 6, Armik asked Sheegl to tell AECOM "not [to] discuss city affairs with others regardless of who they are". A few days after that, on May 10, Armik told Sheegl that "Acom [*sic*] has shared prices with Akman" and that Aziz wanted to meet with Richard Akman to go over costs. Concerned about any scrutiny of the numbers Caspian had submitted to the City in respect of the GMP proposal, Armik then told Sheegl, "Tomorrow you may have to tell him to lose the bloody numbers."

[141] Earlier on the same day (May 10), Armik expressed concern about AECOM having access to the "numbers" and about Richard Akman trying to convince the City to "go CM [Construction Management, opposed to the design-build or quasi-design-build contract Armik was seeking]". Sheegl was quick to allay Armik's concerns, stating eight minutes later, "He can talk all he wants ... WE ARE NOT GOING CM!!"

[142] On or about May 12, 2011, Sheegl blind copied Armik on confidential City correspondence between himself and Robinson relating to AECOM's fees. After calling AECOM fees "unreal", Armik then forwarded it on to Abouzeid with the comment, "FYI Confidential".

[143] On or about May 20, 2011, at 9:26 a.m., Armik asked Sheegl to call him. Eleven minutes later, at 9:37 a.m., that call presumably having taken place, Armik sent Sheegl an email with the subject line: "congratulation [*sic*] Phil". Six days later, Sheegl's appointment as the City's new CAO was announced. (Armik was told of Sheegl's appointment on May 20.) It is reasonable to conclude that Sheegl had during his May 20 telephone call with Armik, disclosed his appointment as CAO. On the date of the announcement (May 26), Armik laid out his plans for the later phases of the WPSHQ project to Sheegl and Abouzeid in a "confidential" email. In that email, Armik indicated that he would provide a GMP based on "our discussions" and that "One major Caveat must be Caspian has to be in charge of design team, and cost control". Sheegl responded with a simple "Agreed!!" The next day, on May 27, Armik proposed a meeting with Sheegl to discuss the formal price Caspian needed to submit and reiterated the fact that Caspian

needed to be in control of the design team, adding the comment "I am sure Phil is on board with this again no surprises here."

[144] In addition to laying out his plans for the WPSHQ project on May 26, 2011, Armik also told Sheegl and Abouzeid "not [to] worry Richard [Akman] going forward". At that time, Richard was the principal of Caspian's joint venturer, Akman. Within a week, however, on June 6, 2011, Armik updated Sheegl on the status of his negotiations with Richard relating to the assignment of the Phase 1 contract to Caspian alone. Armik told Sheegl, "He [Richard] needs City to release him from his portion of bond." Between June 16 and 23, 2011, Sheegl forwarded internal City correspondence (including emails between the City and its legal department) to Armik relating to the assignment of the Phase 1 contract, for which Armik expressed his gratitude. On June 23, Armik asked Sheegl to contact the City's legal department to ensure that "everything is in order" with respect to the assignment agreement. Sheegl confirmed that he had already spoken to the City's legal department and that a clean copy of the agreement was being circulated. That same day, Sheegl as the CAO for the City approved the assignment of the Phase 1 contract to Caspian alone.

[145] In accordance with Armik's direction to Sheegl that Akman needed the City to release it from its portion of the bonding requirements, the assignment agreement ultimately signed by the City included a clause to that effect, as summarized by Iain Day of the City in a confidential email which Sheegl then forwarded to Armik.

[146] On June 24, 2011, Caspian submitted a draft GMP submission to Abouzeid and Aziz. On June 27, 2011, after Sheegl blind copied Armik on his email to the City's legal

department regarding Abouzeid's appointment as project director, Armik directed Sheegl to keep Aziz as Project Manager and ensure that Aziz reported to Abouzeid such that "in case of disputes, [Abouzeid] will make the call".

[147] On June 29, 2011, Armik forwarded Sheegl correspondence between Caspian representatives regarding Caspian's draft GMP proposal, with the comment "Confidential Please call me upon receipt of this". Later the same day, Sheegl and Armik exchanged emails wherein Armik stated, "I will be sending you #s shortly only you and Ossama ... then around noon I will send to Abdul and Ossama." In the same email, Armik expressed his frustration with Aziz "shopping around with numbers". Sheegl then appears to offer to assert his authority and weight as CAO, stating, "I need one person to stand up and say abdul is in fact divulging numbers and then I can terminate his employment at the City". I note as the City has argued that there is no evidence or even suggestion that Aziz was doing anything except looking out for the interests of the City as he saw them. Nonetheless, it appears that because Armik was alarmed or irritated by Aziz's questions, Sheegl indicated a willingness to terminate Aziz's position.

[148] On July 5, 2011, an exchange (which the City describes as "strange") took place between Armik and Abouzeid relating to Caspian's GMP proposal. Armik told Abouzeid that Sheegl had called him and "asked me to ask you put [*sic*] recommendation at 150m because he can not talk to you." A day later, Abouzeid as the City's project director prepared a memo to the City wherein he concluded that the "most realistic figure" for the GMP was $150 million. On July 6, after hearing rumors that the GMP was $158 million, Armik asked Abouzeid to contact Phil and reassure him. In response, Abouzeid confirmed

that "[his] number will not exceed $150M", an email that Armik then forwarded to Sheegl on July 7 with the comment "I hope this assures you. If you can get more we can deal with it."

[149] On July 7, after Sheegl forwarded his, Armik's and Abouzeid's email exchange regarding the $150M number to the City with the comment, "seems to be we are onside here", Armik expressed concern, "I ask [you] not to copy my emails to the guys please it's about credibility."

[150] On July 9, Armik confirmed to Abouzeid that he (Abouzeid) would recommend $151.7 million to the City, to which Abouzeid (the City's project director) replied, "My suggestions. It is your call of course." In respect of this evidence, the City underscores for the Court that the City's project director (hired by Sheegl) is telling Armik (the principal of the contractor with whom the City is negotiating) that it is Armik's call what he (the project director) should recommend to the City. On July 13, Armik then forwarded Abouzeid's email ("It is your call of course") to Sheegl, with the comment "I may have to tune it up plz but these are #s". In this connection, I note the City's forceful submission that this patently inappropriate exchange between Abouzeid and Armik apparently warranted no reply from the City's then-CAO, Sheegl. In fact, on July 13, Armik expressed his appreciation for Sheegl and his hard work to Katz and credited Sheegl with "recogniz[ing] the weakness and [bringing] Ossama on board."

[151] On July 20, 2011, City Council resolved to increase the budget for the WPSHQ project to $155 million and to delegate Sheegl as CAO the authority to award the contracts on that project. Sheegl advised Armik and Abouzeid of City Council's decision,

to which Armik replied, "Phil I cannot thank you enough for your help now it's up to us to deliver the Project. I DID NOT SAY ON TIME AND BUDGET."

[152] The next day, on July 21, Sheegl executed his employment agreement with the City to act as CAO, effective May 25, 2011. The day after that, on July 22, Caspian issued a cheque in the amount of $200,000 to another company controlled by Armik, Mountain Construction ("Mountain"), which in turn issued a cheque on the same day to Sheegl's company FSS in the amount of $200,000 "re: Consultant Services". On July 30, FSS issued a cheque of $100,000 to Katz's bank account, with the memo line "Loan".

[153] On July 26, 2011, Armik and Abouzeid exchanged emails relating to Aziz's comments on the draft Letter of Intent between the City and Caspian. Armik expressed his frustration concerning Aziz "moving [the] goal posts" to Abouzeid, stating, "I would forward these to Phil and his committee Abdul better be prepared to explain." He then forwarded his email exchange with Abouzeid to Sheegl stating, "I will insist to get LOI today. I have too much at risk with characters like this on file." On the same day, Armik forwarded further exchanges between himself and Abouzeid to Sheegl, with the comment, "These are in confidence to you please keep it to yourself'. After expressing his frustration with Aziz, Armik then told Abouzeid that he would call Sheegl and insist on getting a Letter of Intent today. The Letter of Intent between the City and Sheegl was ultimately executed on August 8, 2011. By September 2, 2011, Aziz had announced that he would be stepping down as the City's Project Manager, three months after Sheegl's threat to terminate him and after months of Armik railing against Aziz to Sheegl. Sheegl

forwarded Aziz's resignation email to Armik who stated on September 3, "Next Aecom group need to smarten up ask Ossama".

[154] True to his word, on September 8 and 9, 2011, Armik intensified his efforts to undermine AECOM and its design work. In fact, on September 9, Armik advised Sheegl that, "I am just hammering them [AECOM], will not let off' and then directed Sheegl as follows, "Please tell they [*sic*] guys hold payment until Ossama has a chance to evaluate the overall progress." Armik's campaign against AECOM continued throughout September and into October. On September 21, Armik told Sheegl, "AECOM will need to be addressed, they cannot deliver the project. I am not worried because I have plans already." On September 22, Armik told Sheegl to "please hold payment". On September 29, Armik urged Sheegl to "Let me get a different design team for city". The next day, Sheegl echoed Armik's complaints to AECOM, stating that the City and AECOM were "at the crossroads of our relationship" and threatened that unless AECOM delivered what was promised, "we the City must move on".

[155] On October 4, Armik told Sheegl that AECOM "should be dismissed form [*sic*] Gun range." On October 7, Armik raised the idea of a design-build contract with the City whereby he/Caspian would pay for (and be in control of) the designers. By October 19, Armik had already explored the option of installing another design team and advised Sheegl and Abouzeid that he had spoken to AAR and GRC.

[156] In this same period (October/November 2011), Armik/Caspian are also negotiating with the City in terms of the GMP contract. On October 26, 2011, Armik alluded to a "gentleman's agreement" between himself, Abouzeid and Sheegl in the context of

complaining about the City's insistence on being provided with back-up documents for all associated costs submitted to the City. Following what the City described as Armik's rant about their "gentleman's agreement", Sheegl sided with Armik, stating to DCAO Joshi, "we can not have it both ways. Either we are GMP or not!" In emails dated November 2 and 3, 2011, Armik again proposed the idea of retaining his own design consultants and forwarded both Sheegl and Joshi the names of Peter Chang ("Chang") of AAR and Patrick Dubuc ("Dubuc") of GRC. According to the City's submissions, it is at this point, after months of tolerating and participating in Armik's inappropriate meddling with City business, that Sheegl finally cautioned Armik, not on the inappropriateness of the behaviour itself, but on its appearance. Specifically, on November 3, Sheegl stated, "Stop your [*sic*] over the top ... guys will be suspicious." This point appears to have been conceded by Armik, who did not react as if the remark had been facetious as later asserted by Sheegl.

[157] The next day, Armik forwarded to Sheegl, correspondence between himself and Caspian's lawyer who was then negotiating the GMP contract with the City. In the text of the forwarded email, Armik stated, "I am pushing as hard as I can", to which Sheegl responded, "So am I and Thank you for your efforts". On November 16, Armik forwarded to Sheegl email correspondence from Caspian's lawyer wherein he confirmed that the GMP contract was being finalized, with the comment: "I hope you are happy!!" In response, Sheegl said, "We should both be happier and happiest in December 2013!!" Sheegl on behalf of the City and Armik on behalf of Caspian signed the GMP contract on

or about November 17, 2011. On the same day, Armik asked Sheegl if they could talk about "managing Aecom".

[158] Within days of the GMP contract being signed, Abouzeid as the City's project director was already communicating with Armik's preferred design consultants, Chang and Dubuc. After Armik accidentally replied all to an email between Abouzeid and Chang, and City representatives to which he had been inappropriately blind copied, Armik contacted Sheegl on or about November 24, 2011 complaining about the backlash Caspian was then receiving from the City. After calling for discretion on Sheegl's part ("PHIL PLEASE THIS VERY CONFIDENTIAL DO NOT SEND TO ANYBODY"), Armik stated that he/Caspian would not operate under suspicion and warned that "if AECOME [*sic*] stays Caspian will not." He also claimed that the City was "overreacting". By February 2012, the City had terminated its relationship with AECOM. On February 9, 2012, Armik congratulated Sheegl for his "non [*sic*] nonsense style" and said that he was "Glad to have you on our side".

[159] Based on all of the admissible evidence from the Jack affidavits, the City argues that by this stage, Armik had good reason for thinking Sheegl was on his side. In addition to assisting in the termination of AECOM and installing Armik's handpicked "design team", Sheegl also appeared to be assisting Caspian on other City contracts. On January 18, 2012, a City representative noted that Sheegl had "asked for the evaluation spreadsheets [for the Transit Garage RFQ] ... This is the one we discussed when Phil wanted Caspian included in the RFP." Ultimately, the City awarded the contract for the Transit Garage project to Caspian in or around May 2012. Moreover, by the end of February 2012, it

appears that Sheegl would make good on his promise to Abouzeid and awarded a single source contract to Abouzeid's company, Dunmore, in the amount of $200,000 (backdated to June 1, 2011).

[160] On June 25, 2012, in response to a media inquiry regarding the contractors working on the WPSHQ project, Sheegl denied the request on the basis that the City "can not divulge their list of sub-trades as this proprietary [*sic*] to them." Two days prior, it should be noted that Armik continued to thank Sheegl and Katz for their "support" in the context of a newspaper article being published relating to Armik cutting ties with a fellow investor in the Boyd Building (Ray Rybachuk).

[161] On August 2, 2012, Armik forwarded Sheegl his email exchanges with the City relating to Wyper Road stating, "Confidential ... Only Ossama should be making decision on behalf of City and Police should have no say".

[162] On or about August 15 - 16, 2012, another Caspian company controlled by Armik, Logistic Holdings Inc. ("Logistic"), issued a cheque for $127,200 to Armik's personal bank account. Armik then arranged for the $127,200 to be deposited into the bank account of Katz's Nevada corporation, Samuel Michaels Properties ("Samuel Michaels"). Within a week of the $127,200 being deposited in the Samuel Michaels' account, $63,600 was transferred to another entity. During the Sheegl examination, Sheegl confirmed that the $63,600 transfer was from Samuel Michaels to Winnix.

[163] On November 6, 2012, Armik continued to express his gratitude for Sheegl's "hard work" and provided an example of "how effective you [Sheegl] can be in your decision making". In particular, Armik stated, "You helped this project greatly by firing AECOM

design team that required a lot of courage!! Without that this project was dead at arrival." Sheegl did not respond to this communication, at least by email.

[164] In an email dated December 9, 2012 from Armik to himself with the handwritten notation "Private Memo to OA/Phil", Armik laid out his concerns about cost overruns in WPSHQ project, stating that although there were cost overruns, there were also adequate funds in the project and that, "Somebody needs to move things around", which Armik later justified as "not stilling [stealing] money we are allocating funds". Armik then indicated that Abouzeid could not "move things around" because "he keeps telling me we are being watched."

[165] On April 27, 2013, Armik forwarded Sheegl email exchanges between Pamela Anderson ("Anderson") of Caspian and the City related to late payments. Sheegl then emailed other City representatives, demanding to know why Caspian was awaiting payment. Sheegl then forwarded his exchange with the City to Caspian, stating, "Fyi I will follow up on Monday and get you paid immediately." Sheegl continued to seek payment for Caspian on June 26, 2013 and July 4, 2013, telling Anderson that he would "rattle some cages today, stand by please".

[166] On May 15, 2013, Armik vented to Sheegl and Abouzeid about the WPSHQ project and warned them that due to increasing construction costs, a budget increase would be required, estimating that the project cost would be approximately $168 million and that there would be a budget shortfall of approximately $6 million. In response, Abouzeid said, "We need to agree on what your number should be first." Armik continued to vent his frustrations regarding the project on June 27, 2013. (In or around December 2013,

the City and Caspian entered into a supplemental agreement to the GMP contract pursuant to which the GMP increased from $137.1 million to $156,374,911.67.)

[167] In an email dated May 30, 2013, Armik advised Sheegl that, "it's scheduled for June 13th". The subject line of the email was "Your Deck". On June 19, 2013, a representative of Deck City sent an invoice to Armik, seeking payment. In response, Armik stated that he would "ask clients input [*sic*] if they are satisfied with installation". Sheegl appears to have been blind copied on that email and later responded, "They did a good job, it looks fabulous." Armik then told Sheegl, "Good I will have him paid in full." On September 30, 2014, Sheegl's wife emailed Armik, asking for "the contact information for the guys that built my deck". Armik provided a phone number for Deck City.

[168] On October 16, 2013, after members of the EPC of the City indicated that it had lost confidence in Sheegl's ability to manage affairs at the City, Sheegl threatened to pursue damages against the City for the cessation of his employment. Ultimately, Sheegl signed a release in favour of the City in exchange for the sum of $250,000 (a payment acknowledged by Sheegl during the Sheegl examination) and on October 17, 2013, announced his resignation as CAO.

[169] There is no evidence before this Court to establish or even suggest that at any time prior to the award of the Phase 1 contract or the GMP contract, and indeed at any time whatsoever during the currency of the WPSHQ project (or Sheegl's employment with the City) that Sheegl ever disclosed to the Clerk of the EPC or that committee itself or to the City at large that:

a) $200,000 had been paid in July 2011 by the Armik/Caspian-

controlled company Mountain to Sheegl's company FSS; and

b) among the co-investors in Tartesso were Daniel and Richard Akman, one of whom was the principal and directing mind of Akman (a company with which the City was negotiating and ultimately contracted with through the Joint Venture).

This was confirmed by Sheegl himself in the course of the Sheegl examination during which he confirmed that at no time had he disclosed to the City that he and Daniel and Richard Akman (the latter being the principal of Akman, one of the joint venturers in the Joint Venture) were co-investors in a property, other than saying that "Sam Katz [another investor in Tartesso] would have known".

[170] In or around January 2017, it was published in the media that the documents seized by the RCMP revealed that $327,200 had been paid by Armik/Caspian/Mountain to Sheegl/FSS/Katz/Samuel Michaels in July 2011 ($200,000) and August 2012 ($127,200). As it relates to this payment, it is of course the position of the City that Sheegl subsequently fabricated a story about a real estate transaction in order to provide cover for what the City says constitutes a bribe. While the City maintains that the related and ultimate decision by the Crown to not proceed with a criminal prosecution is irrelevant to these proceedings, the City also insists that given the Crown's decision, this alleged fabrication and strategy apparently succeeded in providing the intended cover.

[171] On January 26, 2017, Sheegl's counsel gave an interview to the CBC. This is when, for the first time, an explanation about the supposed Tartesso land deal between Armik and Sheegl is offered. During the January 26 interview, Sheegl's counsel provided CBC

News with a copy of a handwritten agreement "that was signed by Sheegl and had a space for Babakhanians' signature". As for the blank space left for Armik's signature, Sheegl's counsel explained that, "he needed time to get a copy of the document with both signatures." In an article dated March 22, 2017, CBC then reported that Sheegl's counsel provided them with a copy of the handwritten agreement with both Sheegl's and Armik's signatures "two weeks later".

[172] The explanation provided about the payments and the supposed real estate transaction involves the following details. Armik and Sheegl periodically discussed in mid to late 2010 and into 2011 the possibility of Armik investing in Tartesso. The discussions continued until an agreement between them (the "handshake deal") was reached in June or July 2011, that for $327,200 US, Armik would purchase 25 percent of the collective 50 percent interest of Winnix and Duddy in the group's one-third interest in Tartesso.

[173] On this now publicly provided explanation, Armik paid, in what the City describes cynically as "this alternative universe", $327,200 for a 4.2 percent (1/24) interest in Tartesso. At the peak of the market, before the crash of 2007-2008, Katz and Sheegl had paid $47,000 for the equivalent interest. This, as it is explained, Armik did on a handshake basis. No lawyers were engaged. Armik did not seek advice from an appraiser or a real estate agent regarding the value of the 4.2 percent interest. The figure was $327,200 because Katz and Sheegl believed that is what 4.2 percent was then worth. There was no negotiation documented. There was no memorandum of understanding created. There were no emails, texts or anything whatsoever in writing contemporaneously evidencing the sale. (This is confirmed by the fact that Deloitte

reviewed the data seized by the RCMP from Caspian's corporate offices and found no notes, letters, emails or other documents relating to the supposed Tartesso land deal, other than what the City describes as a self-serving email from Sheegl dated January 26, 2017.) The other investors in the Tartesso development were not advised of Armik's purchase. Their consent was not sought. The sale proceeds were neither disclosed to nor shared by them. They learned of the "sale" in 2017, in the Winnipeg media coverage of disclosures of information within RCMP's seized records.

[174] I note that the first written item purporting to reference the "sale" was a document handwritten by Sheegl. Sheegl claims it was written by him on May 1, 2012. Why, as the City asks, was it created then? Apparently (as Sheegl testified on his discovery) Caspian and the City "were doing business together at that time", so he thought it a good idea. It is of course the position of the City that the idea occurred to him in 2017, when the contents of the RCMP's seized documents were publicized.

[175] Sheegl was interviewed for the CAO position in or about May 2011. He disclosed to the interviewees that he had ongoing investments in real estate in Arizona and elsewhere. He was asked on discovery if he disclosed to the committee interviewing him his supposed then ongoing negotiations with Armik regarding the Tartesso property. He said he did not. Why not, he was asked. In response he said, that did not come up. It need be noted this was at the very time that he was assisting Armik in various ways to obtain a $137.1 million contract with the City. As the City suggests in its argument, Sheegl's response seems to suggest that somehow the interviewers ought to have divined that the DCAO of the City, while seeking to be CAO of the City, might at that very moment

be acting in a way which directly conflicted with the interests of the body of which he was DCAO and of which he sought to be CAO.

[176] An additional reference to what the City calls this *faux* agreement is this email exchange between Armik and Sheegl on May 11 and 12, 2018, almost seven years post-"sale". On May 11, 2018, Armik emailed Sheegl as follows:

> Hello Phil hope all is well with you.
>
> I would appreciate if you can forward me the financial statement for each year which I have been an investors [*sic*] in that property please.
>
> Also a list registered [*sic*] shareholders or investors please.
>
> Please confirm if holding company is a Canadian company.
>
> Is there an annual maintenance fee, taxes or any other associated cost.
>
> Finally we have had a few updates but would appreciate your most recent update on this property please.
>
> Your prompt response would very much be appreciated.

[177] In respect of the above email, leaving aside what is suddenly the seemingly more incongruous and formal tone as between Armik and Sheegl, the City poses the following incredulous but logical question: Are we to believe that Armik paid $327,200 for something but he cannot recall (if he ever knew) if he got shares, whether the entity in which he invested is Canadian or not, who else had invested or owned shares, whether he has ongoing expenses (seven years post acquisition) and that seven years after his purchase or investment, it just occurred to him that he should get the financial statements for "each year which I have been an investor"?

[178] Sheegl's response of May 12, 2018 was as follows:

> The property is owned by three partners of which I (Winnix Properties Corp.) am one.
>
> My share (Winnix Properties Corp) is owned by 4 partners: Irv Micflikier [friend and member of Glendale], Sam Katz, Danny Akman and myself.
>
> You purchased 25% interest in mine and Sam's shares.
>
> My holding company Winnix Properties Corp. is an Arizona company.
>
> Our agreement is that Sam and I would cover all costs, fees, taxes, etc. associated with the ongoing ownership of this property and would be taken into account on our final disposition of the property.
>
> [Forgotten is another co-investor and member of Glendale: Richard Akman.]

[179] I note that in May/June 2013, Armik and Sheegl exchanged emails in respect of work to be done by Deck City on Sheegl's deck. On June 19, 2013, after Deck City sent an invoice to Armik for payment, Armik indicated that he would "ask clients input [*sic*] if they are satisfied with installation". Sheegl then responded, "They did a good job, it looks fabulous." In response, Armik stated, "Good I will have him paid in full." Sheegl claims that he engaged Mountain to find a sub-trade to install a deck at his personal residence and that he "paid Deck City in full for the installation". In support of that proposition, Sheegl has produced a cheque issued by him to Mountain in the amount of $8,534.41. I note that the date of that cheque is October 15, 2017, more than four years after the deck installation was completed. As the City asks and this Court wonders, what could possibly have prompted Sheegl's payment after more than four years? The City says that Caspian/Mountain/Armik paying for the deck was in further consideration of Sheegl's ongoing "consultant services". This City insists that it was the publicity regarding the

previous payments and the RCMP seizure that suggested to Sheegl that it would be prudent to reimburse Mountain.

[180] In addressing as I have the evidence which this Court can consider on these motions, I note that attached to one of the written briefs filed by the City was a table cross-referencing portions of the First Mike Jack affidavit (containing instances where Mr. Jack refers to something said by Sheegl in the course of the Sheegl examination) with the relevant excerpts from the transcript of the Sheegl examination, which excerpts were also attached at the accompanying tab. As requested, I have considered that portion of the evidence as having been read into the record.

VIII. ANALYSIS

[181] In the analysis that follows I propose to address the two questions earlier set out at paragraph 5, that constitute the main issues on these cross-motions:

1) Is this an appropriate case for a potentially dispositive determination on summary judgment; and

2) If this is an appropriate case for a potentially dispositive determination on summary judgment, are either the City or the Sheegl defendants entitled to summary judgment?

[182] As it relates to the first question, I set out below the legal framework for considering the appropriateness and the availability of summary judgment where, as here, it is fair and equitable to do so and it provides a viable and proportionate option to the traditional trial.

[183] As it relates to the second question, I can address both cross-motions (and the question of the respective entitlement to summary judgment) by examining separately the allegations that make up the City's claim respecting their causes of action in bribery and breach of fiduciary duty.

[184] Prior to addressing the substantive aspects of the second question and the allegations of bribery and breach of fiduciary duty, I will address at paragraphs 193 to 204, a preliminary matter raised by the City respecting what it argues is the appropriateness of this Court drawing an adverse inference as a result of what the Sheegl defendants failed to provide by way of evidence respecting individuals identified in the evidence who the City says were material and available witnesses.

A. ***The Legal Framework for Summary Judgment***

[185] ***Queen's Bench Rule*** 20 requires the Court to grant a motion for summary judgment where it is satisfied that there is no genuine issue requiring a trial with respect to the claim or defence. ***Queen's Bench Rule*** 20.03(2) provides that in making that determination, the Court may weigh evidence, evaluate the credibility of the deponent and draw adverse inferences, unless it is in the interest of justice for these powers to be exercised only at trial.

[186] The test for summary judgment is set out by the Manitoba Court of Appeal in ***Dakota Ojibway Child and Family Services et al. v. M.B.H.***, 2019 MBCA 91 (***Dakota Ojibway***). The most pertinent portions of the Court's enunciation of the test (as presented at paragraphs 108 – 111) can be summarized as follows:

a) The moving party must satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant principles and that a trial would not be proportionate, timely or cost-effective) and that there is no genuine issue requiring a trial;

b) Once the moving party meets this burden, the responding party bears an onus to show why the record, the facts or the law, preclude a fair deposition of the matter in a summary way or that there is a genuine issue requiring a trial; and

c) If the responding party fails to show why a trial is required, summary judgment will be granted.

[187] The comparatively new ***Queen's Bench Rule*** for summary judgment in the Manitoba Court of Appeal's judgment in ***Dakota Ojibway*** follows coherently from the transformative Supreme Court of Canada judgment in ***Hryniak v. Mauldin***, 2014 SCC 7. In that judgment, the Supreme Court of Canada signaled a culture shift requiring judges to manage amongst other things, the summary judgment process consistent with the principle of proportionality when applying rules like that of ***Queen's Bench Rule*** 20. As Greenberg J. noted in ***Free Enterprise Bus Lines Inc. et al. v. Winnipeg Exclusive Bus Tours Inc. et al.***, 2018 MBQB 64, "[t]he traditional trial is no longer the default position but should be pursued only where the judge cannot "achieve a fair and just adjudication of the issues" on the basis of the evidence produced on the summary judgment motion". In ***Hryniak***, Karakatsanis J. was clear when explaining that in the context of the new Ontario rules, they were "designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication." In other words, the subtle but important distinction required noting that the test on a summary judgment motion was no longer whether there is a "genuine issue for trial" but whether there is a "genuine issue requiring trial".

[188] At paragraphs 56 and 57, the Court in ***Hryniak*** noted as follows:

> [56] While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.
>
> [57] On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve

> the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and (2.2) can provide an equally valid, if less extensive, manner of fact finding.

B. ***Is This an Appropriate Case for a Potentially Dispositive Determination on Summary Judgment?***

[189] Having fully reviewed the issues, the evidence and the applicable law that pertain in the circumstances of this case, I am satisfied that there can be a fair and just determination and adjudication of the City's claim as represented by its motion, just as there can be a fair and just determination and adjudication of the Sheegl defendants' cross-motion. In other words, I am of the view that the summary judgment process will permit the Court to find the necessary facts and to apply the relevant principles in a manner that this case requires. Further, I have determined that a trial in the circumstances of this case would not be proportionate, timely or cost efficient and as I will explain, based on the evidence that was adduced on these cross-motions, there is no genuine issue requiring a trial.

[190] I note that in the circumstances of this case, both parties have brought motions for summary judgment. Clearly, while both parties take entirely different positions with respect to their motions, neither the City nor the Sheegl defendants object to this matter being dealt with in a dispositive way by way of a determination on summary judgment. While not determinative, in my view, the implicit positions taken by the parties, reflect Karakatsanis J.'s observations set out at paragraphs 56 and 57 in ***Hryniak***.

[191] Pursuant to ***Rule*** 20.03(2), as the motion judge, I am able to weigh evidence, evaluate credibility of the deponents and draw reasonable inferences from both direct

and circumstantial evidence. All of those powers permit me to make findings of fact on the evidence presented. Although I remain ever mindful of the need to ensure that a fair and just determination on the merits is possible in the context of a summary judgment motion, I note as did Karakatsanis J. in ***Hryniak***, that the evidence need not be equivalent to that at trial but must be such that the court is confident that it can fairly resolve the dispute.

[192] In short, I am in agreement with the Sheegl defendants (although not with their position on the merits of the cross-motions) that in the circumstances of this case and in light of the principles that govern the summary judgment process, this is indeed a case that can and should be brought to a fair and equitable conclusion prior to a trial.

C. ***The City's Requested Adverse Interest Respecting the Sheegl Defendants' Failure to Call Certain Evidence/Witnesses***

[193] Prior to my consideration of the more substantive second issue or question relating to the parties and their respective entitlement to summary judgment, it is appropriate that I clearly address this preliminary matter raised by the City in that it could affect the assessment I bring to the evidence generally and Sheegl's position more specifically. This preliminary matter or issue relates to what the City submits is the adverse inference that the Court should draw as a result of what the Sheegl defendants failed to provide by way of evidence respecting individuals identified in the evidence who the City says were material and available witnesses.

[194] Unlike most of the preliminary evidentiary issues and objections raised by the Sheegl defendants, which I dealt with earlier in this judgment at paragraphs 37 to 107, the "adverse inference" issue raised by the City does not engage an issue of admissibility

nor does it raise a question of what evidence this Court can properly consider. Instead, the adverse inference request by the City suggests an approach to my assessment of the evidence that could cause me to infer from the tactical approach taken by the Sheegl defendants, that the evidence/witnesses that they did not call would not have supported their position on the issues about which they could have given material evidence. This in turn would have implications for the Court's perspective vis-à-vis the Sheegl defendants' position more generally and could affect, not surprisingly, the credulity with which this Court considers the Sheegl defendants' submissions.

[195] Given the potential impact and how it could otherwise affect my discussion of the evidence and the adequacy of the evidence as it relates to the position of each party, I did not want to leave the issue of the adverse inference (in the face of the City's specific request) ambivalent or vague going into my discussion and analysis as to whether the City has satisfied me on a balance of probabilities that the elements of bribery and breach of fiduciary duty have been established. Accordingly, I address directly below, the City's submissions as it relates to its argument respecting why the Court ought to draw an adverse inference. Despite that discussion, while I will not be drawing the requested adverse inference for the reasons I will provide, this is a case where it behooves me to address the issue as the City has compellingly raised it.

[196] In contending that this is an appropriate case for an adverse inference, the City invokes the earlier cited judgment in ***Singh***, where at paragraph 8, the court noted that in the absence of an explanation, an adverse inference may be drawn from the failure of a party to produce a document or to call a witness. In that regard, in considering whether

to draw an adverse inference, courts need consider the following factors: 1) whether there is a legitimate explanation for the failure to call a witness; 2) whether the absent witness is not equally available to both parties; and 3) whether the witness has material evidence to provide or is the best person who can provide the evidence (see ***Singh***, at paragraph 9).

[197] The City reminds the Court that it takes two individuals to complete a bribe, namely the payor and the payee (who the City identifies as Armik and Sheegl), just as it takes two individuals to enter into an agreement, even if as the City suggests, the agreement respecting the supposed land deal is an imaginary or fictitious one. The City insists that given that the Sheegl defendants' sole "defence" appears to be that the $327,200 payment related to an alleged real estate transaction concerning Tartesso, it is reasonable to expect that the other two key players to that transaction — Armik and Sam Katz — would have been called upon to give evidence confirming the "agreement". In this connection, the City underscores that in the first Sheegl affidavit, he asserts that he and Katz agreed that Winnix and Duddy would sell a portion of their collective interest in Tartesso to Armik.

[198] It is the position of the City that the Sheegl defendants' failure to file affidavit evidence from both Armik and Katz should give rise to an adverse inference given that they had material evidence to provide, that evidence was not equally available, and there has been no legitimate explanation for the absence of that evidence.

[199] Respecting the materiality of the evidence, the City submits that with the exception of Sheegl himself, no one other than Armik and Katz would be better placed to speak to

the factual issues central to the Sheegl defendants' "defence", namely the rationale behind the $327,200 payment made in July 2011 and August 2012. As the City argues, if Sheegl's story is to believed, Katz was privy to Sheegl's discussion with Armik and it is undisputed that a Katz company received the August 2012 payment of $127,200. Given that fact, the City suggests that it is clear that Katz would have material evidence as to why he received the payment. Concerning Armik, he would be better placed than both Sheegl and Katz to speak to the rationale behind the payment since only Armik can know what the motive behind the payment was. The City makes this last point while at the same time reminding the Court that the subjective intentions of the payor of a bribe are not relevant to the applicable test for the civil tort of bribery.

[200] The City also contends that both Armik and Katz were not equally available. In that regard, the City notes that having alleged fraud against Armik, Caspian and his various companies, the City is obviously adverse in interest to Armik. As for Katz, the City notes that although unnamed, he would be similarly adverse to the City given that a finding of bribery against Sheegl would imply that Katz's company Samuel Michaels, was also used as a vehicle for the payment of that bribe. In any event, the City's position is that Katz would be an unwilling and uncooperative witness for the City. Conversely, both Armik and Katz are old acquaintances and/or friends of Sheegl and if Sheegl's story is to be believed says the City, both Armik and Katz continue to be co-investors in Tartesso. If such is the case, the City emphasizes that it cannot be said that Armik and Katz are as equally available to the City as they are to the Sheegl defendants.

[201] Finally, the City contends that there has been no explanation as to why Armik and Katz were not called upon to provide evidence on these cross-motions.

[202] In light of the above, the City says an adverse inference should be drawn from the fact that Armik and Katz were not called upon to give evidence. In other words, it should be inferred that Armik's and Katz's evidence would have been contrary to or at least not supportive of the Sheegl defendants' case.

[203] In considering this issue, I note as well that the City has also suggested that pursuant to some of the other related and potentially applicable jurisprudence (see ***Martin v. Goldfarb***, [1997] O.J. No. 1918 (QL), 30 OTC 321 (Ont. Ct. J. (Gen. Div.)) an adverse inference could also be appropriate in respect of the Sheegl defendants' failures to call Richard Ackman and Shaun Babakhanians. In that connection, the City argues that affidavit evidence from Shaun Babakhanians might have explained why he repeatedly forwarded Sheegl's emails with such comments as a "please, this stays here" and "for your eyes only", for which Sheegl claims to have no knowledge, or what he meant by such noteworthy phrases as "yes and we will [get through to Phase 1 stage] Phil assured us" respecting which, Sheegl again claims to have no knowledge. For his part, the City submits that Richard Akman might have provided similar material evidence respecting for example, what he meant when he told Armik that if the CAJV could get the bureaucrats onside, it "will make Phil and Sam's job a [*sic*] a lot easier to select us."

[204] I have considered carefully the above arguments raised by the City in respect of their requests for this adverse inference. Having done so, and assuming without deciding that an adverse inference might properly be drawn in this case, I am of the view from

my review of the totality of the evidence, that I need not make a determination on that issue. Accordingly, my analysis should be seen as based on an assessment and an evaluation of only the evidence that was adduced. That analysis will not in any way depend upon an adverse inference being drawn from the failure on the part of any party to adduce any specific evidence or witness. As I will explain, the practical reality in this case is that the overwhelming effect of the admissible evidence before the Court (circumstantial and direct) is to persuade me on a balance of probabilities that the theory of the City as it relates to the bribery and breach of fiduciary duty allegations (and the requisite and relevant legal elements and connected proof), have been made out. To the extent that Sheegl has responded with an explanation, I say simply (as I will also later explain) that his response is not credible or congruous in the circumstances of this case. Further, I am of the view that on the evidentiary foundation before me, there is insufficient credible, supporting, confirming or corroborating evidence adduced on the part of the Sheegl defendants, so as to persuasively respond to the proof adduced by the City, which I repeat, has in its totality, with the cumulative force of its circumstantial and direct evidence, established the allegations in the City's claim on a balance of probabilities. To repeat, the above determinations are made without the necessity of the requested adverse inference.

D. ***If This is an Appropriate Case for a Potentially Dispositive Determination on Summary Judgment, are Either the City or the Sheegl Defendants Entitled to Summary Judgment?***

[205] In the analysis that follows, I will identify and discuss the substantive basis for the two legal causes of action (the alleged bribery and the breach of fiduciary duty) that make up the City's claim against the Sheegl defendants.

[206] In making my factual and legal determinations in respect of the City's bribery and breach of fiduciary allegations, I will be implicitly explaining why the Sheegl defendants' motion for summary judgment need be dismissed and conversely, why in my view, the City's motion for summary judgment ought to be granted.

1. *The Bribery Allegation*

[207] The City's theory as to the bribery allegation relates to the earlier discussed total payments sent and received from Armik in the manner described. I accept as fact that account of the payment just as I accept as fact the relevant underlying evidence the City has adduced to establish Sheegl's fiduciary duties, the contemporaneous relationship with the alleged co-conspirators and the evidence adduced generally to establish the elements of the civil tort of bribery. The evidence from which I find the facts and draw any related and necessary inferences to support the foregoing, comes from — to a considerable extent — the voluminous affidavit evidence of Michael Jack (and the attached exhibits).

[208] I note that the primary defence asserted by the Sheegl defendants is that the $327,200 payment related to a *bona fide* real estate transaction. I have considered carefully all of the evidence adduced in that connection, including everything contained in the affidavit of Phil Sheegl.

[209] For the reasons that follow, in the context and circumstances of the evidence before me, the explanation offered up by the Sheegl defendants is not credible. I do not believe the explanation or any of the related responding evidence as provided in any of the Sheegl affidavits.

[210] When I apply the governing law to the facts (circumstantial and direct) that I accept and rely upon, I find that the City has established on a balance of probabilities the elements of a cause of action in bribery.

[211] The civil tort of bribery was the subject of discussion in the Ontario Court of Appeal decision in ***Enbridge Gas Distribution Inc. v. Marinaccio***, 2012 ONCA 650 (***Enbridge***). At paragraphs 33 and 34, the court outlined the elements of a cause of action in bribery and the presumptions that follow when the elements of a bribe are established:

> [33] The civil tort of bribery is the payment of a secret commission. In *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.* (1989), 1989 CanLII 4257 (ON CA), 67 O.R. (2d) 587 (C.A.), at p. 591, Morden J.A. set out the three elements of a cause of action in bribery:
>
> > The term "bribe" has, for the purposes of the civil law, received a wide interpretation. In *Industries & General Mortgage Co. v. Lewis*, [1949] 2 All E.R. 573 (K.B.D.), Slade J. said at p. 575:
> >
> > > For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.
>
> [34] Once all the elements of bribery are established, the court will presume in favour of the principal and against the briber and the agent bribed, that the agent was influenced by the bribe. The presumption is irrebuttable: see *Optech Inc. v.*

> *Sharma,* 2011 ONSC 680, at para. 23. Moreover, the motive of the person making the bribe is irrelevant: see *Ruiter Engineering,* at p. 591-592; *Barry v. Stoney Point Canning Co.,* 1917 CanLII 620 (SCC), [1917] 55 S.C.R. 51, at p. 74.
>
> [emphasis added]

[212] The British Columbia Supreme Court in ***Procon Mining and Tunnelling Ltd. v. McNeil***, 2010 BCSC 487 (***Procon Mining***), also considered the principles that apply where a bribe has been established. The court noted at paragraph 93:

> [93] In my view, they are correct to do so. The applicable principles with respect to secret commissions were stated in *Alberta Housing Corporation v. Achtem*, 1981 CanLII 1138 (AB QB), [1982] 2 W.W.R. 218 at 224-5 (Alta. Q.B.) [*Achtem*] as follows:
>
> ...
>
> > If a bribe be once established to the court's satisfaction, then certain rules apply. Amongst them the following are now established, and, in my opinion, rightly established, in the interests of morality with the view of discouraging the practice of bribery. First, the court will not inquire into the donor's motive in giving the bribe, nor allow evidence to be gone into as to the motive. Secondly, the court will presume in favour of the principal and as against the briber and the agent bribed, that the agent was influenced by the bribe; and this presumption is irrebuttable. Thirdly, if the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality, the assumption should be held an irrebuttable one; but we need not finally decide this because in the present case there is nothing to rebut the presumption."
>
> Those requisite elements are all clearly established in the present case.
>
> [emphasis added]

[213] The City concedes that the Canadian jurisprudence in respect of bribery is not voluminous. Part of the City's submissions therefore involves the provision of certain English decisions so as to assist the court in understanding what principles (in addition to those in the earlier cited Canadian judgments) may apply where a bribe has been alleged.

In that regard, the City relies upon the following cases: ***Eze v. Conway & Anor***, [2019] E.W.C.A. Civ. 88 (Eng. C.A.) (***Eze***); ***Otkritie International Investment Management Ltd. & Ors v. Urumov & Ors***, [2014] E.W.H.C. 191 (Eng. H.C. (Comm.) (***Otkritie***) and ***Fiona Trust & Holding Corporation Ors v. Privalov Ors***, [2010] E.W.H.C. 3199 (Eng. H.C. (Comm.) (***Fiona Trust***). The City submits that in relation to these noted English cases, the following principles have been established and should be seen as potentially applicable in cases of alleged bribery occurring in Canada:

a) "There is no need to establish dishonesty or corrupt motives. This is irrebuttably presumed." (see ***Eze***, at paragraph 25; see also ***Fiona Trust***, at paragraph 72);

b) "The motive for the payment or inducement (be a gift, payment for services or otherwise) is irrelevant" (see ***Eze***, at paragraph 35);

c) "The law does not excuse an actual or potential conflict of interest because it arises from a payment made to the fiduciary in some other capacity and not because he was agent or other fiduciary: it still regards the payment as a bribe, unless there has been full disclosure" (see ***Otkritie***, at paragraph 69; and see also ***Fiona Trust***, at paragraph 1392);

d) "If a payment is made to an agent that creates a real possibility of this kind [a conflict between interest and duty], it does not make 'any difference whether there is surreptitious profit was gained as a pure gift or for services rendered or for any other reason'" (see ***Fiona Trust***, at paragraph 73);

e) "The payments (or other benefits) do not have to be made directly to the fiduciary ... the test is whether the payment ... puts the fiduciary in a real (as opposed to

fanciful) position of conflict between interest and duty" (see ***Eze***, at paragraph 35);

f) "There is however no need to show that the payor intended the agent to be influenced by the payment or whether he was in fact influenced thereby. There is an irrebuttable presumption as to both, and that the principal has suffered damage in the amount of the bribe" (see ***Eze***, at paragraph 35); and

g) "The payment need not be linked to a particular transaction ... it is sufficient if the agent is tainted by the bribery at the time of the transaction between the payor of the bribe and the payee's principal" (see ***Eze***, at paragraph 35; and see also ***Otkritie***, at paragraph 69; and ***Fiona Trust***, at paragraph 73).

[214] Based on both the Canadian and English jurisprudence, I accept that in the context of a court's analysis with respect to an alleged bribe, the court will not inquire into the motives or subjective intentions of the payor or payee. Instead, once the elements of a bribe have been established (an undisclosed payment to a fiduciary) there is indeed an irrebuttable presumption that the payor intended to influence the payee, that the payee was in fact influenced, and that the principal has suffered damage in the amount of the bribe. I accept the City's submission on this point that it is accordingly not a defence to say that the payment by the payor was paid in respect of services rendered by the payee or was paid in respect of a *bona fide* real estate deal between the payor and payee.

[215] Having set out above the elements of a cause of action in bribery, having set out the presumptions that follow when the elements of a bribery are established and having set out the jurisprudence discussing the irrelevance of the motives or subjective intentions

of the payor or payee, I now turn to the question of whether or not the elements of bribery have been established in the unique and particular circumstances of this case.

[216] Based on my application of the above law and my findings of fact, I am persuaded by the City's submissions that the evidence shows as the Sheegl defendants acknowledge, that on July 22, 2011 (two days after Sheegl was delegated the authority to award the contracts in respect of the WPSHQ project), Armik (through his company Mountain) paid Sheegl (through his company FSS) $200,000 in Canadian funds. Sheegl acknowledged receipt of that payment in the course of his examination for discovery.

[217] The evidence also shows as the Sheegl defendants acknowledge, that on August 16, 2012, Armik paid Katz's company Samuel Michaels $127,200 in US funds, of which $63,600 was then transferred to Sheegl's company Winnix. That payment was also acknowledged by Sheegl in the course of his examination for discovery.

[218] The two payments identified in the previous two paragraphs were made at a time when Sheegl as CAO was the City's agent contemporaneous with the period during which the City was dealing with Armik (through Caspian) in respect of the WPSHQ project. At no time did Sheegl disclose to the City in general and/or the EPC (or its clerk) in particular, the $327,200 payment he had received from Armik.

[219] Based on the above, the City has persuaded me on a balance of probabilities that the elements of bribery have been satisfied. It is worthy of note that in respect of each element that need be established, the Sheegl defendants themselves provide acknowledgement. It is acknowledged that Armik did pay, and Sheegl did receive, the $327,200 payment and that such payment was never disclosed to the City.

[220] Insofar as the Sheegl defendants provide as their primary defence the explanation that the $327,200 payment related to a *bona fide* real estate transaction, I reject that explanation as incredible and moreover, I note that even if it were true, it provides them little if any relief in law.

[221] First, as it relates to the purported real estate transaction, I have given that explanation full consideration. According to that explanation, Armik and Sheegl periodically discussed in mid to late 2010 and 2011, the possibility of Armik investing in Tartesso. The discussions continued until an agreement between them (the "handshake deal") was reached in June or July 2011, that for $327,200 (US), Armik would purchase 25 percent of the collective 50 percent interest of Winnix and Duddy in the group's one-third interest in Tartesso. That explanation was offered in the affidavit of Phil Sheegl, sworn May 31, 2021, at paragraphs 10 – 13.

[222] The above transaction and the details of it, give rise to serious questions. The acceptance of the related explanation requires a suspension of reasonable belief not to mention an acceptance of a line of reasoning that only the most naïve could endorse or accept.

[223] According to the explanation offered up by the Sheegl defendants, Armik paid $327,200 for a 4.2 percent (1/24th) interest in Tartesso. I note that at the peak of the market, before the crash of 2007-08, Katz and Sheegl had paid $47,000 for the equivalent interest. This transaction with Armik was apparently completed on a handshake basis and no lawyers were engaged. Moreover, Armik apparently did not seek advice from an appraiser or the real estate agent regarding the 4.2 percent interest. The figure was

$327,200 because Katz and Sheegl believed that is what 4.2 percent was then worth. There was apparently no negotiation documented. There was no memorandum of understanding created. Nor were there any emails, texts, or anything contemporaneously documenting or substantiating the sale. I note that this complete absence of any substantiation of the sale or transaction was confirmed when Deloitte reviewed the data seized by the RCMP from Caspian's corporate offices. Deloitte found no notes, letters, emails, or other documents relating to the supposed Tartesso land deal, other than a self-serving email from Sheegl dated January 26, 2017.

[224] I also note that as it relates to the so-called real estate transaction, the other investors in the Tartesso development were not advised of Armik's purchase. Nor apparently, was their consent sought. The sale proceeds for this purported transaction were neither disclosed to nor shared by them. They did not learn of the sale until 2017 following the Winnipeg media coverage of disclosures of information within the RCMP's seized records.

[225] The City is right to point out that the first written item purporting to reference the "sale" or real estate transaction was a document handwritten by Sheegl. According to Sheegl, the document was written by him on May 1, 2012. When asked on discovery why the document was created then, he explained that Caspian and the City "were doing business together at that time", so he thought it was a good idea. In light of all of the other incredible and incongruous details surrounding this transaction, I am persuaded by the City's explanation for the timing of that written document: that the idea occurred to

Sheegl in 2017 because that was when the contents of the RCMP's seized documents were publicized in the local Winnipeg media.

[226] When Sheegl was interviewed for the CAO position in May 2011, he disclosed that he had ongoing investments in real estate in Arizona and elsewhere. When he was asked on discovery if he disclosed to the committee interviewing him his supposed then ongoing negotiations with Armik regarding the Tartesso property, he said he did not. When asked why not, he responded saying that it did not come up. I note that this was at a time when Sheegl was assisting Armik in various ways to obtain a $1.371 million contract with the City.

[227] Also, in relation to questions that arise surrounding the curious timing of some of the impugned payments, I note the payment of $8,534.41 from Sheegl to Mountain in respect of a supposed payment for a deck construction that occurred some years before. Although Sheegl produced a cheque in respect of that payment by him to Mountain, the City is justified in asking the Court to take note of the date of that cheque — October 15, 2017. That date is more than four years after the deck installation was completed. The City asks rhetorically, "what could possibly have prompted Sheegl's payment after more than four years?" I find that the Caspian/Mountain/Armik paying for the deck, was in fact, in further consideration of Sheegl's ongoing "consultant fees" and it was the publicity regarding the previous payments and the RCMP's seizure that suggested to Sheegl that it would be prudent to reimburse Mountain. As the City has argued, it is difficult to "manufacture a tale about a real estate deal involving only an in-kind payment of $8,534.41".

[228] Having dealt with what I find is the incredible and fanciful explanation put forward by the Sheegl defendants as to the purported real estate transaction, I now turn briefly to the Sheegl defendants' assertion that there can be no inducement or agreement to act by the person receiving the bribe unless and until the bribe has been paid.

[229] At paragraph 83 of the Sheegl brief, the Sheegl defendants seem to suggest that because Sheegl did not receive his $200,000 payment from Armik/Mountain until after the City Council approved a GMP contract with Caspian, Sheegl could not have been induced to act in Caspian's favour by providing unfair procurement advantages. I agree with the City that this argument is factually, logically and legally flawed.

[230] As it relates to the facts, City Council did not approve Caspian's GMP proposal in July 2011. Instead, City Council approved an increase in the budget for the WPSHQ project. Although the increase in that budget may have been based on what Caspian proposed as its GMP number at the time, the City is right to point that that is not the same thing as approving Caspian's GMP proposal. No Letter of Intent nor the GMP contract was entered into between the City and Caspian in July 2011 and in fact, the GMP contract was not entered into until November 2011.

[231] It need also be understood (even had I accepted there was in fact a real or *bona fide* land deal) that if Sheegl and Armik (as Sheegl himself acknowledges) had been negotiating the Tartesso land deal since mid to late 2010, throughout the period from mid to late 2010 to July 2011, Sheegl would have anticipated a payment from Armik. This was the period during which Sheegl was involved with Armik/Caspian on the WPSHQ

project. In this very particular context, it is not unreasonable to suggest that a promise or expectation of payment could be sufficient to induce a person to act in one's favour.

[232] I also note that the jurisprudence surrounding the tort of bribery clearly indicates that a promise of a bribe remains a bribe and attracts the same legal consequences (see ***Eze***, at paragraph 36).

[233] For all of the reasons that I have explained above, I have determined that the elements of the tort of bribery have been established and that the explanation provided by the Sheegl defendants as to the purported real estate transaction is incredible and in my view, fictional. I also wish to point out however, that even if I had found that the purported real estate transaction was credible and not fictional (which I do not), the legal position in which the Sheegl defendants would have found themselves would not have been different. I say that because once the elements to the tort of bribery are established, the motives behind that payment are irrelevant (see ***Enbridge***, at paragraph 34 and ***Eze***, at paragraph 35). The Court should neither inquire into Armik's motive nor permit into evidence proof relating to his motive (see ***Procon***, at paragraph 93). As the City has insisted, "the entire fairytale on which the Sheegl defendants place so much emphasis is irrelevant for the purposes of the law".

[234] In summary as it relates to the alleged bribery, having acknowledged the elements of a bribe, the Sheegl defendants are required to confront an irrebuttable presumption that: a) Armik intended to influence Sheegl by the $327,200 payment; b) Sheegl was in fact influenced by the that payment; and c) the City suffered damage in the amount

that payment (see ***Enbridge***, at paragraph 34; ***Procon***, at paragraph 93; and ***Eze***, at paragraph 35).

2. *Breach of Fiduciary Duty*

[235] Based on his various employment agreements with the City, Sheegl acknowledged that he was in a fiduciary relationship with the City and that he was required to act honestly, in good faith, without conflict of interest and in the best interests of the City. He was to abide by the City of Winnipeg's Code of Conduct for Employees ("Code of Conduct") adopted from time to time by the City. He also would have declared that he had no conflict of interest that could have precluded him from accepting the position he held.

[236] Sheegl acknowledged during his examination that he understood that he was a fiduciary to the City at all material times and that he was required to comply with the City's Code of Conduct for Employees. That Code of Conduct requires all City employees to "avoid situations in which their personal interest, conflicts or appears to conflict with the City in their dealing with persons doing or seeking to do business with the City". The following provisions of the Code of Conduct are relevant for my determinations:

> 1. No employee shall engage in any outside employment, business, or undertaking for the employee's direct or indirect personal gain,
>
> (a) that will, or is likely to, interrupt or interfere with, the performance of his or her employment duties;
>
> . . .
>
> (c) in which the employee will gain, or appear to gain, a benefit as a result of his or her position with the City;
>
> (d) that will, or is likely to, influence, affect, or impair the manner in which the employee carries out his or her duties with the City, or his or her impartiality;
>
> . . .

> 4. No employee shall accept any gift, favour, commission, reward, advantage or benefit of any kind from any person who is directly or indirectly involved in any business relationship whatsoever with the City, unless it is:
>
> (a) a nominal exchange of hospitality among persons doing business;
>
> (b) a token exchanged as a part of protocol; or
>
> (c) a normal presentation made to persons participating in public functions.
>
> Where an employee, as a result of the performance of his or her duties, receives or becomes entitled to receive any monetary payment, good, or service, that is outside the limits set out in this section, the employee shall turn over the monetary payment, good or service to his or her department head for such civic or charitable purposes as the department head may determine.
>
> . . .
>
> 9. No employee shall use any information acquired as a result of his or her duties with the City for personal benefit unless the information is available to the public.
>
> 10. No employee shall grant any special consideration, treatment or advantage to any person in their dealings with the City.
>
> 11. No employee shall represent the City in dealings with any persons in which he or she has a direct or indirect pecuniary interest or with his or her dependants or relatives.

[237] Part of the Code of Conduct provides that in the event of an actual or potential conflict, the employee must disclose the conflict or potential conflict in writing to, in the case of a statutory officer such as a DCAO or a CAO, the clerk of the EPC.

[238] In ***Dunsmuir v. Royal Group, Inc.***, 2017 ONSC 4391, (aff'd 2018 ONCA 773), the Ontario Superior Court of Justice explained that all employees owe a general duty of fidelity to their employers (see paragraph 132), but an employee who stands in a fiduciary relationship to their employer owes even higher duties, namely "duties of loyalty, honesty, candour, and scrupulous avoidance of actual and potential conflicts of interest" (at paragraph 127). Further, given that a fiduciary relationship is at its essence characterized by reliance and trust, it was noted that "the court enforces fiduciary duties strictly to

ensure that there is no incentive to violate their high ethical and legal duties" (see paragraph 130).

[239] In the British Columbia Supreme Court in ***Pirani v. Pirani***, 2020 BCSC 974, the court at paragraphs 134 to 142 reviewed the jurisprudence in respect of what type of conduct constitutes a breach of fiduciary duty. The court noted that a fiduciary "is not allowed to put himself in a position where his interest and duty conflict ... or 'may conflict'" (at paragraph 138). The court also noted that the beneficiary of the fiduciary relationship "is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interest" (at paragraph 141). It was noted that conduct that rises to the level of a breach would include "acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances" (at paragraph 134).

[240] In its discussion of what factors a court should or should not look at in determining whether an alleged breach of fiduciary had occurred, the court in ***Pirani*** noted as follows (at paragraphs 146 and 147):

> [146] As a result, when assessing an alleged breach of trustee's fiduciary duty to avoid conflicts of interest "the subjective motivations of the fiduciary, the absence of actual harm to the beneficiary, and even whether the fiduciary in fact profited, are irrelevant": *Louis* at para. 26.
>
> [147] Furthermore, it may not be necessary to show that the alleged conflict of interest influenced the fiduciary's actions. In *Strother* at para. 69, the majority found that the conflict was triggered because the fiduciary had "created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests".
>
> [emphasis added]

[241] The court in ***Pirani*** follows closely the strict approach to breaches of fiduciary duty taken in ***Dunsmuir*** and it further relies on recent decisions of the Ontario and British

Columbia appellate courts to support the assertion that once the person alleging breach of fiduciary duty establishes a *prima facie* case of conflict of interest, the law "imposes a reverse onus that shifts the burden to the fiduciary to disprove the beneficiary's allegations (see paragraphs 160 – 161). For the purposes of establishing a *prima facie* breach, the court noted that "the plaintiffs need only establish that the defendants were in a position where there was a substantial risk their duties and interest could conflict" (see paragraph 172).

(a) Has the City established a prima facie conflict

[242] Has the City established a *prima facie* conflict by demonstrating that there was a substantial risk that Sheegl's duties as CAO could conflict with his personal interests?

[243] Having already made my findings that the City has established on a balance of probabilities the elements of the civil tort of bribery, there is by that finding alone and the underlying conduct involved on the part of Sheegl, an apparent conflict insofar as Sheegl's duties, at the relevant time, would have been subjugated to Sheegl's personal interest. Separate and apart from my findings respecting the facts underlying the bribery allegation, there are other facts in this case that also support a *prima facie* conflict where there was substantial risk that Sheegl's duties as CAO could conflict with his personal interests.

[244] Sheegl acknowledges and the evidence demonstrates that Armik paid him (through FSS) $200,000 in July 2011 at a time when the City was negotiating with Armik/Caspian and that of the $127,200 paid to Armik to Katz in August 2012, Sheegl (through Winnix) would have received $63,600. In my view, these payments and the promise of these

payments had the potential to affect his conduct in respect of Armik/Caspian. In that sense, there was indeed a substantial risk that Sheegl's duties could conflict with his personal interests.

[245] As part of the City's persuasive argument with respect to the breach and conflict, it has asked the Court to note that on December 16, 2010, in the early stages of Caspian's involvement in the WPSHQ project, when Caspian (specifically the CAJV) was still only a bidder on the Phase 1 contract, Sheegl made a curious comment. A minute prior to sending an internal City email advocating for lowering the bonding requirements of RFP 833-2010, Sheegl emailed Armik, warning him that he was about to send a blind copy of a confidential email and that "its [*sic*] part of my strategy to get this done for you".

[246] With the above in mind, the City asks this Court to consider all of the things done by Sheegl in the course of the WPSHQ project as part of his self-described "strategy to get this done for [Armik]":

(a) on December 15, 2010, Sheegl advocated for extending the bid deadline on RFP 833-2010, as requested by Armik. That deadline was extended twice;

(b) on December 16, 2010, Sheegl advocated for having the bonding requirements on RFP 833-2010 lowered, as requested by Armik. The bonding requirements were subsequently lowered on January 12, 2011;

(c) on January 21, 2011, Sheegl forwarded Shaun confidential information concerning the identity of the other bidders on RFP 833-2010;

(d) on January 27, 2011, Sheegl reported to Shaun on the results of the evaluation of RFP 833-2010, exploiting the information he obtained by virtue of his being DCAO;

(e) on February 2, 2011, Sheegl gave Shaun insider information relating to RFP 833-2010 and the Phase 1 contract. In particular, he contacted Shaun with

a view to "prepar[ing] [him] for the questions that will be asked for clarification";

(f) on February 8, 2011, Sheegl and Armik exchanged calls wherein Armik gave Sheegl "the approximate numbers so you have it in advance of the meeting"; Armik reported to Richard that Sheegl just wanted the CAJV to "take over this project to bring it home". The Phase 1 contract was awarded to the CAJV two days later;

(g) on February 17, 2011, Sheegl told Armik that he would get approval for $126 million but that he wanted "2+2 for sam and phil". On July 20, Sheegl was delegated the authority to award the GMP contract. Two days later, Armik's company Mountain paid Sheegl's company FSS $200,000. The GMP contract, which was signed by Sheegl as CAO, was awarded to Caspian in the amount of $137.1 million on November 18, 2011. Despite the size of the contract, no competitive bids were ever sought and indeed, the City never sought tenders from any other contractors;

(h) on March 19, 2011, after Armik expressed concerns about AECOM, Sheegl requested a meeting with the City legal department "as I think we may have an out", a phrase which Sheegl acknowledged meant a way to get out of the AECOM contract;

(i) on May 1, 2011, Sheegl directed that there be a "full stop on payments [to AECOM] until we meet with them";

(j) on May 4, 2011, after Armik expressed concerns about the City's project director Aziz, Sheegl promised to get a contract for Armik's handpicked consultant Abouzeid. In February 2012, Sheegl as CAO awarded a single-source contract to Abouzeid's company Dunmore - the contract was backdated to June 1, 2011. At one point, on June 29, 2011, Sheegl threatened to use his authority as CAO to terminate Aziz's employment. By September 2011, Aziz had been forced out of his role as City Project Manager;

(k) on June 23, 2011, after Armik requested it, Sheegl contacted the City's legal department to "ensure everything is in order" with respect to the assignment of the Phase 1 contract to Caspian alone. As requested by Armik to Sheegl on June 6, the assignment agreement, signed by Sheegl as CAO, ultimately included a clause whereby the City released Akman Construction from the obligations under its bond;

(l) on July 5, 2011, Sheegl requested through Armik that Abouzeid, the City's new Project Manager, make a recommendation to the City of $150 million. He did so. Ultimately, the City increased its budget from $127.167 million to $155 million on July 20, 2011;

(m) on September 30, 2011, after Armik told Sheegl to put AECOM on notice and let him install a different design team and, indeed, went so far as to

> providehim with the names of Chang of AAR and Dubuc of GRC, Sheegl placed AECOM on notice, which in due course ended with the City terminating its relationship with AECOM by February 2012, and used his influence to increase the chance that the City entered into a design contract with Armik's handpicked design team, AAR, by March 2012.

[247] When I consider the above, I am in agreement with the position of the City that Sheegl's willingness throughout the project to advocate for and whenever possible, to deliver on Armik's/Caspian's requests, suggests quite clearly that there was a real and substantial risk that Sheegl's actions generally and the $327,200 payment more specifically could conflict with Sheegl's fiduciary duties. Indeed, Sheegl's actions (as described above) demonstrate that they did conflict with his fiduciary duties. I have no difficulty finding a *prima facie* breach has been established.

(b) With a prima facie conflict having been established, have the Sheegl defendants discharged what now becomes a reverse onus to disprove the City's allegations respecting breaches of fiduciary duties?

[248] I have taken into consideration the Sheegl defendants' response when they say that there was no conflict between Sheegl's duties as CAO and the payment of $327,200 since that payment related to a *bona fide* real estate transaction and had nothing whatsoever to do with the WPSHQ project. Although I have already made my determination in respect of the veracity of that explanation, I will pause to note that even if the Sheegl defendants' fabricated story about the Tartesso land deal between Armik and Sheegl in June/July 2011 were found to be true, it would nonetheless fall short of providing any defence against the City's assertion that Sheegl was in breach of his fiduciary and contractual duties to the City.

[249] If I were to assume that Armik and Sheegl had in fact been negotiating a true real estate transaction from the period of mid to late 2010 to June/July 2011 and that in June/July 2011, Armik and Sheegl had agreed that in exchange for the $327,200, Armik would acquire a 4.2 percent interest in Tartesso, how would such facts reflect on the City as beneficiary, and Sheegl as fiduciary? As the City emphasizes, even in such a scenario, that would have meant that at a time when the City, through Sheegl, was negotiating a contract with Armik/Caspian, Sheegl was negotiating with Armik and in July 2011, Sheegl (through FSS) received $200,000 from Armik with the expectation that another $127,200 would be paid to him. Further, and no less importantly, Sheegl had never disclosed to the City his ongoing shared investment with the Ackmans or his supposed negotiations with Armik or the payments and other benefits received from Armik/Caspian/Mountain.

[250] Irrespective of whether the payments from Armik/Caspian related to a real estate transaction, it was incumbent on Sheegl to disclose the supposed Tartesso land deal to the City in a prompt and full way pursuant to the Code of Conduct, which expressly prohibits the acceptance of advantages or benefits and dealings with persons with whom one shares a pecuniary interest. Sheegl also had a duty to so disclose as a fiduciary. Put simply and starkly, this was a breach of trust and a breach of loyalty.

[251] The Sheegl defendants insist that Sheegl did inform the City that he had real estate investments in Canada and in Arizona, which included Tartesso, and that he had "many conversations with a substantial number of individuals employed with [the City] regarding Tartesso". The Sheegl defendants submit that it was during these conversations that

"the nature of the investment and identity of the investors" was discussed (see first Sheegl affidavit, paragraphs 30 – 31).

[252] Upon examination, the Sheegl defendants' insistence respecting what they say was disclosed to the City seems shallow and it does not withstand scrutiny. When Sheegl was asked specific questions about what exactly he disclosed and to whom, the Sheegl defendants' position appears shaky. For example, when asked during his examination whether he had disclosed to the City the fact that the Ackmans were co-investors in Tartesso, Sheegl noted that he had not disclosed that fact to the EPC as was required by the Code of Conduct, but noted that "Sam Katz would have known because he was a partner". When asked whether during his interview for the position of CAO in May 2011, he disclosed the fact that he was then negotiating the supposed Tartesso land deal with Armik, Sheegl stated "that didn't come up". When asked whether he had ever disclosed to the City the $200,000 payment he received from Mountain in July 2011, Sheegl confirmed that he did not and when asked why not, he stated, "I didn't think it was relevant".

[253] None of the responses noted in the previous paragraph can be squared with the assertion in Sheegl's first affidavit that he had many discussions with many people about Tartesso. The above responses reveal clearly that Sheegl did not satisfy his duty of disclosure. In this connection, it is reasonable to ask (as the City does) whether Sheegl's silence regarding the negotiations with and sale to Armik was rooted in Sheegl's knowledge that his conduct was wrong. Again, as the City asks, why was it not disclosed?

[254] As it relates to the duty of disclosure, in ***Dunsmuir***, the Ontario Superior Court of Justice described the duty of disclosure as one that falls upon fiduciaries in cases of actual or potential conflicts of interest and that it is a positive and exacting duty (see paragraph 70). As evidence of the exacting nature of the duty, the court in ***Dunsmuir*** specifically rejected that a fiduciary cannot satisfy his duty to disclose by leaving "a trail of breadcrumbs". Neither is it enough to argue that the principal could have discovered the conflicting relationship on his, her or its own (at paragraph 70). To the contrary, the court was clear in noting that the duty of disclosure is "absolute" insofar as "there must be the 'fullest disclosure' and an informed consent by the principal" (at paragraphs 146 – 147).

[255] In situations involving a true transaction, the onus rests upon the agent to prove that the transaction was entered into after full and fair disclosure of all material circumstances and of everything known to him respecting the subject matter of the contract which would be likely to influence the conduct of the principal (see ***McNeel v. Low***, 1962 CarswellBC 210, 35 D.L.R. (2d) 226 (BCCA), at paragraphs 23 – 24).

[256] I agree with the City's position that insofar as Sheegl may have disclosed to someone at the City, at some time, the fact that he was involved in an Arizona real estate development or that he had an interest in Tartesso, is not enough. Even if the Tartesso deal was a genuine and *bona fide* real estate transaction, Sheegl had a positive duty to disclose the deal in all of its material circumstances. That would have included disclosing that Armik was a party to that deal, that Armik was then a principal of the person with whom the City was negotiating a multi-million dollar contract and that negotiations had

been ongoing since mid to late 2010 and further, that Sheegl had received $200,000 and expected to receive another $127,200.

[257] In failing to disclose the above material facts, Sheegl was in breach of his fiduciary obligation of full disclosure. Where an agent's interest is in conflict with the principal's and the agent is unable to or has not discharged the onus of proving that complete disclosure has been made to the principal, there is a breach of fiduciary duty (see ***Oskar United Group Inc. v. Chee***, 2012 ONSC 1545, at paragraph 66).

[258] Part of the Sheegl defendants' arguments is their assertion that Sheegl was not acting in a conflict of interest because Armik's investment in Tartesso had no relation to Sheegl's work as CAO and because the Tartesso transaction did not constitute "a gift, favour, commission, award, advantage or benefit for the purposes of the City's Code of Conduct. I reject this argument.

[259] In response to the Sheegl defendants' position as advanced above, I note the evidence of the City (see the first affidavit of Michael Jack, at paragraphs 9 (hhh) to (jjj), pages 38 & 39) where it refers to July 20, 2011, when City Council resolved to increase the budget for the WPSHQ project and to delegate to the CAO the authority to award contracts for the WPSHQ project — including the GMP contract. Also I note the evidence showing that on July 21, 2011, Sheegl executed his employment agreement with the City relating to, and confirming, his appointment as CAO for the City. Finally, on July 22, 2011, Caspian issued a cheque for $200,000 to Mountain and Mountain in turn issued a cheque for the same amount to Sheegl's company FSS, a company which is entirely unrelated to Tartesso. When I consider the timing of these events, any suggestion of

coincidence seems strained, particularly given that the events occurred in the context of a $200,000 payment on July 22, 2011. In this context, the City persuasively invokes the Ontario Court of Appeal judgment in ***R. v. Greenwood***, [1991] O.J. No. 1616 (Ont. C.A.), where at paragraph 12, the court noted:

> The Crown's argument has considerable force. If the totality of the evidence adduced in the Crown's case admits of a reasonable inference supporting a finding of guilt, a trial judge cannot direct a verdict of not guilty at the end of the Crown's case: *R. v. Monteleone* (1982), 1982 CanLII 2162 (ON CA), 38 O.R. (2d) 651, 67 C.C.C. (2d) 489 (Ont. C.A.), affd 1987 CanLII 16 (SCC), [1987] 2 S.C.R. 154, 35 C.C.C. (3d) 193. Evidence that a person who was having dealings with the government bestowed a benefit on a government employee involved in those dealings during the currency of those dealings reasonably suggests a connection in the mind of the giver between the benefit and the dealings. Indeed, Lamer J., writing for the majority in *Starr v. Houlden*, 1990 CanLII 112 (SCC), [1990] 1 S.C.R. 1366, 55 C.C.C. (3d) 472, at pp. 1406-07 S.C.R., pp. 501-03 C.C.C., described the inference as "almost ... irresistible".
>
> [emphasis added]

[260] In my view, the potential inference that there was a connection between Armik's payment to Sheegl and the fact that two days before it, Sheegl had been given the authority to award Armik's company a multi-million dollar contract, is, on the totality of the evidence, almost irresistible. In this regard, the City is well to remind the Court that unlike an analysis in the criminal realm where *mens rea* must be proven, neither Armik's nor Sheegl's intentions are relevant. Indeed, the only relevant consideration is whether a reasonable person, reviewing the matter objectively, would conclude that Sheegl's duties as CAO and Sheegl's personal interests conflicted or overlapped.

[261] Respecting the Sheegl defendants' suggestion that the supposed Tartesso land deal gave rise to no gain for Sheegl such that it did not violate the City's Code of Conduct, such an argument is not persuasive. Even if the Sheegl defendants' assertion were true, that Sheegl did not in any way gain or profit by the arrangement, it is nonetheless

reasonable to ask (as the City does) why Sheegl would have entered into such a transaction in the first place. Why would Sheegl, a successful real estate developer, give Armik an interest in real property for nothing? Based on the totality of the evidence, I am persuaded by the City's theory that the Sheegl defendants' explanation about Armik's supposed investment in Tartesso is nothing more than *an ex post facto* attempt to explain away why, as the City's CAO, Sheegl accepted $327,200 from Armik, whose company was then negotiating a multi-million dollar contract with the City.

[262] I will point out yet again that even if I was to have accepted that the supposed real estate transaction was genuine and *bona fide*, and that the $327,200 payment was in respect of Tartesso, I am still persuaded that the consideration Sheegl and his companies would have received in relation to that transaction, would in any case, still constitute a "reward, advantage or benefit of any kind" within the meaning of s. 4 of the City's Code of Conduct. I note that the meaning of the words "commission, reward, advantage or benefit" were examined in ***Greenwood***, at paragraphs 29 and 42. While ***Greenwood*** was decided in the context of s. 121 of the ***Criminal Code*** (the criminal bribery provisions) it is my view that the same customary meaning given to the words "advantage" and "benefits" should apply to the City's Code of Conduct. Accordingly, the receipt of the $327,200 remains an "advantage" or "benefit" with the meaning ascribed to such words in the City's Code of Conduct.

[263] In the end, as with the bribery allegation, based on the persuasive evidence adduced by the City and the absence of any persuasive responding evidence from the

Sheegl defendants, I have no difficulty concluding that the City has made out its allegation of breach of fiduciary duty.

[264] Based on the evidence before me, were I to find that Sheegl's undisclosed receipt of the $327,200 payment from Armik (for whatever reason), while Sheegl was an officer with the City and while he was negotiating a multi-million dollar contract with Armik's company, did not constitute a breach of fiduciary duty, I would in my view be sending a preposterous message. That message would be nothing short of suggesting that high-ranking public officials can do business in secret with persons seeking contracts from the very public bodies for whom public officials work. Neither the law nor common sense support or justify such a dubious conclusion or message.

IX. THE AWARD RE: THE QUESTION OF THE $327,200; THE SEVERANCE PAYMENT; PUNITIVE DAMAGES; AND LAWYER AND CLIENT COSTS

A. *The payment of the $327,200*

[265] Apart from the other aspects of the summary judgment award that the City addresses and for which they seek relief (the severance payment, punitive damages, and lawyer and client costs), the City also requested the "repayment" of the $327,200, plus interest.

[266] The issue of the $327,200 does indeed deserve to be addressed as part of the award on summary judgment although it is not clear that it can properly be addressed as a "repayment" in light of the fact that the payment comes from the parties identified and not the City. If this is not a repayment per se, it is not clear exactly under which head of damages or what part of the award that payment can be addressed. Despite the lack of

clarity on this issue and the absence of applicable or clarifying law currently before me, given all my findings, it would be perverse if any portion of the $327,200 paid to the Sheegl defendants was left unaddressed on this summary judgment award.

[267] Insofar as the payment of the $327,200 did constitute a civil bribe, any portion of that tainted money paid to Sheegl cannot be permitted to remain with Sheegl. In the circumstances, I am requesting of counsel further submissions that can be made orally or in writing respecting how the issue of the $327,200 can, in law, be best addressed as part of my award on this summary judgment.

[268] In the meantime, while further submissions on the question of the $327,200 payment will be required, I can nonetheless proceed to deal with the other aspects of the award to which the City is entitled.

B. ***The City's Entitlement to the $250,000 (plus Interest Paid to Sheegl in Severance***

[269] As part of its motion for summary judgment, the City argues its entitlement to the $250,000 paid to Sheegl in severance (plus interest thereon). In that connection, I note that in or around October 2013, members of the EPC indicated that they had lost confidence in Sheegl's ability to manage the affairs of the City. On October 16, 2013, Sheegl threatened to pursue damages against the City — including punitive damages — for the termination of his employment. In the end, in exchange for a signed release in favour of the City, the City paid, and Sheegl received, $250,000, which was approximately equivalent to Sheegl's annual salary as a CAO, plus employment benefits.

[270] As part of the context respecting Sheegl's departure, the City invokes Clause 9(2) of Sheegl's employment agreement with the City that provided that mayor and EPC could

terminate his employment as CAO "at anytime with 12 months' notice or pay in compensation in lieu of benefits".

[271] It seems unnecessary to assert that had EPC known that Sheegl was involved in what has now been established as a civil bribe and had they known that he failed in his fiduciary and contractual obligations by, amongst other things, not disclosing the $327,200 amount (and whatever other payment and benefits that Sheegl may have received from Armik/Caspian) they would have terminated his employment for cause. The City would certainly not have terminated Sheegl's employment without cause and paid $250,000 to Sheegl in lieu of notice.

[272] The City contends that it is in the identical position to that of the plaintiff in ***York University v. Markicevic***, 2018 ONCA 893 (***Markicevic*** CA decision). In that case, the defendant was the assistant vice-president of the plaintiff university and conspired with others to misappropriate university funds by way of a fraudulent invoicing scheme. Prior to the university becoming aware of the defendant's dishonesty, it terminated the defendant's employment without cause and negotiated a severance agreement with him whereby that defendant was paid 36 months' gross salary. Later, when the university learned of the defendant's scheme, it initiated an action against the defendant and his co-conspirators, seeking amongst other things, to rescind the severance agreement. In affirming the lower court's decision to rescind the severance agreement, the Ontario Court of Appeal noted as follows (at paragraph 22):

> [22] The trial judge's finding that York was induced to enter into the severance agreement by the appellant's fraudulent misrepresentation that he was innocent of any financial dishonesty is supported by the evidence and no palpable or overriding error has been shown. It is difficult to imagine circumstances in which

> an employer acting responsibly would pay three years severance pay to an employee it knew had misappropriated large sums of money from it.
>
> [emphasis added]

[273] As part of the City's submission, it commends the lower court's reasoning. In the lower court judgment at ***York University v. Markicevic and Brown***, 2016 ONSC 3718, the Ontario Superior Court noted as follows (at paragraph 144):

> [144] As a fiduciary, Mr. Markicevic had a positive obligation to disclose the full extent of his fraudulent activity before he entered into the Severance Agreement. He did quite the opposite. He failed to disclose these activities and actively denied that he had done anything improper. This intentional and material non-disclosure itself entitles York to set aside the Severance Agreement.
>
> [emphasis added]

[274] I am persuaded that like the university in the ***Markicevic*** decisions, the City in the present case would not have paid $250,000 in severance to Sheegl had he disclosed that he had received a $327,200 payment from Armik. I am in entire agreement with the City's position that it is no defence to say that Sheegl never denied receiving the payment or that the City could have and should have inquired about it. As a fiduciary, Sheegl had a positive obligation to disclose that payment and any other benefits he received from Armik/Caspian. This non-disclosure itself is sufficient to justify rescission of the severance agreement.

[275] I have determined that the City is indeed entitled to the $250,000 paid to Sheegl in severance, plus interest thereon.

C. ***Punitive Damages***

[276] The City seeks punitive damages in light of the dishonest and moral blameworthy conduct on the part of Sheegl.

[277] The Supreme Court of Canada in ***Whiten v. Pilot Insurance Co.***, 2002 SCC 18, stated that the quantum of punitive damages must be "rationally proportionate to the end sought to be achieved" (at paragraph 111). That is, the court must award an amount proportionate to:

- the blameworthiness of a defendant;
- the degree of vulnerability of a plaintiff;
- the harm or potential harm directed specifically at a plaintiff;
- the need for deterrence;
- other penalties, civil or criminal, which have been or are likely to be inflicted on a defendant for the same misconduct;
- the advantage wrongfully gained by a defendant.

[278] The present case is particularly serious because of Sheegl's fiduciary duties. In the previously cited ***Oskar***, the Ontario Superior Court of Justice noted conduct that "gives rise to multiple breaches of fiduciary duty that are sufficiently egregious, intentional, deceptive and outrageous to be deserving of an award of punitive damages" (at paragraph 73).

[279] In ***Oskar***, the fiduciary breached his fiduciary duties (as did Sheegl) to his principal by failing to disclose a conflict between his personal interests and those of his principal, namely the fact that he had an interest in property that the principal was seeking to acquire. As with Sheegl, the fiduciary's conduct in ***Oskar*** went beyond a mere breach of duty and was as suggested by ***Oskar***, impugnable as conduct that was incompatible with fiduciary duties.

[280] In the present case, my findings are such that the City is justified in arguing that "soliciting and receiving a secret commission from a person with whom his principal was dealing was in gross breach of ordinary commercial and public service morality and is deserving of this Court's sanction".

[281] I am in agreement with the City's position that Sheegl's conduct in the present case is deserving of this Court's denunciation and sanction. No less important and deserving of sanction were Sheegl's continuing attempts to cover up his wrongdoing. I have found on the facts of this case that the entire Tartesso land deal was a concocted story, one that was made up in 2017 after the RCMP investigation uncovered the $327,200 payment. As such, it is as the City suggests, a absurd *ex post facto* justification "of truly scandalous behaviour on the part of the City's former CAO". In this sense, the City is correct to insist that Sheegl's conduct was analogous to the conduct of the fiduciary in ***McKnight v. Hutchinson***, 2019 BCSC 944, where the British Columbia Supreme Court determined that the fiduciary had acted reprehensively by doing such things as taking profits and taking "considerable pains to delay his judgment day, withholding information from the plaintiff and dragging the litigation out to lengths that cannot be condoned" (at paragraph 177).

[282] As part of the City's submission for punitive costs, it underscores that this is a case about the acceptance of a bribe by a high-ranking City official, from a person with whom the City was then negotiating a multi-million dollar contract. The City insists that if such a breach of fiduciary, contractual and moral duty is not worthy of this Court's sanction, then nothing is so worthy. I agree. Accordingly, I have determined that punitive costs in the amount of $100,000 is reasonable in the circumstances.

D. ***Lawyer and Client Costs***

[283] The City also seeks lawyer and client costs against the Sheegl defendants.

[284] In addressing the City's request for lawyer and client costs, I remain mindful of the earlier explained award I am making in respect of punitive damages. In that regard, I note that a court must take care to avoid the "double compensation" that Suche J. referred to in ***Sartor et al. v. Boon et al.***, 2018 MBQB 174, at paragraph 82. The award of punitive costs in this case is made in respect of the "reprehensible, scandalous or outrageous conduct" on the part of Sheegl (see ***Young v. Young***, [1993] 4 S.C.R. 3. That conduct, including the fabricated story of the land deal, was pre-litigation. As it relates to lawyer and client costs, I note that Sheegl's ongoing conduct, even after litigation commenced, included a failure to meet his disclosure and production obligations. That failure further inhibited access by the City to the relief that they had a right to seek as part of a fair adjudication in a court of law whose process is to be informed and protected by proper compliance with this Court's rules of civil procedure.

[285] Accordingly, in my view, while the Sheegl defendants are obviously subject to serious rebuke for their pre-litigation conduct, so too are they (not their counsel) subject to criticism for their conduct in the course of the litigation itself. Although the alleged ongoing cover up overlaps both the pre-litigation and litigation stages, there are compelling reasons why, relating to the public interest and the principle of indemnification, the appropriate compensation in this case should include both an award of punitive damages and an award for lawyer and client costs.

[286] In support of its submission for lawyer and client costs, the City notes the following:

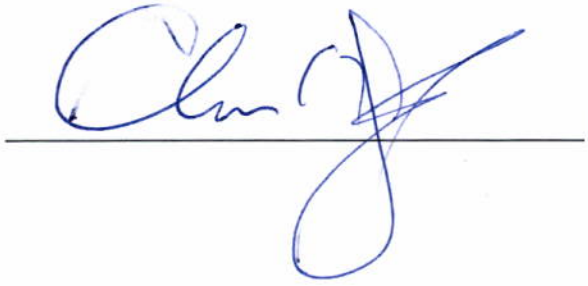
a) in separate reasons, the Ontario Superior Court of Justice in the ***Enbridge***

case awarded costs on a substantial indemnity basis, having found the defendants liable for bribery, fraud and breach of fiduciary duties (***Enbridge Gas Distribution v. Marinaccio,*** 2011 ONSC 4962);

b) following the ***Markicevic*** (Sup. Ct. decision), the court in that case issued separate reasons on the issue of costs in ***York University Markicevic,*** 2016 ONSC 6561 *("**Markicevic** (Costs)"* wherein the court awarded costs on a full indemnity basis against the defendant vice-president (para. 10);

c) in separate reasons, the court in ***Pirani*** and the court in ***Procon*** awarded special costs, finding the defendants' conduct was worthy of rebuke (see ***Piraniv Pirani,*** 2020 BCSC 1711 and ***Procon Mining & Tunnelling Ltd. v McNeil,*** 2010 BCSC 1435.

[287] In the unique circumstances of this case, I am persuaded that an award for reasonable lawyer and client costs is justified and can properly co-exist with an award for punitive damages.



C.J.Q.B.

EMAILS IN FURTHERANCE OF THE CONSPIRACY

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
First Mike Jack Affidavit (sworn May 27, 2021), Vol. I		
12	**September 7, 2010**: Organizing Sept. 13 meeting between Armik, Shaun, Sheegl and Giannuzzi	Meeting between conspirators. Statement made to instruct or update conspirators.
13	**September 9, 2010**: Organizing Oct. 1 meeting between Katz, Sheegl, Armik, Shaun and Giannuzzi – "Dinner to discuss possible business arrangement.	Meeting between conspirators. Statement made to instruct or update conspirators.
17	**December 10, 2010**: Organizing Dec. 10 meeting between Sheegl and Armik. Armik: "Please let's have the place ready … he [Sheegl] could be Caspian [*sic*] friend for a long time to come."	Meeting between conspirators. Statement made to instruct or update conspirators.
18	**December 15, 2010**: Sheegl emails Alex Robinson, with Armik blind copied, asking him to follow up with the legal department to re-evaluate bonding requirements, per Armik's request (p34)	Statement made to advance the objects of conspiracy, i.e., lowering bonding requirements to benefit Caspian and its chances of obtaining the Phase 1 contract.
18	**December 15, 2010**: Armik thanks Sheegl for his help (see email above), and re-assures him: "we will bring this under cost control … [project] will be your and your groups legacy [*sic*] for many year to come". (p169)	Statement made to re-assure co-conspirator.
18	**December 15, 2010**: Sheegl recommends to Alex Robinson that the deadline for bids be extended by one week, per Armik's request (p36)	Statement made to advance the objects of conspiracy, i.e., extending bid deadline to consider

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
		lowering bid bonding, to benefit Caspian and its chances of obtaining the Phase 1 contract.
18	**December 15, 2010**: Sheegl forwards to Armik City's decision to extend bid deadline, with the comment: "Here you go my friend!". (p171)	Statement made to instruct, update or report back to co-conspirator.
19	**December 15, 2010**: Armik asks Abouzeid if he has any connection to City hall; Abouzeid said says: "Phil Sheegl? But I think you know him?"	Statement made to advance the objects of the conspiracy, i.e., identifying connections within the City to exert influence in City's favour.
20	**December 16, 2010**: Shaun forwards Sheegl City's decision not to change bonding requirements; Sheegl emails Alex Robinson, demanding that "whom ever [*sic*] made this unilateral decision … give us a briefing note explaining exactly why "we" are taking this position … PLEASE make this thing work". (p45)	Shaun's statement made to instruct, update or report back to co-conspirator. Sheegl's statement made to advance the objects of conspiracy, i.e., lowering bonding requirements to benefit Caspian and its chances of obtaining the Phase 1 contract.
20	**December 16, 2010**: Armik tells Sheegl what the City should do about the bonding; Sheegl forwards Armik's proposal to Robinson, saying "I think this makes sense" (p46)	Armik's statement made to instruct, update or report back to co-conspirator. Sheegl's statement made to advance the objects of conspiracy, i.e., lowering bonding requirements to benefit Caspian and its chances of obtaining the Phase 1 contract.
20	**December 16, 2010**: Sheegl tells Armik that he's about to send a "Blind copy of a confidential email" as part of	Sheegl's first and third statement made to instruct, update or report back to co-conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
	his strategy "to get this done for you". Sheegl then sends email to Robinson, advocating for lowering bonding. Sheegl then forwards that email to Armik. (P172-174)	Sheegl's second statement made to advance the objects of conspiracy, i.e., lowering bonding requirements to benefit Caspian and its chances of obtaining the Phase 1 contract.
22	**January 6 + 7, 2011:** Armik requests phone calls from Phil.	Conversation between conspirators. Statement made to instruct, update or report back to co-conspirator.
25	**January 17, 2011**: Armik asks Abouzeid for his help in putting together a proposal for WPSHQ, says "Phil Sheegl is on it".	Armik's statement made to instruct co-conspirator and to re-assure him of Sheegl's involvement.
28	**January 21, 2011**: Sheegl provides Shaun with the names of the other bidding contractors.	Statement made to instruct, update or report back to co-conspirator.
25	**January 21, 2011**: After Armik knows the names of other bidders, Armik gives Abouzeid his "take on this project" and asks him to convey it to the City.	Armik's second statement made to instruct, update or report back to co-conspirator.
28	**January 21 & 26, 2011**: Abouzeid agrees to "work on it"; Armik then asks Abouzeid if he's heard anything re: WPSHQ.	Statements made to instruct, update or report back to co-conspirator.
29	**January 26, 2011:** Armik expresses that Caspian really wants the project, Sheegl responds: "I know and you know I will do everything to help us all succeed here together".	Statement made to re-assure co-conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
30	**January 27, 2011**: Sheegl notifies Armik that he has good news re: Police station.	Statements made to instruct, update or report back to co-conspirator.
31	**February 4, 2011**: Armik and Richard exchange emails, during which Armik says Sheegl gave Caspian the issues that will come up during the RFP evaluation. (p179-6)	Statements made to instruct, update or report back to co-conspirator.
31	**February 7, 2011**: Armik and Richard exchange emails, during which Richards says getting the City bureaucrats on site "will make Phil and Sam's job a a [*sic*] lot easier to select us." (p179-2)	Statement made to re-assure co-conspirator.
32	**February 7, 2011**: Shaun tells Armik that "Phil assured us" that Caspian will get through D'Avignon and get the Phase 1 contract; Armik says "Phil and Sam are pulling for us"	Statements made to re-assure co-conspirator.
33	**February 7, 2011**: Shaun requests meetings with Sheegl re: RFP evaluation.	Organizing a meeting between conspirators. Statement made to instruct, update or report back to co-conspirator.
34	**February 8, 2011**: Armik requests call from Sheegl to "update you the [*sic*] #s before meeting".	Organizing a phone call between conspirators. Statement made to instruct, update or report back to co-conspirator.
35	**February 8, 2011** Armik and Richard discuss their meeting with the City, says Sheegl "just wants us take [*sic*] over this project to bring it home"	Statement made to update or report back to co-conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
39	**February 17, 2011**: Armik indicates that Sheegl said he would get approval for a 126 million budget for the project. Armik states "this will remain confidential forever".	Aide mémoire prepared by conspirator. Statement made to confirm instructions and agreement between conspirators.
43 / 48	**February 23, 2011 & March 11, 2011:** Armik expresses concerns about AECOM to Sheegl.	Statement made to update or report back to co-conspirator.
44 / 45 / 47	**February 24 & 25, 2011**: Shaun forwards Sheegl an email exchange with Aziz and with AECOM, with comments like "please, this stays here". Shaun alludes to having "committed [to] each other to get this done".	Statement made to update or report back to co-conspirator. Statement made to preserve or conceal the existence of conspiracy.
46	**February 25, 2011**: Abouzeid asks for, and Armik provides, for an update on WPSHQ project to Armik. Armik says "Phil has been a great support for us" (p69-2)	Statement made to update or report back to co-conspirator.
49	**March 21, 2011**: Sheegl tells Aziz that he wants to discuss a few clauses of the AECOM contract because "I think we may have an out". (p73-2)	Sheegl's statement made to advance the objects of conspiracy, i.e., dismissing AECOM to benefit Caspian and its chances to obtain the GMP contract.
50 / 51	**April 5 & 27, 2011**: Armik arranges meetings with Sheegl, with comments like "I would rather see you off site" and "We have to be careful I really don't want Abdul know I am visiting you there".	Statement made to update or report back to co-conspirator. Statement made to preserve or conceal the existence of conspiracy.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
53 / 60	**May 2, 3 & 20, 2011**: Emails dated May 2 and 3 demonstrate attempts from Phil, Abouzeid and Armik to talk on the phone.	Organizing a phone call between conspirators. Statement made to instruct, update or report back to co-conspirator.
54	**May 2, 2011**: Armik forwards Phil Caspian's proposal to Aziz for later phases of the WPS project, writing "confidential for your eyes only".	Statement made to update or report back to co-conspirator. Statement made to preserve or conceal the existence of conspiracy.
55	**May 4, 2011**: Armik forwards Sheegl an email from Aziz requesting a GMP proposal, asking: "how do you need me to respond. I can come up with all kind of excuses".	Statement made to update or report back to co-conspirator, and to seek instructions from co-conspirator.
56	**May 5, 2011**: Armik tells Sheegl that Aziz has "loose lips" and "needs to keep quiet".	Statement made to instruct co-conspirator.
57	**May 12, 2011**: Sheegl blind copies Armik on correspondence with Alex Robinson. Armik forwards the emails to AbouZeid writing "FYI confidential".	Statement made to update or report back to co-conspirator.
58	**May 13, 2011**: Armik forwards Sheegl and Abozeid his email exchange with Aziz re: RFI system.	Statement made to update or report back to co-conspirator.
61	**May 22, 2011**: Armik asks for Sheegl's input before meeting with Abouzeid for the final negotiation of GMP numbers.	Statement made to update or report back to co-conspirator, and to seek instructions from co-conspirator.
64	**May 26 & 27, 2011**: Armik tells Sheegl and Abouzeid that "Caspian has to be in charge of the design team, and cost control", and that "we should put Aecom on	Statement made to instruct, update and report back to co-conspirators.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
	notice that they have limited time to provide design consistence".	
66	**May 27, 2011**: Armik tells Abouzeid that Caspian "need[s] to manage the design team … I am sure Phil is on board with this.	Statement made to instruct, update and to reassure co-conspirators.
67	**June 6, 2011:** Armik tells Sheegl that the City needs to release Akman from his portion of the bond (in the context of the assignment of the Phase 1 contract)	Statement made to instruct co-conspirator.
68	**June 7, 2011**: Armik tells Sheegl "we need to stress that today's meeting [relating to assignment contract] … is very confidential".	Statement made to instruct and update co-conspirator.
69 / 70	**June 16 & 18, 2011**: Sheegl forwards Armik confidential City correspondence related to the Phase 1 contract being prepared and finalized.	Statement made to update and report back to conspirators.
71	**June 23, 2011**: Armik asks that Phil contact Lisa Rowswell (City Legal) to ensure "everything [relating to Phase 1 contract] is in order".	Statement made to instruct conspirator.
74	**June 27, 2011**: Sheegl blind copies Armik on an email to Aziz requesting the drafting of a letter identifying "Ossama [Abouzeid] as Project Director"; Armik tells Sheegl that Aziz should report to Abouzeid.	Sheegl's statement made to update and report back to conspirators. Armik's statement made to instruct co-conspirator.
75	**June 29, 2011**: Armik forwards Sheegl Caspian's draft GMP letter, with the comment "Confidential Please call me upon receipt of this".	Statement made to update or report back to conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
76 / 77	**July 5 & 6, 2011**: Armik tells Abouzeid that Sheegl asked Armik to ask Abouzeid to "put your recommendation at 150m because he cannot talk to you". Abouzeid complies with Armik's instruction and recommends to the City that GMP number be 150M.	Armik's statement made to instruct conspirator. Abouzeid's statement made to advance the objects of the conspiracy, i.e., ensuring that GMP price be set by Caspian
78	**July 7, 2011**: in response to Abouzeid's 150M recommendation, Sheegl tells the City "seems to be we are onside … we need GMP of 150M"	Statement made to advance the objects of the conspiracy, i.e., ensuring that GMP price be set by Caspian.
79	**July 7, 2011**: Armik forwards Sheegl Abouzeid's assurance that GMP will not exceed 150M, telling Sheegl "I hope this assures you. If you can get more we can deal with it"	Statement made to update or report to and to reassure conspirator.
80	**July 7, 2011**: Armik expresses concern with Sheegl copying Armik's emails with Sheegl to the City, with the comment: "please it's about credibility."	Statement made to preserve or conceal the existence of a conspiracy.
81	**July 10, 2011:** Armik forwards Sheegl Abouzeid's recommendation for GMP at 151.7M, with comment: "we have to work on wordings"	Statement made to update and to seek instructions from conspirator.
82	**July 11, 2011:** Armik tells Sam that "Phil has been working very hard with myself and Ossama … to make numbers ... work."	Statement made to update or report back to conspirator.
87	**July 26, 2011:** Armik complains about Aziz to Sheegl, stating: "We need to talk … we are getting just more	Statement made to update or report back to conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
	aggravation please this needs to stop" and "I am giving it to you as heads-up"	
88	**September 9, 2011**: Armik forwards Sheegl his and Shaun's emails with AECOM, complaining about their performance (pp266-267)	Statement made to update or report back to conspirator.
89	**September 21, 2011**: Armik tells Phil and Abouzeid that "Aecom will need to be addressed. They will not deliver the project" and says that Phil said "if there are any issues at all [with getting GMP contract over with] … just take it directly to him." (p274) Armik tells Phil to "hold [AECOM's] payment" (p275)	Statement made to update or report back and to instruct conspirator.
90 / 92	**September 21, 2011 & October 19, 2011**: Armik complains about AECOM and says "Let me get a different design team for city" (Ex. 90). Armik recommends Chang/AAR and Dubuc/GRC and says "we have to pick right group"	Statement made to update or report back and to instruct or seek instructions conspirator.
91	**September 30, 2011:** Sheegl threatens to dismiss AECOM: "[either AECOM deliver] or we the City must move on"	Statement made to advance the objects of the conspiracy, i.e., dismissing AECOM from the project and ensuring that Caspian was in control of the design.
94	**November 24, 2011:** after the City raises concern about Chang blind copying Armik on email, Armik tells Sheegl that "if AECOME [sic] stays CASPIAN will not"	Statement made to instruct or to update conspirators.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
100	**August 2, 2012**: Armik complains to Sheegl about WPS, stating "Only Ossama should be making decision on behalf of city"	Statement made to instruct or to update conspirators. Statement made to preserve or conceal the existence of a conspiracy.
104	**December 9, 2012**: Armik writes "Private Memo to OA/Phil", updating both of them on cost overruns and saying "We can not let this continue it needs to be addressed ASAP please".	Statement made to instruct or update conspirators.
106	**May 15, 2013**: Armik, Abouzeid and Sheegl exchange emails on GMP cost. Ossama states: "We need to agree on what your number [GMP cost increase] should be first."	Statement made to update or report back and to instruct or seek instructions conspirator.
113	**Late 2011 – October 2013**: Various emails showing calls or meetings between Armik and Sheegl.	Meeting between conspirators. Statement made to instruct or update conspirators.
114	**Late 2011 – October 2013**: Various emails demonstrating correspondence which Sheegl and Armik labeled as confidential or sensitive.	Statement made to update or report back while concealing the existence of a conspiracy.
125 / 126	**February 7 & 8, 2011**: Armik asks Sheegl to call him "so I can update youthe#s [*sic*] before meeting".	Meeting between conspirators. Statement made to instruct or update conspirators.
127	**February 9, 2011**: while waiting on results of RFP, Armik asks for "good news". Sheegl says: "It is all good we are good to go".	Statement made to update or report back conspirator.
128	**February 25, 2011**: Armik tells Sheegl that he has concerns re: AECOM	Statement made to update conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
129	**March 17, 2011**: Armik forwards Sheegl his email with AECOM, and tells him "Please be careful what you are telling them in case something comes up".	Statement made to update conspirator.
130	**April 4 – April 6, 2011**: Armik and Phil organizing several phone calls and meetings, including an April 6 email where Armik writes "no email" with regard to a scheduled conversation.	Meeting between conspirators. Statement made to instruct or update conspirators. Statement made to preserve or conceal the existence of a conspiracy.
131	**April 27, 2011**: Armik proposes a meeting with Sheegl, stating that "players acting up and think they will change the process".	Statement made to update or report back conspirator.
131 / 132 / 133	**April 27, 2011 & May 1 and 4, 2011**: Armik and Sheegl organize meetings during which Armik says "We have to be careful I really don't want Abdul Aziz to know I am visiting you here" (Ex. 131) and asking "Can we meet somewhere not so public please." (Ex. 132) After Armik tells Sheegl that that Aziz wants to meet to go over costs, Sheegl says "Tell Abdul you are busy"	Statements made to preserve or conceal the existence of a conspiracy.
133	**May 4, 2011:** Armik tells Sheegl that Abouzeid needs a contract. Sheegl says: "Ossama will get what I promised him".	Statements made to update or report back and to instruct or seek instructions conspirator.
134	**May 5, 2011**: Armik complains to Sheegl that "these guys [Aziz and Akman] are loose lips left right and centre"; asks Sheegl to tell Aziz "not to talk cost"	Statements made to update or report back and to instruct or seek instructions conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
135	**May 6, 2011**: Armik tells Sheegl to tell AECOM "not to discuss city affairs with others regardless of who they are".	Statement made to instruct conspirators.
136	**May 10, 2011**: Armik tells Sheegl that Akman wants to go CM. Sheegl says "He can talk all he wants … WE ARE NOT GOING CM!!"	Statement by Sheegl made to re-assure co-conspirator.
137	**May 10, 2011**: Armik tells Sheegl AECOM have shared their prices with Akman and that Aziz wants to go over costs with Akman. Armik instructs Phil to tell them to "lose the bloody numbers".	Statements made to update or report back and to instruct conspirator.
139	**June 23, 2011**: Armik asks Sheegl to speak with Lisa Rowswell to ensure that the Phase 1 contract was assigned to Caspian alone. Sheegl confirms that he did.	Statement made to instruct or update conspirators.
140	**June 23 – June 24, 2011**: Sheegl forwards Armik internal City correspondence related to the Caspian Akman Joint Venture.	Statements made to update or report back to conspirator.
141	**June 29, 2011**: Armik tells Sheegl that Aziz as "shopping around with numbers". Sheegl says: "I need one person to stand up and say Abdul is in fact divulging numbers and then I can terminate his employment at the City".	Statements made to update or report back and to instruct or seek instructions conspirator.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
142	**July 11, 2011**: Armik forwards Sheegl Caspian's GMP proposal, saying "somebody there keeps moving the target and confusing everyone."	Statements made to update or report back to conspirator.
145	**September 3, 2011:** Sheegl forwards Armik Aziz's resignation letter. Armik says "Next Aecom group need to smarten up … We should keep the pressure on them."	Statements made to update or report back and to instruct or seek instructions conspirator.
146	**September 9, 2011**: Phil forwards an internal City discussion regarding AECOM's billing to Armik.	Statements made to update or report back to conspirator.
147 / 148 / 149	**October 5 – October 7, 2011**: Armik forwards Sheegl his emails with AECOM. Armik tells Sheegl "Please do not pay this [AECOM's fees]"	Statements made to update or report back and to instruct conspirator.
151	**November 2 – November 3, 2011**: Armik recommends AAR, in response to which Sheegl states "Stop your [sic] over the top… guys will be suspicious".	Statements made to update or report back to conspirator.
152	**November 4, 2011:** Armik outlines the challenges he and Sheegl have faced and are facing together, i.e., Akman, AECOM, and Aziz.	Statements made to update or report back to conspirator.
164	**Late 2011 – October 2013**: Various emails showing calls or meetings between Armik and Sheegl.	Meeting between conspirators. Statements made to instruct or update conspirators.
165	**Late 2011 – October 2013**: Various emails demonstrating correspondence which Sheegl and Armik labeled as confidential or sensitive.	Statements made to update or report back while concealing the existence of a conspiracy.

Affidavit Ex. No.	Subject Matter	In Furtherance Requirement
B	**February 2, 2011**: Sheegl and Shaun organize a call so that Sheegl can meet to "update you [Shaun] and prepare you for the questions that will be asked for clarification" (in the context of RFP 833-2010).	Statement made to instruct or update conspirators.
E	**December 9, 2012**: Armik writes "Private Memo to OA/Phil", updating both of them on cost overruns and saying "We can not let this continue it needs to be addressed ASAP please".	Statement made to instruct or update conspirators.