



**Office of the Auditor General**

**Investigation of the Lease Cancellation for  
300 Coventry Road**

**Tabled at Audit Committee  
October 27, 2020**



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### **Acknowledgements**

The team responsible for this investigation, comprised of Nathan Sassi from the Office of the Auditor General (OAG), under the supervision of Ed Miner, Deputy Auditor General and the direction of Ken Hughes, Auditor General, would like to thank those individuals who contributed to this project, and particularly, those who provided insights and comments as part of this investigation.

Original signed by:

Auditor General

## Introduction

In September 2019, the Office of the Auditor General (OAG) commenced an investigation into the cancellation of the commercial lease at 300 Coventry Road between the City of Ottawa and Independent Baseball of Ottawa.

The OAG's investigation ("the Investigation") was in response to a report received through the City's Fraud and Waste Hotline. This document details the findings and recommendations resulting from the Investigation.

## Background and context

The City of Ottawa entered into a 10-year, 11-month lease with Independent Baseball of Ottawa<sup>1</sup> that was intended to run from February 1, 2014 to December 31, 2024. Rent and baseball commenced in 2015. The lease was entered as a result of a Request for Offers (RFO) process that the City conducted in 2013. On October 9, 2013, Council approved a recommendation to delegate authority to the City Manager to finalize and execute a lease. The lease contained the following parameters:

- Term – 10 years with two successive five-year extensions
- Base Rent – \$108,000 per year covering the outdoor and indoor spaces
- Additional Rent – \$250,000 per year (to recover the City's on-going operating costs)
- Life Cycle Recovery – \$50,000 per year for 2015, 2016 and 2017, \$100,000 per year for 2018 to 2024 (to recover the City's long-term capital maintenance costs)
- Other amounts to be paid to the City:
  - \$1 per every paid parking attendee
  - 10% on all gross concession revenues over \$1.2M per year
  - 50% of all net naming rights over \$200,000

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<sup>1</sup> The original lease was signed with Inside the Park LLC. In February 2015, the Can-Am League informed the City that it had transferred Inside the Park LLC (an American Entity) to Independent Baseball of Ottawa Inc. (a Canadian Entity). The executed lease required any transfer, sale, or assignment shall be subject to approval by the City and/or its Council. This authorization was approved by Acting Deputy City Manager John Moser in May 2015.

Based solely on the guaranteed revenue components of the lease (i.e. base rent, additional rent and life cycle recovery), the City expected to receive \$4,430,000 over the lease term.

In 2017, Independent Baseball of Ottawa began falling behind on its rent payments to the City. While it did pay its parking rent of \$19,168 that year, it only paid \$133,340 of \$358,000 rent that was due. To assist the team, on October 3, 2017, City staff agreed to defer the team's Life Cycle Recovery payments for the years 2017 (\$50,000) and 2018 (\$100,000). The revised payment schedule was for \$0 payments in 2017 and 2018, and \$125,000 per year from 2019 to 2024.

In 2018, the situation worsened, and Independent Baseball of Ottawa paid only \$25,000 in rent in addition to its parking rent of \$22,134. City staff terminated the lease prior to the beginning of the 2019 season. By that time, even after excluding the Life Cycle Recovery payments that had been deferred, the City was owed \$418,942. This amount consisted of unpaid Base Rent, Additional Rent and over \$100,000 in interest charges.

The City entered into a debt repayment agreement with Independent Baseball of Ottawa. When the City entered into this debt repayment agreement, in staff's view, Independent Baseball of Ottawa was no longer in default. This is important as City policy prohibits it from entering into new Facility Use Agreements if the party is in default.

To facilitate the continuation of the 2019 Ottawa Champions season, City staff and Independent Baseball of Ottawa entered into three Facility Use Agreements for non-exclusive use. The Facility Use Agreements were for pre-season games, season games and all practices related to the 2019 season. Total City revenue from these three Facility Use Agreements was to be \$123,000, plus a \$2.00 per car parking fee, expected to total a further \$40,000 over the season. As a result, the expected revenue for 2019 went from \$378,000<sup>2</sup> under the lease (excluding the Life Cycle Recovery payments) to \$163,000 under the Facility Use Agreements, a decrease of \$215,000.

In July 2019, Independent Baseball of Ottawa made a \$10,000 payment in accordance with the new debt repayment agreement schedule. On September 11, 2019, Independent Baseball of Ottawa informed the City that no further payments would be made until the team was sold. On September 19, 2019 the City demanded and later

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<sup>2</sup> Base Rent (\$108,000) + Additional Rent (\$250,000) + (\$1.00 per car parking fee \* 20,000 cars) = \$378,000

received \$108,000 from a letter of credit that had been established at the outset of the lease in 2014.

Therefore, as of September 30, 2019, \$118,000 had been received by the City. \$90,000 of restructured debt scheduled to have been recovered on September 4, 2019, was not paid. In addition, no payment was received for the \$123,000 due from the three Facility Use Agreements.

## Objective of OAG investigation

The overall objective of this investigation was to identify the extent to which the City complied and demonstrated compliance with relevant by-laws, policies and procedures leading up to the termination of the original lease with Independent Baseball of Ottawa and its subsequent replacement with Facility Use Agreements.

## Scope

The scope of this investigation included an examination of compliance with the relevant City by-laws, policies, procedures and other applicable requirements surrounding the decision to terminate and replace the council approved lease with Independent Baseball of Ottawa.

## Investigation approach and methodology

The approach to this investigation was designed to identify the possible existence of non-compliance with relevant City requirements. Through interviews and document review, the OAG gathered evidence with a view to answer the following questions:

- Did City staff have the delegated authority to terminate a Council approved lease and replace it with Facility Use Agreements?
- What was the sequence of events leading up to the lease termination?
- Was there a duty to report the lease termination to Council?
- Was the reporting to Council related to the lease termination accurate?

The investigation was conducted during the period from September to October 2019 inclusive. The OAG briefed the General Manager, Recreation, Cultural and Facility Services on the investigation results and recommendations.

## Findings and recommendations

### **Delegated Authority**

In October 2013, Council passed a motion that included delegating to the City Manager the authority to finalize and execute a lease with Independent Baseball of Ottawa for the Ottawa Stadium. In addition, Delegation of Authority (DoA) By-law (currently By-Law 2019-280) includes a section dealing with the Corporate Real Estate Office (CREO). The Director of CREO is granted delegated the authority to:

...approve, execute documentation as required, and conclude real estate transactions involving the sale of an interest in land or property including fee simple sales, easements, rights of way, leases including extensions and renewals thereof, joint use and maintenance agreements, licences including licenses of occupation, consents to enter, and mortgages, including amendments to such transactions.

The Delegation of Authority is a technical document that does not include a complete description of all powers being delegated. Instead, the DoA provides the broad strokes of the authority delegated by Council to City staff, that allows them to perform the duties of their job without having to delay decisions unnecessarily by waiting for the next Council meeting.

Through an interview with a City solicitor, we understand that while the DoA grants the Director of CREO a broad range of powers, it does not explicitly provide the Director with authority to terminate a Council approved lease. However, the DoA does authorize the Director to administer executed leases. City staff and the City solicitor we interviewed interpret this delegated authority to administer a lease to include the authority to terminate a lease.

The lease between the City and Independent Baseball of Ottawa included a clause on default and remedies. This clause contained several potential default conditions, as well as several remedies for the various conditions. Ultimately, when the lease fell into default, the City could enact any number of remedies, including termination of the lease. With a long history of unpaid amounts that were due, there is no doubt the lease could be considered “in default”.

Based on a broad reading of the Delegation of Authority By-Law, it was reasonable for the City to assume that CREO had the delegated authority to enforce the termination

clause contained within the lease with Independent Baseball of Ottawa, once it was determined to be in default. However, it could be useful to clarify this authority.

**Recommendation #1:**

That the City request that Council update the Delegation of Authority By-law to include the delegated authority to terminate leases.

**Management response:**

Management agrees with this recommendation.

The interpretation of the current Delegation of Authority By-law is that City staff has the delegated authority to terminate leases. This authority has been applied since the inception of the By-law; however, management agrees that the language could be clarified. CREO staff will work with Legal Services to bring forward changes to the By-law to provide more explicit language for such actions by Q4 2020, in conjunction with other proposed by-law updates, to be considered by Council through the 2018-2022 Mid-Term Governance Review report.

## **Reporting lease termination to FEDCO**

Once CREO terminated the lease with Independent Baseball of Ottawa, it needed to report the change to the Finance and Economic Development Committee (FEDCO).

The Delegation of Authority By-law is based on the premise of transparency. When any group exercises their rights under the DoA, they must report use back to the appropriate Standing Committee and/or Council on the use of this delegation on an annual basis, at a minimum. Senior Legal Counsel for the City advised that in order to maintain transparency, staff should report to Council that the 2013 lease had been terminated and replaced with the Facility Use Agreements.

CREO accomplished this by submitting an Information Previously Distributed (IPD) memorandum from the Director of CREO, addressed to the Chair and members of FEDCO, dated June 27, 2019. This IPD reported that the lease with Independent Baseball of Ottawa for the premises at 300 Coventry Road had been terminated and replaced with Facility Use Agreements. This memo specified the following:

- The original lease included base rent, and additional rent totaling \$358,000 per year, in addition to revenue sharing agreements on parking, concession revenues, and net naming rights; and

- Independent Baseball of Ottawa owed \$418,492 and had signed a repayment agreement whereby approximately \$200,000 was to be paid by September 30, 2019 through a series of payments and the application of their letter of credit.

A key message in the IPD was that through a series of measures, the City expected to be able to offset the entire revenue loss. This would be accomplished by receiving rental revenues from the Facility Use Agreements totalling \$163,000, additional rental revenue from increased use of the stadium for community sport and special events, and unspecified reductions of the operational support provided to the facility. These changes would bring the maintenance standards in line with all other municipal sports fields in the City.

We found that there are two key areas where the information provided could have been improved.

1. The FEDCO report ignores the Life Cycle payments that Independent Baseball of Ottawa was required to pay. The original lease required Independent Baseball of Ottawa to pay into a Lifecycle fund to facilitate the lifecycle maintenance costs for the Stadium. The original lease required payments of \$50,000 per year from 2015 to 2017 and increasing to \$100,000 per year from 2018 to 2024. In October 2017, CREO and Independent Baseball of Ottawa agreed to defer the lifecycle payments for 2017 and 2018 (totalling \$150,000), and the payments would increase to \$125,000 per year for 2019 to 2024. There is no mention of these amounts in the final version of the IPD submitted to FEDCO.

These payments were included in earlier draft versions of the IPD but were subsequently removed at the request of senior City staff as "...these together makes the gap between what they used to pay and what they pay under the permits (*Facility Use Agreements*) even larger."

2. There was no discussion in the IPD of the ability of Independent Baseball of Ottawa to actually pay the new amounts set out in the Facility Use Agreements or the restructured debt from the original lease. The IPD only identifies that a repayment agreement had been signed and was currently in good standing. This was accurate as debt had been restructured such that no payments were due until after the end of the 2019 season. City staff told us that the use of Facility Use Agreements was meant as a temporary measure to

allow the team to play in the 2019 season, at which point, more permanent measures could be taken.

Independent Baseball of Ottawa would have to had become significantly more profitable in 2019 than it was in 2018 for it to pay the amounts set out in the 2019 Facility Use Agreements plus the \$200,000 repayment of restructured debt due by September 30, 2019. It is not clear from the documentation if staff seriously evaluated the likelihood of such a significant turnaround beyond discussions with the team's owner.

In any event, the issue was not included in the IPD; and during our field work, we were informed that Independent Baseball of Ottawa had only paid \$10,000 toward the 2019 Facility Use Agreements and the repayment agreement, and that the amounts owing would only be repaid if the team was sold.

## **Property taxes**

During the investigation, OAG staff became aware that the original lease was not in compliance with the Assessment Act with respect to property taxes. We identified a similar issue in our Audit of City Leases that was tabled at Audit Committee on April 8, 2019.

According to the Assessment Act, all real property in Ontario is subject to assessment and taxation, subject to a few specific exemptions. One such exemption is any land owned by a municipality. A past By-law, authorized by Council in 1992 (By-law 304-92), exempted 300 Coventry Road from taxes for municipal or school purposes, other than local improvement rates, rates under sections 218, 220 and 221 of the Municipal Act and municipal and school taxes levied on the business assessment. The City, as the landlord, would be required to contact the Municipal Property Assessment Corporation to alert them that a tenant was occupying a space that needed to be assessed, if this By-law was not in place. As set out in the 1992 By-law, it was automatically repealed on December 31, 2018, and the Municipal Property Assessment Corporation has not yet been contacted.

### **Recommendation #2:**

That the City notify the Municipal Property Assessment Corporation that 300 Coventry needs to be assessed when another lease is signed.

**Management response:**

Management agrees with this recommendation.

Generally, City property is exempt from assessment unless occupied by a taxable tenant. Staff will be bringing forward a report to City Council in Q2 2020 to recommend reinstatement of the municipal capital facility exemption (via a new By-law), for potential tenants of the baseball stadium. Should the By-law not be approved by City Council, and should staff secure a new tenant for the baseball stadium, staff will contact the Municipal Property Assessment Corporation to identify which areas are under exclusive control of the future tenant, and which areas remain under general control of the City.

**Compliance with the Municipal Act**

The inclusions contained within the 2019 Facility Use Agreements were likely in compliance with the Municipal Act.

The Municipal Act, 2001, includes a provision that prohibits municipalities from directly or indirectly assisting any manufacturing, industrial, or commercial entities with “bonusing”. The scope of the prohibition includes the giving or lending of any municipal property, including leasing or selling any municipal property. Specifically, under Economic Development Services, section 106 of the Municipal Act, 2001, reads:

**Assistance prohibited**

**106** (1) Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for the purpose.

**Same**

(2) Without limiting subsection (1), the municipality shall not grant assistance by,

- (a) giving or lending any property of the municipality including money
- (b) guaranteed borrowing
- (c) leasing or selling any property of the municipality at below fair market value; or
- (d) giving a total or partial exemption from any levy, charge or fee

### **Exception**

(3) Subsection (1) does not apply to a council exercising its authority under subsection 28 (6), (7) or (7.2) of the *Planning Act* or under section 365.1 of this Act.

The Act does not further define what is meant by “through the granting of bonuses”. However, subsection 106(2) provides a list of some transactions that are prohibited forms of assistance.

In the original lease, the City of Ottawa granted Independent Baseball of Ottawa exclusive use of approximately 31,500 square feet of space in addition to use of the playing field. This space included office space, retail area, dressing rooms, training rooms, etc. When these spaces were included within a commercial lease, there was no issue with bonusing.

When the lease was terminated, it was replaced with Facility Use Agreements. These Facility Use Agreements rented the facilities at 300 Coventry for the Council approved rate of \$128.25/hour, with a premium of \$48.35/hour for stadium lights during night games. Added to the “Conditions of Use” section of the standard Facility Use Agreement, the City included the following at no additional cost:

- Exclusive use to certain areas of the Stadium as defined, notably, office space, retail area, designated dressing, shower, and training rooms for both home and visiting teams and restaurant, storage room, and designated concession areas
- On Event Days, the contract holder will have control over the currently available 850 +/- parking stalls at the Stadium
  - The contract holder will keep a log of all paid parked vehicles and submit to the City \$2.00 for each paid parked vehicle
- Limited exclusivity for commercial advertising throughout the Stadium
- Permitted to negotiate the sale of a “naming rights” package for the Stadium and retain associated revenues

It is possible that providing these benefits to a commercial entity, such as Independent Baseball of Ottawa, could be construed as bonusing under Section 106 of the Municipal Act. However, City legal staff reviewed the matter and concluded that as the standard commercial rates for 300 Coventry were approved by Council, that likely addressed the bonusing issue.