

# Codes of Conduct and Role of the Integrity Commissioner



**John Mascarin**

The Township of Huron-Kinloss

May 1, 2023

**AIRD BERLIS**





# CODE OF CONDUCT

# Codes of Conduct

---

## Codes of Conduct - s. 223.2(1)

- codes of conduct are now **mandatory** for members of council and local boards

### Code of conduct

**223.2 (1)** A municipality shall establish codes of conduct for members of the council of the municipality and of its local boards.

- a by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence or is required to pay an administrative penalty – s. 223.2(2)

# What is a Code of Conduct?

---

**Gregory Levine, *Municipal Ethics Regimes*, (2<sup>nd</sup> Ed.) at p. 7:**

“Codes of ethics in the public sector are intended to promote integrity in public affairs and to provide guides to acceptable behaviour.

Codes are reference points for public servants, as well, they are tools for the public to view government actions. They provide a set of standards by which the public may judge government action or evaluate the action of officials they have encountered.”

- a code of conduct is *not* an encyclopedia

# Mandatory Subject Matters

## O. Reg. 55/18 – Prescribed Subject Matters

1. Gifts, benefits and hospitality.
  2. Respectful conduct, including conduct toward officers and employees of the municipality or the local board, as the case may be.
  3. Confidential information.
  4. Use of property of the municipality or of the local board, as the case may be.
- s. 223.2(4) - The Minister may make regulations prescribing one or more subject matters that a municipality is required to include in a code of conduct.

# Code of Conduct for Council and Local Boards

---

1. General Integrity
2. Conduct at Council and Committee Meetings
3. Discrimination and Harassment
4. Conduct Respecting Staff
5. Improper Use of Influence
6. Use of Municipal Property and Resources
7. Conduct Respecting Lobbying
8. Confidential Information
9. Gifts, Benefits and Hospitality
10. Election Related Activity

# Code of Conduct for Council and Local Boards

---

11. Compliance with the Code of Conduct
12. Enforcement of the Code of Conduct – Integrity Commissioner
13. Other Duties of the Integrity Commissioner
14. Procedure – Informal Complaint
15. Procedure – Formal Complaint
16. Refusal to Conduct Investigation
17. Response to complaint Outside of the Jurisdiction of the Integrity Commissioner
18. General Provisions

# Complaint Protocol

---

## What is a Complaint Protocol?

- a complaint protocol is a procedural guide for the conduct of an investigation
  - it seeks to provide for a process and procedure that is fair and equitable for all parties involved in a complaint, including the complainant and the respondent member
- a complaint protocol is considered part of the “**statutory scheme**” (together with Part V.1 of the *Municipal Act, 2001* and the Code of Conduct) respecting the enforcement of code of conduct complaints



# Complaint Protocol

---

- complaint protocol provides for such matters as:
  - filing and submission
  - forms
  - in-take and review procedures
  - summary dismissal and termination
  - evidence gathering: response, reply, sur-reply
  - timelines
  - final comments from parties
  - completion and transmission
  - receipt and consideration of report by council



# INTEGRITY COMMISSIONERS

# Integrity Commissioner

---

***Toronto Computer Leasing Inquiry Commission Report,***  
**(Toronto: City of Toronto, 2005), Vol. 2 [page 46]:**

“An effective Integrity Commissioner system provides two basic services:

- An **advisory service**, to help councillors and staff who seek advice before they act.
- An **investigative or enforcement service**, to examine conduct alleged to be an ethical breach.”

# Integrity Commissioner

---

## Mandatory Accountability Officer

- statutory officer who reports directly to council – s. 223.3
- exercises his or her functions independently
- functions are assigned by the municipality with respect to the code of conduct and *Municipal Conflict of Interest Act*:
  - *advising* council or members to prevent violations
  - *educating* members on responsibilities and obligations
  - *investigating* complaints and conducting *inquiries*
  - *adjudicating* complaints
  - *recommending* penalties and corrective or remedial measures to be imposed for contraventions

# Integrity Commissioner - Functions

## Integrity Commissioner

**223.3(1)** Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Integrity Commissioner who reports to council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to **any or all of the following**:

1. The application of the code of conduct for members of council and the code of conduct for members of local boards.
2. The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and of local boards.
3. The application of sections 5, 5.1, 5.2 and 5.3 of the *Municipal Conflict of Interest Act* to members of council and of local boards.

## Integrity Commissioner - Functions

---

4. Requests from members of council and of local boards for advice respecting their obligations under the code of conduct applicable to the member.
5. Requests from members of council and of local boards for advice respecting their obligations under a procedure, rule or policy of the municipality or of the local board, as the case may be, governing the ethical behaviour of members.
6. Requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*.
7. The provision of educational information to members of council, members of local boards, the municipality and the public about the municipality's codes of conduct for members of council and members of local boards and about the *Municipal Conflict of Interest Act*.

# Integrity Commissioner – Additional Functions

---

## ***Kroetsch v. Hamilton (City) Integrity Commissioner*** **2021 ONSC 7982 (Ont. Div. Ct.)**

- an Integrity Commissioner may be assigned all or some of the statutory functions set out in s. 223.3(1) of the *Municipal Act, 2001* by council
- however, a council has power pursuant to ss. 9 and 10 of the *Municipal Act, 2001* to request its Integrity Commissioner to investigate other matters or to undertake other services on behalf of the municipality
  - for example: investigate members of advisory committees; give advice under employee code of conduct; draft policies or guidelines for ethical behaviour, etc.



# ADVICE



# Advice-Giving Function

---

## ***Municipal Act, 2001 – ss. 223.3(1) and (2.2)***

- the Integrity Commissioner is now **expressly authorized** to provide *specific* advice to members of council and the municipality's local boards on *their* obligations (not those of other members) regarding:
  - the code of conduct
  - any ethical policy guidelines or procedure
  - the *Municipal Conflict of Interest Act*

# Advice-Giving Function

---

- Integrity Commissioner advice must be:
  - requested in writing by the member; and
  - provided in writing by the Integrity Commissioner
- members may rely upon advice if all relevant facts are provided to the Integrity Commissioner and its written advice is followed
- two conditions to request for advice:
  - must set out **all relevant facts** to allow written advice to be provided
  - must relate to the member's **own** obligations



# INVESTIGATIONS

# Investigative Powers

---

## General

- in general, an Integrity Commissioner investigates or undertakes an inquiry on a complaint or request basis
- council may request that an Integrity Commissioner investigate or research a matter and report
- the Integrity Commissioner has no authority to act on its own volition or initiative
  - the “own initiative” authority was included in the first reading version of Bill 68 but was removed
- code of conduct / complaint protocol sets out the terms for an Integrity Commissioner to investigate / inquire

# Investigative Powers

## Inquiry by Commissioner

**223.4** (2) The Commissioner may elect to exercise the powers under sections 33 and 34 of the *Public Inquiries Act, 2009*, in which case those sections apply to the inquiry.

## Information

(3) The municipality ... shall give the Commissioner such information as the Commissioner believes to be necessary for an inquiry.

## Same

(4) The Commissioner is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality... that the Commissioner believes to be necessary for an inquiry.

# Investigative Obligations

## Duty of confidentiality

**223.5(1)** The Commissioner may and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

## Exception

(2) Despite subsection (1), information may be disclosed in a criminal proceeding as required by law or otherwise in accordance with this Part.

## Section prevails

(3) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

# Investigative Obligations

---

## Reference to appropriate authorities

**223.8** If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act or of the *Criminal Code* (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council.

# Investigative Authority

## ***Di Biase v. Vaughan (City)* (2016), 55 M.P.L.R. (5th) 173 (Div. Ct.)**

- Integrity Commissioner has relatively low obligations of disclosure
  - “The investigating body is...the master of its own procedure.”

## ***Watson v. Stirling-Rawdon (Municipality)*, 2021 ONSC 2436 (Div. Ct.)**

- Integrity Commissioner carries out functions with “significant autonomy” and is not required to disclose each and every detail of an investigation

## ***Dhillon v. Brampton (City)*, 2021 ONSC 4165 (Div. Ct.)**

- Integrity Commissioner must afford the parties a reasonable level of procedural fairness which requires a fair procedure





# ENFORCEMENT

# Reporting – Integrity Commissioner Duty

---

## Report about conduct

**223.6** (2) If the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has **contravened the applicable code of conduct**, the Commissioner may disclose in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report.

# Reporting – Municipal Duty

## Publication of reports

**223.6 (3)** The municipality and each local board shall ensure that reports received from the Commissioner by the municipality or by the board, as the case may be, are made available to the public.

- contrast this duty to publicly disclose with the general position under MFIPPA where a report alleging *any wrongdoing* is typically held to be personal information which is **not** subject to disclosure
- although s. 16 of MFIPPA contains a compelling public interest exception

# Enforcement

## Penalties

**223.4 (5)** The municipality may impose either of the following penalties on a member of council or of a local board if the Commissioner reports to the municipality that, in his or her opinion, the member has contravened the code of conduct:

1. A **reprimand**.
  2. **Suspension of the remuneration** paid to the member in respect of his or her services as a member of council or of the local board, as the case may be, for a period of up to 90 days.
- Integrity Commissioner makes **recommendations** and Council imposes **penalties / remedial measures**

# Enforcement

---

## Penalties

### *Magder v. Ford*

(2013), 7 M.P.L.R. (5th) 1 (Ont. Div. Ct.) at para. 66:

“The literal reading of [s. 223.4(5) of the *Municipal Act, 2001*] is that there are only two sanctions or penalties that council can impose for a breach of the Code.”

- Integrity Commissioner **recommends** penalties and/or remedial measures or corrective actions
- Council **decides** upon to impose (or not) any penalties and/or remedial measures or corrective actions that are recommended

# Enforcement

---

## Remedial or Corrective Measures

***Magder v. Ford***  
**(2013), 7 M.P.L.R. (5th) 1 (Ont. Div. Ct.)**

“We agree with the application judge that a generous reading of the City's power to pass a code of conduct, in accordance with s. 6(1) of the [*City of Toronto Act, 2006*], would support the validity of including remedial measures in such a code. We need not determine the precise ambit of permissible remedial measures in this appeal.”

***Villeneuve v. North Stormont (Township)***  
**2022 ONSC 6551 (Div. Ct.)**

“... a municipal council may require remedial actions in addition to these penalties, to respond to the conduct underlying the complaint and provide redress for a complaint.”

# Enforcement

## Remedial or Corrective Measures

***Altmann v. Whitchurch-Stouffville (Town)***  
**(2018), 81 M.P.L.R. (5th) 1 (Ont. S.C.J.) [paras. 39 & 49]:**

- “other actions” imposed by a council for contravention of a code of conduct must actually be corrective or remedial in nature
  - they cannot be punitive sanctions or penalties
  - principles affirmed in *Dhillon v. Brampton (City)* and *Villeneuve v. North Stormont (Township)*
  - all three decisions held that some remedial measures imposed by council were punitive in nature and were accordingly invalid

# Investigation vs. Adjudication

## *Chiarelli v. Ottawa (City)*, 2021 ONSC 8256 (Div. Ct.)

- investigation and determination of contravention or breach of code of conduct: **Integrity Commissioner**
  - investigative capacity
- decision on the imposition of penalties and/or remedial measures or corrective actions where a contravention is reported: **Council**
  - adjudicative capacity
  - “Council’s duty is to consider and respond to the report” – not to make a determination re breach



# Council's Consideration of Investigative Report

---

*Assaly v. Hawkesbury (Town)*,  
2021 ONSC 1690 (Div. Ct.)  
at para. 11:

“If the Integrity Commissioner concludes that a council member has contravened the Code of Conduct, the municipality has **no power** to contest or question that conclusion. Its only power is to determine whether a penalty should be imposed and, if so, to issue a reprimand or suspend the member’s remuneration for up to 90 days under s. 223.4(5).”

# Council's Consideration of Investigative Report

---

## Toronto Integrity Commissioner Annual Report 2019

“It is plain to see that any value gained by assigning a neutral, independent, expert officer to investigate misconduct on Council’s behalf is lost when Council attempts to go behind the findings or challenge the lines of inquiry or analysis undertaken. It is also unfair to the parties and others involved and has the overall impact of undermining the accountability framework and the Office of the Integrity Commissioner itself.”

# Challenges to Investigation and Decision

- there is **no right of appeal** in the *Municipal Act, 2001* from a decision of council when it receives and responds to an Integrity Commissioner's report
- the decision of council and the Integrity Commissioner's investigation can be judicially reviewed pursuant to section 2 of the *Judicial Review Procedure Act* to the Ontario Divisional Court
  - *Fallis v. Orillia (City)*, 2022 ONSC 5737 (Div. Ct.)
- the Integrity Commissioner's investigation can be reviewed by the Ontario Ombudsman under section 14 of the *Ombudsman Act*

# Indemnification of Integrity Commissioner

---

## Indemnity

**223.3 (6)** A municipality shall indemnify and save harmless the Commissioner or any person acting under the instructions of that officer for costs reasonably incurred by either of them in connection with the defence of a proceeding if the proceeding relates to an act done in good faith in the performance or intended performance of a duty or authority under this Part or a by-law passed under it or an alleged neglect or default in the performance in good faith of the duty or authority.



# INTEGRITY COMMISSIONER TEAM MEMBERS

# Integrity Commissioner Team Members

---

<b>Lawyer</b>	<b>Title</b>	<b>Year of Call</b>
John Mascarini	Partner	1989
Meghan Cowan	Partner	2013
Paula Boutis	Counsel	2001
Laura Dean	Partner	2015
Meaghan Barrett	Partner	2016
Daria Peregoudova	Partner	2017
John Pappas	Associate	2020



# CONCLUSIONS

# Conclusions

- **all** members of council and local boards are subject to a code of conduct
  - four mandatory subject matters under O. Reg. 55/18
- integrity commissioners have broad authorities:
  - to investigate complaints and to report, and
  - to provide specific and individual written advice to members of councils and local boards on the code of conduct as well as the *Municipal Conflict of Interest Act*
- integrity commissioners can inquire as to whether a member did not comply with section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* and commence court application



~ *fin* ~

AIRD BERLIS

**John Mascarin**

**Partner**

**Email: [jmascarin@airdberlis.com](mailto:jmascarin@airdberlis.com)**

**Direct Line: 416.865.7721**