



ADR
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for the City of Welland

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June 1, 2023

SENT BY EMAIL TO:

Ms. Jane Thompson

AND TO:

Councillor Chiocchio
Councillor DiMarco
Councillor Green
Councillor Richard
Councillor Speck
Councillor Fokkens

Re: Investigation Report
Complaint No. IC-22027-0123

DELEGATION

Pursuant to a written delegation of powers dated February 28, 2022, Ms. Deborah Anshell ("Ms. Anshell" or the "Integrity Commissioner"), in her capacity as Integrity Commissioner for the City of Welland ("Welland" or the "City"), delegated to Mr. Michael Maynard, an Integrity Commissioner and Investigator

in the ADR Chambers Office of the Integrity Commissioner, pursuant to section 223.3(3) of the *Municipal Act, 2001*, certain of her powers and duties as Integrity Commissioner to inquire into, investigate, and prepare a report (subject to her review and approval) with respect to the complaint (the "Complaint") described herein.

THE COMPLAINT

Overview

The Complainant ("Complainant"), Ms. Jane Thompson, alleged that the above-named Councillors ("Councillor [Surname]", or collectively "Respondents") each breached the City's Code of Conduct ("Code") respecting their decision and vote at the November 1, 2022 Council meeting to not pursue a recount of ballots in Ward 6 after it was made known that wrong ballots (i.e., ballots for Ward 3) were issued in Ward 6 at the Grand Canal Retirement Residence for a period of several hours on Voting Day – October 24, 2022. The Complainant asserts that the Councillors knew about the issue but refused to allow a recount to occur.

Accordingly, the Complainant believes the Respondent Councillors each breached the following sections of the Code:

Preamble 1 & 2

The Code of Conduct identifies the public's expectations of Members and establishes guidelines for appropriate behavior. The key principles that underlie the Code of Conduct are as follows:

1. Members shall serve and be seen to serve their constituents in a conscientious and diligent manner;
2. Members shall perform their functions with integrity, accountability, and transparency, avoiding the improper use of the influence of their office, and conflicts of interest, both real and apparent;

6.1 – Conflicts of Interest

Members shall avoid conflicts of interest in accordance with the Municipal Conflict of Interest Act. Members are encouraged to seek

guidance from the Integrity Commissioner and/or legal advisors when they become aware that they may have a conflict between their responsibilities to the public as a Member and any other interest, including a direct or indirect pecuniary interest.

Investigative Process

The process of investigation for this matter included:

- a. a review and exchange of the written submissions of the Parties;
- b. an interview with Ms. Thompson;
- c. a review of other relevant information (e.g., the meeting Agenda and Minutes, meeting video recording, and media reports), and law as may be referenced periodically herein.

Procedural Fairness and Evidentiary Standard

The principles of procedural fairness were followed in this matter. This Complaint was investigated with input from all involved Parties who were provided with the opportunity to review the written statements of the other side. The Respondent had and took the opportunity to provide further evidence by way of interview. I opted not to interview the Respondent Councillors for the reasons stated below. The evidence obtained from all sources has been assessed in a fair and neutral manner. The standard of proof to be applied in this case is the *balance of probabilities* standard.

PRELIMINARY ISSUE

Prior to assessing the evidence and weighing it against the provisions of the Code, we must deal with some preliminary issues relative to the Code sections cited in the Complaint.

Preamble Sections Not Enforceable

This office has previously found in other matters, consistent with the findings of other Integrity Commissioners in the Province of Ontario, that *Preamble* sections of Codes of Conduct do not create enforceable rules but are rather interpretive in nature. We find this to be true of the Welland Code, as the Preamble section itself states that it contains “*principles*” which “*underlie the Code*”. It does not itself create rules.

In *Singh v. Sprovieri*, 2018 ONMIC 20, the Integrity Commissioner for the City of Brampton was faced with a complaint which alleged, amongst other matters, a breach of similar principles in the preamble to that City's Code of Conduct. He determined that the principles were not the proper subject matter of a complaint and stated:

As a general matter, a statement of principle does not create an obligation. It merely states the principle(s) that may be used to interpret obligations created elsewhere in the law...I find that the 'Key Principles' section provides interpretive direction only and it does not create rules or obligations on Council Members that can be the subject of a Complaint. Thus, even though the section declares, "The key principles that underline the rules in this Code of Conduct are as follows", these are only statements of principle. Statements of principle are not enforceable rules. Indeed the language (in) the sentence indicates that the principles and the rules are different.

In the *Brampton* case, it was further determined that the statements of principle in the preamble were too general and nonspecific to be enforceable as standalone rules of conduct.

More recently, in *Jacobs v. Gardhouse*, 2021 ONMIC 1 (CanLII), the Integrity Commissioner for the Township of East Garafraxa came to the same conclusion.

This office has also concluded similarly, for example in *Ip v. Bylsma*, (Niagara Region, 2021), and *[Anon] v. Moise* (Toronto District School Board, 2023).

We agree with these prior decisions and must conclude that the *principles* set out in the Preamble only serve as a guide to assist in the interpretation of the operative provisions of the Code. They are not enforceable, and a Member of Council cannot accordingly be found to have violated one of the sections.

Conclusion on Preliminary Issue

In my view, several of the issues raised are not within the jurisdiction of the Integrity Commissioner to consider as they refer to unenforceable principles of the Code, rather than enforceable rules. This leaves only section 6.1 (Conflict of Interest) as a matter for consideration. However, in the event that we are wrong about these jurisdictional issues, we have conducted an evaluation of these

matters which, in our view, is still appropriate to undertake at least in order to provide an analytical rationale on the substantive matter at issue.

EVIDENCE

Complaint Particulars

As noted above, the background to this Complaint was an apparent error in the issuing of ballots at a retirement residence in Ward 6. These ballots were cast at a community centre adjacent to the residence. This issue was raised at Council during the November 1, 2022 meeting, at which one Councillor – Leo Van Vliet – sought consent from Members of Council to waive procedural rules and allow a motion calling for a recount of ballots. His motion failed to garner the necessary 2/3 majority to waive procedural rules.

The Complainant asserts that it was inappropriate for the Councillors to vote no to a recount when they knew that there were problems with the issuance of ballots.

During her interview, the Complainant suggested that a 50%+1 vote would have been appropriate to determine this issue, rather than a 2/3 majority vote.

When asked what a recount would achieve given the issue was “wrong ballots” being issued rather than a problem with the tabulation of ballots, the Complainant stated:

“To know something is wrong, and it’s a small town, they should just do everything they can to ensure integrity of the election.”

Responses

Councillors Chiocchio, DiMarco, Fokkens, Green, Richard, and Speck provided Responses to the Complaint.

- Councillor Chiocchio observed (and I paraphrase) that the ballots were tabulated electronically and therefore there was no reason to do a recount.
- Councillor DiMarco observed that the rules were appropriately followed.

- Councillor Fokkens observed that the vote was not in respect of a recount, but to suspend the rules of Council. Moreover, the section 56.1 of the Municipal Elections Act only requires a recount in the case of a tie vote. There is no local policy in Welland which requires recounts in the case of close votes. A recount can be requested through the Superior Court pursuant to section 58.1 of the Municipal Elections Act.
- Councillor Green rejected the assertion that his vote failed any test of accountability, as it was conducted in open session. He also pointed out that the vote was in respect of suspending the rules of Council, not on the question of a recount. He further noted that the Clerk certified the election. He observed that he has no pecuniary or personal interest in the matter. Lastly, he noted that there is no statutory requirement for a recount.
- Councillor Richard stated that the election vote was not a tie and therefore no recount was required in accordance with the governing statute. She also noted that she gave her rationale in a news article in the Welland Tribune which was published on November 2, 2022. That article states:

Richard said she is sticking with what's in the Municipal Elections Act — that a recount is automatic only if a race ends in a tie.

She also said she doesn't have enough information about the final results.

"To date, I have not been forwarded any formal election report from our clerk, or anyone, in regards to any issues that have taken place," said Richard.

When asked about the city issuing a news release two days after the election saying some ballots were incorrectly cast in Ward 6 by residents of Grand Canal retirement residence, she said, "I consider that hearsay at this point until we get some type of formal report."

- Councillor Speck noted that Councillors "have absolutely nothing to do with the issuance or counting of ballots," and noted that the Clerk certified the election. The issue on the floor was a motion to suspend the rules of Council, which failed to attain the required vote.

He stated that the individual Council Members did nothing wrong and asserted in particular that he personally retains no conflict of interest in the matter.

The Councillor further pointed out that the issue was the issuance of ballots, not the counting of ballots, and accordingly a recount would serve no purpose. *“We are told by the clerk’s office that the counting equipment is accurate and reliable,”* he stated. Lastly, he noted that the Clerk did not recommend a recount, and no recount was statutorily required.

Reply

The Complainant issued the following Reply:

The “Integrity” of the councillors is violated when two thirds (2/3’s) of the members of council present, where required to vote to amend the agenda to meet their obligation under provincial legislation to permitting a vote to recount the October 24th, 2022 election which would have only required 50% + 1 to ratify.

Assuming 12 members of council, the vote to allow to amend the agenda would require 8 votes while the provincial required vote would be ratified with 7 votes.

Members of council ought to be aware that 145 eligible voters at 439 King St., where [sic] not registered for the municipal election, as well unknown voters were given improper ballots throughout. It is the responsibility of the council to [sic] a fair election as possible.

Analysis of Evidence and Findings

Issues

The key issues raised in this matter are as follows:

1. Did any of the Respondent Councillors fail to observe and/or act in accordance with the underlying principles in the Code?
2. Did any of the Respondent Councillors have a conflict of interest pursuant to the MCIA as set out in section 6.1 of the Code?

Analysis and Findings

For the following reasons, we find that – even if the Code was applicable to these matters – the Respondent Councillors did not act in a manner contrary to its principles.

Preamble

Preamble section 1 includes an underlying principle that Council Members “serve and be seen to serve their constituents in a conscientious and diligent manner”. In the case of this matter, while we have sympathy for the Respondent’s position respecting the integrity of elections, we cannot conclude that the Councillors failed to act appropriately. To the contrary, the Council Members in question followed the law and procedural rules set out before them. They relied on the advice of the Clerk who certified the election results. They considered the issue of whether a recount would have any impact on the results given that the issue was not about tabulation problems but about incorrect ballots being issued, and they concluded in a reasonable manner that a recount would not change the result. There is no legal requirement that a recount be taken. By all accounts, they made a political decision on a procedural question that was within their rights to make.

Preamble section 2 includes an underlying principle that councillors act with integrity, accountability, and transparency. There is no indication that accountability or transparency are at issue. Indeed, four of the Respondent Councillors provided clear rationales to the news media following the vote, though they have no obligation to do so. There was no indication of any impropriety respecting the vote or voting process. A lack of integrity cannot really be proven, as the Respondent Councillors all voted their conscience respecting the suspension of the rules of Council and have variously since explained via this inquiry process that they did not believe there to be any legal requirement or rationale for changing the rules to later allow for a recount as none was required either by the letter of the law nor due to the circumstances in their view. We observe that politicians are entitled to their political views and to vote on matters before them, even where their decisions are unpopular.

There is furthermore no indication of improper influence, which is generally meant to apply to seeking private benefits for oneself or another individual or entity through wielding political influence – a good example of this is seeking to obtain employment at the municipality for a family member or jumping the

queue for a municipal service by pressuring staff. Nothing of the sort occurred in this case.

Conflict of Interest

Section 6.1 of the Code specifically references the Municipal Conflict of Interest Act (“MCIA”), stating: “*Members shall avoid conflicts of interest in accordance with the Municipal Conflict of Interest Act.*” The MCIA governs only pecuniary interests (i.e., economic or money-related interests) and sets out obligations of Council Members where they have a pecuniary interest in an item under consideration by Council.

There is no evidence that any of the Respondent Councillors would or even could gain or lose financially with respect to the vote on whether to suspend the rules, nor even on a potential subsequent vote for or against a recount. They simply had no pecuniary interest in the outcome of such a decision. Absent a pecuniary interest, this section of the Code, along with the MCIA itself, are inapplicable.

We must accordingly conclude that the Respondent Councillors did not breach the Code of Conduct.

Conclusion and Recommendation(s)

Conclusion

We have sympathy for the Complainant’s basic argument about the importance of integrity in elections. However, we make no comment about the integrity of this particular election, about the matter of incorrect ballots being issued, or about the certification of the election. These matters are properly within the jurisdiction of other bodies, including potentially the Ontario Ombudsman and/or the Superior Court of Justice. We understand from the Complainant that the Ombudsman is also reviewing this matter. We believe this is appropriate insofar as the circumstances of the election are a matter relating to the Municipal Corporation rather than individual Council Members.

Our sole remit in the Office of the Integrity Commissioner respecting this Complaint is to determine whether the actions of the Councillors breached the Code of Conduct. Irrespective of whether one agrees with their political stances and votes on this issue (and again, we offer no comment in this regard), we

cannot conclude, based on the foregoing, that the Respondent Councillors breached the *Code of Conduct*, nor indeed to do we find the cited Code provisions to be applicable to this matter in any case.

We accordingly make no recommendations.

Respectfully submitted by,



Michael L. Maynard
Office of the Integrity Commissioner

Endorsement and Issuance of Report

I, Deborah Anschell, Integrity Commissioner for the City of Welland, have reviewed the evidence, process, and results of Mr. Maynard's Investigation. I agree with and endorse this Report, which we have jointly prepared, in respect of this Complaint, and hereby issue it to the Complainant and Respondent in conclusion of this matter.

Matters to Remain Confidential

Pursuant to the City of Welland's *Integrity Commissioner Procedures* document, subsection "Recommendation Report", it is set out that only a report containing findings of a *Code of Conduct* violation are reported to Council. There is no provision for reporting to Council where no breach has been found. As this investigation has not resulted in a finding against the Respondents, this matter will accordingly not be reported to Council.

Because this matter is not being reported to Council, the Parties are hereby accordingly advised that the subject matter of this investigation and this Investigation Report shall remain confidential pursuant to the provisions of the *Municipal Act*, the *Code of Conduct*, and the *Consent and Confidentiality Agreement* signed by the Complainant.

Concluding Remarks

I trust this Investigation Report provides clarity to the Parties regarding the matters at issue raised in this Complaint. Mr. Maynard and I thank the Parties for their assistance and cooperation.

This matter is now concluded.



Deborah Anschell
Integrity Commissioner, City of Welland