

Divisional Court upholds Integrity Commissioner decision: Councillor's pay suspended for 270 days

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Politicians are not above the law. Indeed, they occupy a position in our democratic society which obligates them to behave with the utmost integrity and in accordance with the office they represent. Although no one is perfect, a politician must strive to meet a standard of perfection in his or her conduct when fulfilling their public duties. In municipal law, the *Municipal Act, 2001* requires all municipal councils to establish codes of conduct for council members and allows councils to appoint integrity commissioners who are tasked with the ability to investigate and to report on complaints that a councillor has breached a Code of Conduct. The respective codes of each municipality and the roles of integrity commissioners act as a check and balance on council members and ensures that their behaviour meets the expectations of electors and of the offices which the members occupy. Flagrant breaches of a Code of Conduct can result in severe penalties.

In *Chiarelli v. Ottawa (City)*, 2021 ONSC 8256 (CanLII), the Divisional Court was recently required to determine whether the findings of Ottawa's Integrity Commissioner against long-time council member Richard Chiarelli were reached fairly and without bias and whether a penalty that suspended the council member's pay for 270 days was appropriate.

The factual background of the case

The factual background to this case began in late 2019 when among other complaints made against the Councillor, three similar complaints were made against him for violating sections 4 and 7 of Ottawa's *Code of Conduct* for council members (the "**Code**"). These three complaints were made by women who had interviewed for a job with the Councillor. In those interviews, it was alleged that the Councillor had asked sexually inappropriate questions and made inappropriate comments about the body of one of the complainants. In the case of one complaint, it was also alleged that the Councillor has asked whether the complainant would consider stripping (because of her dance experience) and whether she had participated in "World Orgasm Day".

A few months after the complaints were made, the Councillor underwent heart surgery. Thereafter, he suffered serious complications and other health challenges. Accordingly, Ottawa's Integrity Commissioner, who had commenced an investigation into the three complaints, granted the Councillor extensions to respond to the complaints. However, the Councillor, who was represented by a lawyer throughout, declined to participate in an interview. The Councillor also provided no comments to a draft report issued by the Integrity Commissioner on 25 June 2020, and simply relied upon a blanket public denial that he had issued on 3 October 2019.

The Integrity Commissioner ultimately concluded, on a balance of probabilities, that the allegations in the three complaints were likely true and demonstrated that the Councillor's conduct did not serve the interests of his constituents. Accordingly, the Councillor had not acted in a conscientious and diligent manner. The Integrity Commissioner found that the Councillor had breached sections 4.1 and 4.4 of the Code, which provided:

4(1) Members of Council are committed to performing their functions with integrity, accountability and transparency.

4(4) Members of Council shall at all times serve and be seen to serve the interests of their constituents and the City in a conscientious and diligent manner and shall approach decision making with an open mind.

As well, the Integrity Commissioner concluded that the Councillor had breached section 7 of the Code, which provided that:

7. All members of Council have a duty to treat members of the public, one another and staff with respect and without abuse, bullying or intimidation, and to ensure that their work environment is free from discrimination and harassment. The *Ontario Human Rights Code* applies and, where applicable, the City's *Violence and Harassment in the Workplace Policy*.

As a penalty for the Code violations, the Commissioner recommended that the Councillor's pay be suspended for 90 days, consecutively, in respect of each of the complaints, or, in other words, an aggregate of 270 days.

Ottawa City Council received the Commissioner's final report and adopted the recommendation.

Judicial review of decision by Commissioner and Council

The Councillor then brought a judicial review application to challenge the final report and City Council's decision. He contended that the Commissioner lacked jurisdiction to investigate the complaints, that the Commissioner was biased and that he had been denied procedural fairness. Also, the Councillor argued that Council itself was biased or showed a reasonable apprehension of bias against him which tainted its decision to accept the Commissioner's final report and to impose the 270 day suspension of pay.

In the *Reasons for Decision*, the Divisional Court rejected all of the Councillor's arguments in connection with challenging the decision of the Integrity Commissioner.

On the issue of jurisdiction, the Councillor contended that the complaints of the three women should have been made to the Human Rights Tribunal or been dealt with under Ottawa's *Violence and Harassment in the Workplace Policy*. However, the court noted that the Commissioner considered the Councillor's jurisdictional objection and that it was appropriate to reject the argument that the Commissioner lacked jurisdiction based on a section of a Complaint Protocol. Although the court agreed that the subject-matter of three complaints was sexual harassment and that the allegations made could give rise to complaints to the Ontario Human Rights Tribunal, a plain reading of the Code and the Complaint Protocol confirmed that the Commissioner had jurisdiction to investigate the complaints.

With respect to allegations of bias against the Integrity Commissioner, the Councillor contended that the Commissioner was tainted by an obvious bias of Council. The Mayor and Councillors had been vocal about the allegations made against the Councillor, and accordingly he argued that their statements influenced the Commissioner's investigation and conclusions.

The test of bias against an adjudicator is a high one and there is strong presumption of impartiality. In the court's view, the Councillor simply did not meet this threshold for the following reasons.

First, the Councillor's initial allegation of bias was made against Council, not the Commissioner.

Second, the Commissioner demonstrated a willingness to reasonably accommodate the Councillor's health issues despite a lack of being provided with detailed information and had come to a reasonable conclusion that the Councillor had decided to not participate in the investigation process for reasons other than his health circumstances.

Third, the Councillor's complaint that the Commissioner had failed to take into account exculpatory evidence or to explore whether the complainants had ulterior motives in making the complaints was contrary to the findings reached by the Commissioner. The court stated that the Commissioner did investigate and report upon an allegation that the complaints arose from ulterior motives as demonstrated by the following passage in the final report:

Having reviewed the testimony and the evidence, I have concluded that there is no credible basis for such a conspiracy theory. There is no evidence of an organized political movement. The three complainants did not know each other and there is no evidence of any collusion. The stated reasons in their testimony for coming forward are that the complainants feel a sense of victimization and responsibility to prevent this from happening to other women. All three complainants are believable.

There was also no evidence that the Commissioner proceeded with a closed mind or that the investigation was pre-determined.



With respect to the decision of City Council, the court found, however, that its ultimate decision to adopt the Commissioner's recommendation was tainted by bias as a result of public comments and statements made by various members and actions taken by them before the investigation was concluded. Those actions demonstrated that the outcome of the complaints was prejudged. Although the court recognized that as political actors, Council members were expected to express their views on matters of significant public interest, the court explained that Council members also had a dual role to adjudicate fairly in connection with the complaints and the Commissioner's ultimate report. They did not do so. The court said: "...we conclude that an objective person, viewing the matter dispassionately, with a full appreciation of the circumstances, would doubt whether members of Council were approaching their task with an open mind."

Since this finding made it impossible to remit the issue of penalty back to Ottawa City Council, the Divisional Court determined that concerns for the proper administration of justice and the need to assure access of justice made it appropriate for the court to impose a penalty against the Councillor. Based on the Commissioner's finding that the Councillor's conduct was serious, offensive and disgraceful, as well as a clear violation of the Code, that the Councillor refused to participate in the process and that the Councillor at no time acknowledged any wrongdoing or expressed remorse or regret for his bad conduct, the Divisional Court concluded that the Councillor's pay be suspended for an aggregate of 270 days.

Significance of decision

This decision is significant for many reasons. First, it sends a strong and clear message that politicians must behave with the utmost integrity when carrying out all of their duties and responsibilities and that *Codes of Conduct* should be treated seriously. Second, a politician takes the risk that a negative finding made by an Integrity Commissioner will not be easily set aside on a judicial review in circumstances where he or she refuses to participate in an investigation. Indeed, participating in an Integrity Commissioner's investigation is always a reasonable thing to do. Co-operating and participating in an investigation permits a politician to explain their side of the story and permits a politician to express remorse in the event that a complaint is legitimate and to accept that corrective action might be necessary to prevent future bad conduct. Third, politicians who will ultimately receive an Integrity Commissioner report and decide on the imposition of a penalty against a fellow politician should exercise restraint in commenting upon an active investigation to avoid tainting the investigation process and avoid tainting their own decision on penalty at a later date. Although based on experience it is reasonable to suggest that the Integrity Commissioner complaint process has all too often become a weapon in the arsenal of opposing political forces, the weapon can be easily disarmed by politicians simply behaving with common sense. A PDF version is available to download [here](#).

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