

Integrity Commissioner's ruling against Councillor upheld, but Council cannot unreasonably restrain his ability to communicate with constituents

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In general, politicians at all levels of government in Canada are required to either adhere to a Code of Conduct or are subject to integrity legislation. These Codes or statutory provisions are designed to ensure that elected officials carry out their duties ethically, responsibly and fairly. Where a politician is believed to breach his or her duties, complaints can be made to Integrity Commissioners, who can investigate the complaints and report their findings to their respective government. For municipal governments in Ontario, the authority to establish a code of conduct and to appoint an Integrity Commissioner is governed by the *Municipal Act*.^[1] Under this statute, a municipality can either issue a reprimand or suspend a councillor's pay for 90 days.

In *Dhillon v. Brampton (City)*, 2021 ONSC 4165 (Div. Ct.) (not yet available on CanLII), the applicant, a Brampton City Councillor, sought judicial review of an Integrity Commissioner report which found that he had violated several rules in the City's Code of Conduct for Members of Council in connection with an alleged sexual assault that occurred while the Councillor was on a city-sanctioned trade mission in Turkey. The judicial review also sought to reverse a group of resolutions passed by Council, including a resolution that the Councillor only be permitted to communicate through his official council email address.

The allegations against the Councillor involved an encounter that occurred in a hotel room. According to the complainant, who was a small business owner, the Councillor had attempted to force himself upon her during the trade mission. The complainant had been able to audio-record the encounter, which revealed that the complainant had rebuffed the Councillor by saying "no" a total of 74 times before he exited her room. The Integrity Commissioner's report into the complaint also stated that there was physical contact between the Councillor and the complainant, with the Councillor lifting the complainant off of the ground and forcefully lifting her skirt.

Based on her investigation, the Integrity Commissioner concluded that the Councillor had breached Rule 14 (Harassment) of the Code of Conduct by sexually harassing the complainant and that he had failed to comply with the City's Respectful Workplace Policy. In addition, the Integrity Commissioner found that the Councillor had breached Rule 15 (Discreditable Conduct) and Rule 18 (Failure to Adhere to Council Policies and Procedures) and that the Councillor had refused to participate in an investigative interview and obstructed her investigation contrary to Rule 19 (Reprisals and Obstruction).

On 5 August 2020, Brampton City Council considered the Integrity Commissioner's Final Report. Several resolutions were passed. The resolutions adopted all of the Integrity Commissioner's recommendations and adopted other corrective and remedial measures. The Councillor was removed from the membership and Chair of committees, was prohibiting from travelling outside of Ontario on any City business, was prevented from accessing the city's municipal offices except to retrieve mail, make bill payments or to attend council meetings, and, apart from communications during council meetings, was only permitted to communicate with members of the public via email using his City email address. No other form of communication was permitted.

Among other things, the Councillor argued that he had been denied procedural fairness during the Integrity Commissioner's investigation, the Integrity Commissioner's findings were unreasonable, and that penalties imposed against him by the Integrity Commissioner and City Council were not authorized by the *Municipal Act*.

All but one of the Councillor's arguments were rejected by the Divisional Court panel that heard the judicial review application.

With respect to procedural fairness, the court noted that procedural fairness governs participatory rights, to ensure that administrative decisions are made using a fair procedure, appropriate to the decision being made and its statutory, institutional, and social context: see *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC). In the context of Integrity Commissioner investigations, the court in *Di Biase v. Vaughan (City)*, 2016 ONSC 5620 (Div. Ct.) determined that integrity commissioners have relatively low obligations of procedural fairness because the statutory scheme prioritizes confidentiality, the process is investigatory, the commissioner can only make recommendations, and the maximum penalty is a 90-day suspension of pay. A Councillor cannot lose his or her seat or suffer civil or criminal liability based on a Commissioner's report.

The court held that the disclosure made to the Councillor was sufficient. He had been given the substance of the case and was provided with sufficient particulars to enable him to respond to the allegations of the incident. He knew who was making the complaint, what the allegations were, and the circumstances regarding date, time, and location. The Councillor had also been provided with a copy of the recording's transcript and was given an opportunity to play the recording.

The Councillor had also been given a right to be heard. He had been given several opportunities to meet with the Integrity Commissioner to give his side of the story and to provide comments on her Interim Report. But through his lawyer, the Councillor simply denied the allegations.

With respect to unreasonableness, the court stated that based on *Vavilov*, at para. 100, the Councillor bore the burden of demonstrating unreasonableness, including that any shortcomings or flaws "are sufficiently central or significant to render the decision unreasonable."

Overall, the conclusions reached by the Integrity Commissioner were reasonable and supported by the evidence.

With respect to penalties, the Councillor argued that s. 223.4(5) of the *Municipal Act* only permitted City Council to reprimand him and/or suspend his pay for up to 90 days. The court disagreed. In *Magder v. Ford*, 2013 ONSC 263 (Div. Ct.), the court recognized that a municipality could take "other actions" in response to a breach of a code of conduct beyond the penalties and sanctions expressly provided by statute as long as those other actions were remedial in nature. Punitive actions could not be adopted.

With one exception, the other actions of Brampton City Council were reasonable and within its jurisdiction. The exception related to the restrictions imposed on the Councillor's ability to communicate with the public. The court held that this action was unreasonable because it was overly broad. This action interfered with the Councillor's ability to represent his constituents and discharge his duties as an elected official.

The court held that the Councillor had to be free to serve his constituents, some of whom might not have email or who might prefer to engage by telephone or letter. The Councillor might also wish to post updates on social media, through mailings or through community meetings. The court noted that this sanction was so broad that the Councillor was prevented from acknowledging a greeting in a grocery store or speaking with residents in a park. On this point, the court concluded:

The record does not show that Council attempted to balance the breadth of a councillor's duties and the needs of his constituents with a response tailored to the breaches of the Code of Conduct. Council did not consider more reasonable limits that would allow the Councillor to communicate with members of the public, particularly his constituents, about City business by methods other than email. There is no justification for this overbreadth, and the outcome is unreasonable.

This case once again demonstrates that elected officials can be penalized for conduct that is found to breach a Code of Conduct. In the area of municipal law, the penalty can exceed more than just a reprimand or a 90-day suspension in pay. However, the decision also demonstrates that additional sanctions cannot interfere with the basic abilities of an elected official to represent their constituents. Notwithstanding the severity of a councillor's actions, democracy is entitled to prevail. A PDF version is available to download [here](#).

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