

**TOWNSHIP OF SOUTH FRONTENAC
COMMITTEE OF THE WHOLE MEETING
AGENDA**



**Audio Broadcast on Township's Facebook Page
<https://www.facebook.com/SouthFrontenacTwp>**

TIME: 7:00 PM,
DATE: Tuesday, November 10, 2020
PLACE: Council Chambers.

1. Call to Order/Roll Call
2. Declaration of pecuniary interest and the general nature thereof
3. Approval of Agenda
4. Delegations
- (a) John Mascarin, Aird Berlis, re: Municipal Conflict of Interest and
Municipal Accountability Education and Training
5. Adjournment

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Municipal Conflict of Interest

The Corporation of the Township of South Frontenac

John Mascarin

November 10, 2020

AIRD BERLIS

Background

- Ontario's *Municipal Conflict of Interest Act* (“MCIA”) was originally enacted in 1972
- MCIA codifies provisions found in previous versions of the *Municipal Act*, dating back to 1849
- legislation has received substantial judicial consideration
- there are no regulations under the MCIA
- MCIA is applicable to members of a municipal council and to members of “local boards” (broadly defined in s. 1 of the MCIA); *not* applicable to municipal staff – applies only to “members” (i.e. elected or appointed officials)

Purpose

Moll v. Fisher (1979), 8 M.P.L.R. 266 (Ont. Div. Ct.):

“The obvious purpose of the [Municipal Conflict of Interest] Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal economic interest... There is no need to find corruption on his part or actual loss on the part of council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.”

Declaration of Office

- in order to take their seat at council, a member must solemnly promise and declare four oaths including:
 3. **I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.**
- obligation to abide by the MCIA is personal to the member

Cooper v. Wiancko (2018), 73 M.P.L.R. (5th) 212:

“...the decision to exercise the obligations set out in s. 5 are characterized as **a matter of personal judgment for each councillor.**”

Statutory Principles

Principles – s. 1.1

1. the importance of integrity, independence and accountability in local government decision-making
2. the importance of certainty in reconciling the public duties and pecuniary interests of members
3. members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny
4. there is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise

Conflict of Interest

- *common meaning*:
 - “a situation in which a person has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties as, say, a public official, an employee, or a professional”
- *MCIA meaning*:
 - direct, indirect or deemed *pecuniary* interest
 - no definition of “direct” or “indirect” in the MCIA

Conflict of Interest

Cooper v. Wiancko
(2018), 73 M.P.L.R. (5th) 212 (Ont. S.C.J.)

“What constitutes a sufficient pecuniary interest to trigger s. 5 of the MCI Act **will not necessarily be demarcated by a bright line.**”

Pecuniary Interest

- pecuniary interest only
- pecuniary = financial
 - a pecuniary interest is one “concerning or consisting of money . . . an interest that has a **monetary or financial value**”: *Mondoux v. Tuchenhausen* (2010), 79 M.P.L.R. (4th) 1 (Ont. S.C.J.)
- direct, indirect or deemed
- positive or negative
- arises in a matter before council or committee for consideration or before municipal staff for consideration

Direct Interest

- a *direct* pecuniary interest is one that expressly or unequivocally has an impact on a member's finances or property value
 - "... a situation in which the member could experience an immediate, in the sense of close, non-deviated or traceable financial or economic impact, positive or negative."
- impact may be positive (gain) or negative (loss)
- a potential interest may be considered a pecuniary interest: *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Gen. Div.)

Indirect Interest

- s. 2 of MClA - where a member (or their “nominee”):
 - is a director or senior officer of a public or private company
 - is a shareholder of a private company
 - has a controlling interest in a public company (>10%)
 - is a “member of a **body**”
 - not a defined term but should be interpreted “broadly”
– *Orangeville (Town) v. Dufferin (County)*
 - is a partner
 - is an employee

Deemed Interest

- s. 3 of MClA:
 - a direct or indirect interest of a:
 - spouse
 - child (regardless of age)
 - parent

“if known to the member” is *deemed* to be the member’s own interest

Duty of Member

- s. 5 of MCIA:
 - where a member has a pecuniary interest in any matter and is present at a meeting of the council at which the matter is the subject of consideration, the member *shall*:
 - *disclose* the interest and the general nature prior to any consideration of the matter
 - *not* take part in any discussion or vote
 - *not* attempt to influence the voting in any way

Duty of Member

No Influence of Municipal Officers or Employees

- s. 5.2(1) - where a member has a pecuniary interest in any matter that is being considered by an ***officer or employee*** of the municipality or local board, the member is not permitted to use his or her office to influence any decision or recommendation that results from consideration of the matter
 - expands MCIA *beyond* legislative and deliberative meetings of councils, committees and local boards
 - preclusion is not applicable where the power to suspend the remuneration of a councillor is delegated to a person or body

Exceptions

- nine *specific* exemptions and two *general* exemptions from the requirements in ss. 5 and 5.2 are set out in s. 4 of MCIA:
 - (a) as user of public utility and subject to similar conditions as other persons;
 - (b) entitlement to any service, subsidy, loan or benefit common to other persons;
 - (c) purchase or ownership of debenture;
 - (d) returnable deposit with municipality;
 - (e) interest property affected by *Drainage Act* works or local improvements;

Exceptions

- (f) interest in exempted farm lands;
- (g) eligibility for election or appointment to fill vacancy;
- (h) director or senior officer of municipal corporation or appointee to board commission or other body;
- (i) any allowance, remuneration, salary or benefit that member may be entitled to by reason of being a member or as a member of a volunteer fire brigade;
- (j) interest in common with electors generally;**
- (k) remote or insignificant interest.**

Exception - Interest in Common with Electors

- s. 1 of MCIA:

“interest in common with electors generally” means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects ***only part of the area*** of jurisdiction, means a pecuniary interest in common with the electors *within that part*

- an interest in common generally does *not* always mean the entire municipality
- a difference in **nature / kind or degree?**

Exception - Remote or Insignificant Interest

- the relationship between the member and the subject matter must be so indirect or trivial that it leads to the conclusion that potential personal gain was not a motivating factor in the member's decision making
- test – *Whiteley v. Schnurr* (1999), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.):

“Would a reasonable elector, being apprised of **all** the circumstances, be more likely than not to regard the interest of the councillor as likely to influence the councillor's action and decision on the question?”

Exception - Remote or Insignificant Interest

- **remoteness** – relates to the immediacy and potential of the financial or economic interest
 - the fact that the value of the pecuniary interest is particularly small does not relieve a member from compliance with the MCIA: *D'Arcey v. Mino* (1991), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.)
- **significance** – relates to the **importance** of the matter
 - *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1 (Ont. S.C.J.)

Partial Exception - Code of Conduct Report

Limited Exception re Suspension of Remuneration

- s. 5(2.1) - where the matter under consideration at a meeting is whether to suspend the remuneration paid to the member for a contravention of the code of conduct:
 - the member is able to take part in the discussion of the matter, including making submissions to council, and may attempt to influence the voting on any question in respect of the matter
 - the member is not permitted to **vote** on the matter
 - the member is able to attend a closed meeting during which the matter is under consideration

Duty of Disclosure

- duty arises *at the meeting* at which the pecuniary interest is to be discussed
- member must disclose:
 - the interest
 - the general nature of the conflict
- absence from a meeting is not a declaration (the member should declare the conflict at the next meeting at which he or she is present)

Duty of Disclosure

Written Statement re Disclosure - s. 5.1

- where a member has declared a pecuniary interest, the member is also required to file a *written statement* of the nature of the interest with the clerk or secretary

Registry - s. 6.1

- every municipality is required to establish and maintain a publicly accessible registry of:
 - a copy of each statement of disclosure
 - each declaration recorded in meeting minutes

Requests for and Provision of Advice

In Writing

- duties and responsibilities of an Integrity Commissioner under s. 223.3(1) of the *Municipal Act, 2001* include advising upon:
 6. Requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*.
- requests for advice from members and responses from the Integrity Commissioner must be **in writing**
 - ss. 223.3(2.1) and (2.2)

Requirements (I)

Member's Obligations

1. Disclosure – s. 5(1)(a):

- members must disclose any direct, indirect or deemed *pecuniary* interest prior to consideration of matter
- disclosure should include the following two components:
 - identify the type of pecuniary interest that the member has in all circumstances (direct, indirect, deemed)
 - describe sufficient facts to provide some context for the general nature of the interest at hand
 - written disclosure now required

Requirements (II)

2. **Non-Participation** – s. 5(1)(b):

- a member is obligated to not participate in the decision-making process once the member's interest has been disclosed
- a member shall not:
 - take part in discussion, or
 - vote

Requirements (III)

3. No Influence – s. 5(1)(c):

- a member declaring an interest cannot in *any way*:
 - attempt to influence voting
 - either before, during or after the meeting

Requirements (IV)

4. Exit *Closed Meeting* – s. 5(2):

- if the conflict arises at a closed or *in-camera* meeting, a member is also required to leave the meeting
- this is good practice even if the meeting is not closed as it visibly demonstrates that the member is making no attempt to influence the discussion or the outcome of the voting

Requirements (V) & (VI)

5. **File Written Statement** – s. 5.1:

- member must file a written statement of disclosure and its general nature with the clerk at the meeting at which disclosure is made

6. **No Influence on Employees** – s. 5.2:

- member cannot use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter by an officer, employee or other body

Record of Disclosure

- s. 6 of MCI A:
 - clerk or board secretary is required to record in minutes of the meeting (both open and closed)
 - the declaration of the conflict
 - that the member left the meeting
 - if member is absent from meeting, member must declare conflict at next attended meeting
 - registry of written statements of disclosure to be maintained under s. 6.1

Quorum

- s. 7 of MCIA – quorum deemed constituted
 - where a number of members are disabled from participating due to MCIA, “the remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two”
 - if less than 2 members, council or local board may apply to a judge for an order that council or local board may consider matter
 - judge may order that ss. 5, 5.1. and 5.2 do not apply and allow all members to vote (subject to conditions)

Alleged Contravention

Applicants

- s. 8(1) – an application to a judge to determine whether a council member breached the MCIA may be brought by:
 - an elector
 - a municipal integrity commissioner
 - a person “demonstrably acting in the public interest”
 - the original version of Bill 68 proposed to permit “any person” to bring an application - amended at Standing Committee

Alleged Contravention

Application Period

- s. 8(2) – an application may only be made within six weeks after the applicant became aware of the alleged contravention
 - *MacDonald v. Ford* (2015), 41 M.P.L.R. (5th) 175 (Ont. S.C.J.): “onus is on the applicant to establish that he or she satisfies this criterion for an application”
 - *Hervey v. Morris* (2013), 9 M.P.L.R. (5th) 96 (Ont. S.C.J.): “reasonable subjective belief”

Alleged Contravention

Ultimate Limitation Period

- s. 8(6) – no application may be made after the 6th year anniversary of the alleged contravention no matter when application acquired a reasonable subjective belief of a contravention
 - *MacDonald v. Ford* (2015), 41 M.P.L.R. (5th) 175 (Ont. S.C.J.) - “genuine conventional limitation period” which sets out an “absolute limitation period”

Alleged Contravention

Election Blackout Period

- s. 8(4.1) – an Integrity Commissioner cannot bring an application to a judge during an election period (between nomination day and voting day)
 - added to Bill 68 by Standing Committee
 - preclusion does not apply to an elector or to a person “demonstrably acting in the public interest”
 - Integrity Commissioner must terminate inquiry if not completed before nomination day (but inquiry can be recommenced if the applicant re-files his or her request)

Alleged Contravention

Inquiry by Integrity Commissioner

- s. 223.4.1 of *Municipal Act, 2001*: an application may be made to an Integrity Commissioner to conduct an inquiry as to whether there has been a contravention of ss. 5, 5.1 or 5.2 of the MCIA
 - applicant – an elector or a person demonstrably acting in the public interest
 - inquiry must be completed within 180 days
 - upon completion of the inquiry, Integrity Commissioner may apply to a judge under s. 8 of MCIA
 - municipality is responsible for costs [s. 223.4.1(18)]

Penalties for Contravention

- as of March 1, 2019 - new s. 9(1) of MCI A:
 - expanded range of penalties for contravention of MCI A - *any or all* of the following may be imposed:
 1. reprimand
 2. suspension of remuneration to member for up to 90 days
 3. removal from office
 4. disqualification for up to seven years
 5. restitution of any personal financial gain

Considerations re Penalties

- as of March 1, 2019 - in exercising his or her discretion to impose a penalty, the judge may consider under s. 9(2) among other matters, whether the member:
 - (a) took reasonable measures to prevent the contravention
 - (b) disclosed the pecuniary interest and all relevant facts known to him or her to an integrity commissioner in a request for advice and acted in accordance with the advice, if any, provided to the member by the integrity commissioner
 - (c) committed the contravention through inadvertence or by reason of an error in judgment made in good faith

Appeals

- s. 11 of MClA contains a narrow as-of-right appeal to the Ontario Divisional Court from an *order* under s. 9:

11 (1) An appeal lies from ***any order*** made under s. 9 to the Divisional Court in accordance with the rules of court.

(2) The Divisional Court may give any judgment that ought to have been pronounced, in which case **its decision is *final***, or the Divisional Court may grant a new trial for the purpose of taking evidence or additional evidence and may remit the case to the trial judge or another judge and, subject to any directions of the Divisional Court, the case shall be proceeded with as if there had been no appeal.

Consequence of Contravention

- s. 12 of MCI A:
 - a member's failure to comply with ss. 5, 5.1 or 5.2 does not in itself invalidate any proceedings in the matter
 - however, the proceedings are *voidable* at the instance of the municipality or of the local board
 - limitation – two years from the date of the passing of the by-law or resolution authorizing the matter
 - proceedings will *not* be voided if to do so would adversely affect the rights of any person acquired under or by virtue of the proceedings who acted in good faith and without actual notice of the failure to comply with ss. 5, 5.1 or 5.2

Conclusions

Greene v. Borins
(1985), 28 M.P.L.R. 251 (Ont. Div. Ct.)

“As has been previously said by this Court, each conflict of interest case must largely stand on its own facts.”

Conclusions

- a conflict of interest under the MClA is not nearly as broad as general public likely thinks it is
- *pecuniary* (i.e. financial) interest is key
- positive personal duty on members to declare a pecuniary interest
- large number of exemptions: s. 4 and s. 5(2.1)
- significant sanctions (including loss of office)
- saving provisions for taking reasonable steps to prevent contravention; for following written advice of IC; for acting inadvertently or by a good faith error in judgment
- abundant and, at times, contradictory judicial decisions

AIRD BERLIS

Code of Conduct and Integrity Commissioner



AIRD BERLIS



DECLARATION OF OFFICE

Declaration of Office

- s. 232 of the *Municipal Act, 2001* expressly provides that a person cannot take a seat on council until he or she makes a declaration of office

I...do solemnly promise and declare that:

1. I will truly, faithfully and impartially exercise this office to the best of my knowledge and ability.
2. I have not received and will not receive any payment or reward, or promise thereof, for the exercise of this office in a biased, corrupt or in any other improper manner.
3. I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.
4. I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second...



CODE OF CONDUCT

Code 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

- the Township's Code of Conduct for Members of Council and Local Boards was adopted on February 19, 2019 by Council by By-law 2019-12

What is a Code of Conduct?

Gregory Levine, *Municipal Ethics Regimes*, (2nd Ed.) at 7:

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

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
- a code of conduct should be credible, useful & functional

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

1. Application & Purpose
2. Statement of Principles
3. Definitions
4. General Obligations
5. The Role of Staff
6. Township Property
7. Gifts and Benefits
8. Confidential Information
9. Discrimination and Harassment

Code of Conduct

10. Improper Use of Influence
11. Conflict of Interest
12. Council Policies and Procedures
13. Election Activity
14. Respect for the Code of Conduct
15. Penalties for Non-Compliance with the Code of Conduct
16. Legal Fees
17. Complaint Protocol

Complaint Protocol

- Complaint Protocol is Appendix “B” to Code of Conduct
- 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
- sets out a process and procedure for how a complaint must be filed or submitted and how a matter will be considered and possibly investigated
- provides for timelines, forms, filings, classification, in-take procedures, fees, summary dismissal and termination, review, response, reply, reporting, recommendations, completion and transmission; receipt and consideration of report by council; publication of reports



INTEGRITY COMMISSIONERS

Integrity Commissioner

- 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

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

- as of March 1, 2019
 - s. 223.3(1.1) – municipalities that have not appointed an integrity commissioner are required to make arrangements for all of the responsibilities of an integrity commissioner to be provided by an integrity commissioner of another municipality
 - s. 223.3(1.2) – municipalities that have appointed an integrity commissioner but have *not* assigned them all of the functions and responsibilities set out in subsection 223.3(1), must make arrangements for those services to be provided by an integrity commissioner of another municipality
- Aird & Berlis LLP was appointed as the Integrity Commissioner for the Township on February 19, 2019 by By-law 2019-12

Integrity Commissioner - Functions

Functions of Integrity Commissioner

- s. 223.3(1) - expanded functions of an Integrity Commissioner:
 - application and enforcement of codes of conduct and other ethical policies or guidelines
 - application and enforcement of sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act*
 - written advice to members re: their obligations under the code of conduct and the *Municipal Conflict of Interest Act*
 - provision of educational information to members of council and local boards, the municipality and the public re: codes of conduct and the *Municipal Conflict of Interest Act*



ADVICE

Advice-Giving Function

- 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
 - sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act*
- advice must be:
 - requested in writing by the member; and
 - provided in writing by the Integrity Commissioner
- member may rely upon advice if all relevant facts are provided to the Integrity Commissioner and his written advice is followed



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) Integrity Commissioner **(2016), 55 M.P.L.R. (5th) 173 (Ont. Div. Ct.)**

- first judicial review of an Integrity Commissioner's investigation and report under a code of conduct in Ontario
- Divisional Court clarified that an Integrity Commissioner is conferred a broad discretion with respect to its investigation and investigative process
- Integrity Commissioner is entitled to: decide when to investigate a complaint or not; re-formulate a complaint; undertake a targeted email search on municipal system; not to disclose identities of city witnesses if harassment and reprisal are feared



ENFORCEMENT

Reporting – Integrity Commissioner Duties

Report to council

223.6(1) If the Commissioner provides a **periodic report** to the municipality on his or her **activities**, the Commissioner may summarize advice he or she has given but shall not disclose confidential information that could identify a person concerned.

Report about conduct

(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 has been delegated the authority to *directly* impose penalties by Section 2 of By-law 2019-12

Enforcement

Remedial or Corrective Measures

- sanctioned by the Ontario Divisional Court in *Magder v. Ford*:

“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.”
- cannot be not penalties: *Altmann v. Whitchurch-Stouffville (Town)*:
 - “other actions” imposed by a council for contravention of a code of conduct must actually be corrective or remedial – they cannot be punitive sanctions or penalties”

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.



COUNCIL STAFF RELATIONS

Council Staff Relations

Council-Staff Relationship Policy

- Bill 68 added the following mandatory municipal policy to s. 270 of the *Municipal Act, 2001*, which comes into force on March 1, 2019:

Adoption of policies

270 (1) A municipality shall adopt and maintain policies with respect to the following matters:

...

- 2.1 The relationship between members of council and the officers and employees of the municipality.

Council

Decision-Making Body

***University Village (Guelph) Ltd. v. Guelph (City)*
(1992), 9 M.P.L.R. (2d) 50 (Ont. Gen. Div.)**

- in Ontario, the decision-making power of municipalities is given to the municipal council, and it is to exercise those powers by by-law
- the council is the general agent of the corporation for all purposes and is the means whereby the municipality may bind itself to a course of action

Council

Governing Body

- section 5 of *Municipal Act, 2001*
 - powers of a municipality must be exercised by its council
 - powers shall be exercised by by-law unless otherwise specifically authorized
- a municipality must ultimately act through its council and by by-law (or as otherwise authorized and/or delegated)

Council

Council

- *Municipal Act, 2001*, s. 224: it is the role of council to:
 - represent the public and consider the well-being and interests of the municipality
 - develop and evaluate policies and programs
 - determine which services to provide
 - ensure that administrative and controllership policies, practices and procedures are in place to implement decisions
 - ensure accountability and transparency of operations
 - maintain the municipality's financial integrity
 - carry out statutory duties of council

Council

Council Members

I.M.F. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., Vol. 2, loose-leaf (Toronto: Carswell, 2001) at 148

[Members of council] are merely legislative officers of the corporation, and with the exception of the head or chief executive officer, they have no individual executive or ministerial duties. Moreover, they have no authority to act for the corporation, except in conjunction with other members constituting a forum.

Council

Council Members

Ministry of Municipal Affairs and Housing, *The Municipal Councillor's Guide (2018)*

As a councillor, you have three main roles to play in your municipality: a representative, a policy-making and a stewardship role. These roles may often overlap.

- there is no statutory provision in the *Municipal Act, 2001* that specifies the precise obligations and duties of an individual member of council

Council

Council Members

**George Rust-D'Eye, *Handbook for Municipal Councillors*
(Toronto: Carswell, 2010) at 33:**

Members of council have no authority as individuals to take action on behalf of the municipal corporations, except in conjunction with other members constituting a quorum of the council, unless specifically authorized by statute or a by-law of the municipality.

Municipal Administration

Municipal Officers and Employees

- *Municipal Act, 2001*, s. 228: the **administrative arm** of a municipality is expressly directed to:
 - implement and carry out **council's** decisions
 - advise **council** on municipal policies and programs
 - carry out their duties under the statute or as otherwise assigned by the **municipality** (which can only act pursuant to council's authorized directions) the municipal administration responds to and acts on behalf of its council and not on behalf of any individual council member

Municipal Administration

Statutory Officers

- officers that derive their authority from statute and who have an independent power to deal with specific matters
 - Clerk – s. 228 of the *Municipal Act, 2001*
 - Treasurer – s. 286 of the *Municipal Act, 2001*
 - Auditor – s. 296 of the *Municipal Act, 2001*
 - Integrity Commissioner – s. 223.3 of *Municipal Act, 2001*
 - Chief Building Official – s. 3 of *Building Code Act, 1992*
 - Fire Chief – s. 6 of *Fire Protection and Prevention Act, 1997*

Council & Municipal Administration

Distinction between Council and Staff

**I.M.F. Rogers, *Municipal Councillors' Handbook*,
6th ed., (Toronto: Carswell, 1993) at 9**

While it is the council's role to make decisions on policy and to make rules to govern the municipality on matters within its jurisdiction by by-law or resolution, it is staff of the municipality who will carry out the policies and ensure that the by-laws are made known to the public and enforced.

Council & Municipal Administration

Distinction between Council and Staff

**Michael Ashton, Joseph Kushner & David Siegel,
“Sources of Conflict Between Municipal Politicians and Staff”
118 *Municipal World* (January 2008) No. 1, 43-46 at 45**

The prescriptive literature offers clear, if not always attainable, advice. Politicians must take a clear leadership role in policy setting, and stay out of administration and management.

Council & Municipal Administration

Distinction between Council and Staff

**George B. Cuff, “Council & Administration: Distinction of Roles”,
114 *Municipal World* (October 2004) No. 10, 39-40 at 39**

The roles of council members and administration – legally and practically – are separate. The purpose of council is to govern and lead the community from the perspective of locally elected politicians. It is the job of each council member to reflect and represent public issues and concerns to the rest of council.

The role of the administration...is to provide council with wise advice as to what needs to be done, and then to carry out the wishes of council in an effective, efficient and sensitive manner.

Council & Municipal Administration

Council & Staff Working Together

- Council and staff must respect each other's distinct roles
 - Council = Executive
 - Staff = Administrative
- the CAO is the conduit from council to the administration
 - it is often said that the council has one employee:
 - the CAO



CONCLUSIONS

Conclusions

- **all** members of council and local boards are subject to a code of conduct, with some mandatory subject matters
- integrity commissioner has broad new authorities, including providing 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 commissioner can investigate a complaint that a member did not comply with ss. 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act*
- council staff relations policy – mandatory under s. 270 of the *Municipal Act, 2001* – enforced under code of conduct

