

CITATION: Michael Di Biase v. City of Vaughan; Integrity Commissioner of the City of Vaughan, 2016 ONSC 5620
DIVISIONAL COURT FILE NO.: 309/15 JR
DATE: 20160919

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MARROCCO A.C.J.S.C., C. HORKINS & VARPIO JJ

BETWEEN:)
)
MICHAEL DIBIASE)
) *Morris Manning Q.C., for the Applicant*
Applicant)
)
- and -)
)
)
CITY OF VAUGHAN) *Robert A. Centa, for the City of Vaughan*
)
-and-)
)
THE INTEGRITY COMMISSIONER OF) *Freya Kristjanson and Julia Wilkes, for the*
THE CITY OF VAUGHAN) *Integrity Commissioner of the City of*
) *Vaughan*
Respondents)
)
)
)
)
MARROCCO A.C.J.S.C.) **HEARD:** May 17 & 18, 2016

- [1] The City of Vaughan Integrity Commissioner received a complaint about the applicant in December 2014. The complaint alleged that the applicant, the Deputy Mayor and a Councillor, had, contrary to the City of Vaughan’s Code of Ethical Conduct for Members of Council (“Code of Conduct”), (a) received a benefit from Maystar General Contractors (“Maystar”), (b) assisted Maystar in its attempts to obtain city business and (c) voted improperly on matters before City of Vaughan Council. Maystar had been providing construction services to the City since approximately 2002.
- [2] After receiving the complaint, the Integrity Commissioner sent the complaint to the applicant for a response. Counsel for the applicant responded on January 30, 2015. Counsel’s response contained the following assertions:

- the complainant was a defeated political rival;
- the complainant was the source of a CBC article attached to the complaint and upon which the complainant relied;
- the CBC could not confirm the complainant's allegations that Maystar, a long time City of Vaughan contractor, paid for construction work on the applicant's family cottage;
- the complainant's allegation that the applicant was lying about the renovations to the family cottage was unsupported by any facts;
- the complainant's allegation that the applicant was a vocal proponent of Maystar was unsupported by any facts;
- the complainant's allegation that the applicant influenced members of the Vaughan Public Library Board and tried to interfere in the Civic Centre Resource Library tendering process was unsupported by any facts;
- the complainant was inviting the Integrity Commissioner to go on a "fishing expedition" to look for support for his baseless allegations;
- the complainant had produced copies of the applicant's personal emails without explaining how he got them. The Integrity Commissioner should not condone such behaviour by relying upon "illegally obtained materials and misrepresentations";
- the "illegally obtained" emails provided evidence that Maystar did not do construction work on the applicant's family cottage.

[3] Despite counsel for the applicant's response, the Integrity Commissioner decided to investigate two allegations that in her view were described in Issue 1 located in Appendix 2 of the complaint. Those two allegations were:

- The applicant's improper interference with tendering processes to assist Maystar; and
- The applicant's attempt to exercise influence to benefit Maystar.

[4] On March 27, 2015, the Integrity Commissioner forwarded preliminary findings from her investigation to the applicant's counsel for comment.

[5] On April 13, 2015, counsel for the applicant provided the Integrity Commissioner with seven pages of objections to her preliminary findings.

[6] On April 14, 2015, the Integrity Commissioner placed a Draft Report concerning her investigation without recommendations before the Committee of the Whole of the City of

Vaughan Council. The Committee of the Whole is composed of the City of Vaughan Councillors sitting in committee.

- [7] After hearing from counsel for the applicant, the Committee of the Whole deferred consideration of the matter to the City of Vaughan Council meeting on April 21, 2015.
- [8] On April 17, 2015, the Integrity Commissioner forwarded her Final Report concerning her investigation to the City of Vaughan Council.
- [9] On the same day, counsel for the applicant provided City of Vaughan Council with a further 15 pages of objections to the Integrity Commissioner's process and objectivity, written in response to the Integrity Commissioner's Draft Report.
- [10] On April 21, 2015, the City of Vaughan Council accepted the Integrity Commissioner's report and imposed the penalty she recommended – a suspension of pay for 90 days.
- [11] The applicant unsuccessfully brings this judicial review application to quash both the Integrity Commissioner's Final Report and the decision of the City of Vaughan Council accepting it.

The Statutory Scheme Governing the Integrity Commissioner

- [12] The Integrity Commissioner is subject to a statutory scheme set out in the *Municipal Act, 2001*, S.O. 2001, c. 25 ("*Municipal Act*"), the Code of Conduct, the Complaint Protocol for Council Code of Conduct (the "Complaint Protocol") and the applicable City of Vaughan policies and procedures.
- [13] The Integrity Commissioner is a statutory office created under the *Municipal Act*, which was amended effective January 1, 2007 to add a new Part V.1, entitled "Accountability and Transparency." Part V.1 of the *Municipal Act* authorizes municipal councils to establish codes of conduct for members of councils (s. 223.2), and to appoint Integrity Commissioners (s. 223.3). The Integrity Commissioner is responsible for investigating and reporting on complaints regarding alleged breaches of the Code of Conduct by city councillors. The Integrity Commissioner reports to municipal councils (s. 223.6), and is responsible for "performing in an independent manner the functions assigned by the municipality" (s. 223.3) with respect to the application of codes of conduct for members of council.
- [14] The City of Vaughan Council established the Office of the Integrity Commissioner, as well as the Code of Conduct that sets out the ethical rules governing the conduct of members of Vaughan Council. The Integrity Commissioner responds to complaints within the framework of the Complaint Protocol, a Council by-law that sets out the process for receiving, investigating and reporting her opinion to the Council.
- [15] The Code of Conduct prohibits, among other things, the improper use of a member's office to influence City affairs and City staff, the release of confidential information, and reprisals against staff.

[16] The Integrity Commissioner has significant powers to access information and documents in the course of her investigation. The *Municipal Act* provides:

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

(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 or a local board that the Commissioner believes to be necessary for an inquiry.

[17] The Integrity Commissioner and her staff are subject to a statutory duty of confidentiality under the *Municipal Act*:

223.5 (1) The Commissioner 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.

[18] Following an investigation, the Integrity Commissioner “reports to the municipality... his or her opinion about whether a member of Council has contravened the applicable code of conduct...” (*Municipal Act*, s. 223.6(2)).

[19] In a report on conduct following an investigation the Commissioner “may disclose in the report such matters as in the Commissioner’s opinion are necessary for the purposes of the report” (*Municipal Act*, s.223.6 (2)).

[20] Section 223.4(5) of the *Municipal Act* provides that if the Integrity Commissioner reports to the municipality that in his or her opinion the member has contravened the Code of Conduct, then the council of the municipality, if it accepts the report, may impose either of the following penalties:

- a reprimand; or
- a suspension of the remuneration paid to the member in respect of his or her services as a member of council ...for a period of up to 90 days.

[21] The municipality must make public the Integrity Commissioner's reports (*Municipal Act*, s. 223.6(3)).

The Role of the Integrity Commissioner

[22] The applicant raises a number of procedural fairness and substantive arguments on this application. While the issues of procedural fairness are resolved by taking into account the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), the substantive arguments require the standard of review analysis. Because the standard of review is related to the role and expertise of the Integrity Commissioner, the following comments on ethical urban government from Volume Two (Good Government) of the widely acclaimed Bellamy Report are helpful:

Page 44:

In a municipal government ..., [the Office of the Integrity Commissioner] is valuable for the following reasons.

- An integrity commissioner can help ensure consistency in applying the [municipality's] code of conduct. Compliance with policy improves when everyone is seen to be held accountable under the same set of rules.
- Busy councillors and staff cannot be expected to track with precision the development of ethical norms. The Integrity Commissioner can therefore serve as an important source of ethical expertise.
- An Integrity Commissioner provides significant profile to ethical issues inside City government and sends an important message to constituents about the City's commitment to ethical governance.
- No matter how comprehensive the rules, there will on occasion be situations where the ethical course of action is not clear and an individual will need authoritative advice and guidance.
- Without enforcement, the rules are only guidelines. Although research shows that a values-based approach to ethics policy, focusing on defining values and encouraging employee commitment, is preferable to a system of surveillance and punishment, where the public interest is involved, there should be a deterrent in the form of consequences for bad behavior. The rules must have teeth.

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.

[23] In making this reference, I wish to make it clear that where the applicant has raised a question of procedural fairness, the Court does not engage in a standard of review analysis. Rather the Court determines whether the requisite level of procedural fairness has been accorded, taking into account the factors in *Baker*.

The December 2014 Complaint

[24] The December 2014 complaint about the applicant was particularized in two Appendices:

- Appendix 1 listed the sections of the Code of Conduct allegedly violated by the applicant;
- Appendix 2 set out two “Issues” describing the behaviour of the applicant requiring investigation.

[25] The relevant portion of Appendix 2 provides as follows:

Issue 1

As part of my affidavit, I am bringing forward details that I believe require further investigation into the relationship between Councillor DiBiase and Maystar General Contractors.

Based on my personal research of public records and the activities of Regional Councillor Michael DiBiase, I believe that councillor DiBiase has violated the ethical code of conduct. The findings of my investigation, which were reported by the CBC (article attached), clearly show that Councillor DiBiase’s relationship with long time City of Vaughan contractor Maystar General Contractors is completely inappropriate. I ask that the Integrity Commissioner use the CBC article as a basis for the investigation.

The reported findings by the CBC describe Councillor DiBiase’s personal and financial ties with Maystar General Contractors that I strongly believe to contravene sections of the Ethical Code of Conduct. This inappropriate relationship requires further investigation to understand how deep these ties go.

Within the CBC article, Councillor DiBiase denies that Maystar General Contractors is involved with the construction of his family cottage however there is sufficient evidence to contradict Councillor DiBiase’s story. I consider Councillor DiBiase’s denial to be an outright lie to the public, which in itself can be considered to be a contravention of the Ethical Code of Conduct.

Given the history, Maystar General Contractors has had a controversial past with the City of Vaughan. I have reason to believe that Councillor DiBiase has been a vocal proponent of Maystar General Contractors. I believe that Councillor DiBiase has used his influence as a Councillor to further Maystar’s business interests within the City of Vaughan.

I have reason to believe that members of the Vaughan Public Library Board were influenced by Councillor DiBiase in the matter of the construction of the Pleasant Ridge Library. I encourage the Integrity Commissioner to interview the members of the Library Board, as they would have or ought to have direct knowledge of this matter.

I also have reason to believe that Councillor DiBiase may have tried to interfere in the tendering process in the matter of the Vaughan Civic Center Resource Library. This may have been the subject of a closed session meeting.

I encourage the Integrity Commissioner to interview City Solicitor Mary Lee Farrugia, Acting City Manager Barbara Cribbett and Director of Purchasing Asad Chughtai to understand the details of what transpired, as they would have or ought to have direct knowledge of this matter.

As part of the CBC article, it was reported that one of the contractors who worked on Councillor DiBiase's cottage, revealed that his company was not only hired by Maystar General Contractors, but was also paid by Maystar General Contractors for the work that they performed on the cottage. This would be considered a violation of the Ethical Code of Conduct and also a violation of provincial statues [sic].

I encourage the Integrity Commissioner to interview Maystar General Contractors and the contractor in question to determine what payments were made on behalf of Councillor DiBiase's [sic]. I would also encourage the Integrity Commissioner to request copies of invoices and cancelled cheques from these respective parties. In the event that Maystar General Contractors and the contractor in question refuse to voluntarily speak to the Integrity Commissioner or produce any financial records, I would encourage the Integrity Commissioner to consider invoking her powers under the Public Inquiries Act to compel testimony and to compel the production of the records in question.

Issue 2

[This issue concerned the applicant's voting record. It was not pursued by the Integrity Commissioner.]

- [26] Before considering the applicant's objections to Integrity Commissioners report and process, I will refer to a few preliminary matters that arose during the course of the Integrity Commissioner's investigation.

The Integrity Commissioner's Decision to Investigate and Report

- [27] As indicated, counsel for the applicant responded to the Integrity Commissioner's preliminary findings in a letter dated April 13, 2015. In that letter, counsel demanded among other things "copies of the submitted materials you reviewed at the beginning of your investigation that prompted you to interview 32 individuals and access the Regional Councillors server."
- [28] In my view the Integrity Commissioner properly refused this demand.
- [29] Counsel made this demand relying upon section 10 of the Complaint Protocol. The supporting material referred to in that section is the material provided by the complainant. It does not include every document, submitted by anyone, that causes the Integrity Commissioner to commence her investigation.

- [30] The Complaint Protocol does not require any threshold to be met before an investigation can occur. The Complaint Protocol invites individuals who identify or witness behaviour that “they believe is in contravention of the Code of Conduct for Members of Council” to file a complaint.
- [31] The Complaint Protocol provides that the complaint must be on a Complaints Form. The complaint must include the complainant’s reason for thinking a Councillor has contravened the Code of Ethical Conduct. The Complaints Form must include the provisions of the Code of Conduct allegedly violated, the facts constituting the contravention and the complainant’s contact information.
- [32] The Complaints Form with which we are concerned met these requirements. Even if the Complaints Form did not contain all of this information, it would be open to the Integrity Commissioner to contact the complainant and supplement the information provided.
- [33] The Complaints Form must also name witnesses in support of the allegation. A simple read of Appendix 2, Issue 1, discloses the following witnesses: members of the Vaughan Public Library Board who dealt with the construction of the Pleasant Ridge Library, the City Solicitor, the Acting City Manager, the Director of Purchasing and a contractor named in the CBC article attached to the Complaints Form.
- [34] The Complaint Protocol does not require the complainant to name every witness. This is confirmed by section 10(2) of the Complaint Protocol, which provides as follows:
- 10(2) If necessary, after reviewing the submitted materials, the Integrity Commissioner may speak to anyone, access and examine any other documents or electronic materials and may enter any City work location relevant to the complaint for the purpose of investigation and potential resolution.
- [35] The requirement that witnesses be named is intended to assist the Integrity Commissioner should she decide to pursue the matter.
- [36] The Integrity Commissioner decided to investigate two allegations that in her view were described in Issue 1 in Appendix 2. In the Integrity Commissioner’s view those two allegations were: the applicant’s improper interference with tendering processes, and the applicant’s attempt to exercise influence to benefit Maystar.
- [37] This Court will always be reluctant to permit judicial review of a decision by the Integrity Commissioner to commence an investigation. The decision to commence an investigation does not decide or prescribe the legal rights, powers, privileges, immunities, duties or liabilities of the Councillor who will be investigated. The decision to investigate does not decide whether the Councillor is eligible to receive or to continue to receive a benefit. Permitting judicial review of this class of decisions will inevitably result in two hearings instead of one. Finally, there is no basis for reviewing this Integrity Commissioner’s decision to commence this investigation.

The Integrity Commissioner's Decision to Reformulate the Complaint

- [38] On March 27, 2015, the Integrity Commissioner forwarded preliminary findings from her investigation to the applicant's counsel for comment. The Integrity Commissioner's letter disclosed that she had reformulated Issue 1 of Appendix 2 into four allegations.
- [39] The applicant did not object to the reformulation of the original complaint and it is therefore unnecessary to refer to this in detail. Nevertheless, I think it is helpful to observe that the Integrity Commissioner has the power to reformulate a complaint received from a member of the public and to investigate the reformulated complaint.
- [40] Part V.1 of the *Municipal Act* authorizes municipal councils to establish Codes of Conduct for members of Council and to appoint Integrity Commissioners. See the *Municipal Act* sections 223.2 and 223.3.
- [41] The Complaint Protocol is a by-law passed by the City of Vaughan Council which sets out the procedure for investigating complaints about a City of Vaughan Municipal Councillor. A Complaints Form is attached to this protocol.
- [42] In exercising the powers conferred upon her, the Integrity Commissioner must be able to interpret and reformulate complaints submitted by members of the public who may lack specific knowledge of the Code of Conduct and the Complaints Protocol and who may, therefore, not be familiar with how to identify and formulate alleged breaches.
- [43] By interpreting and applying the Code of Conduct and the Complaint Protocol when reformulating a complaint, the Integrity Commissioner essentially applies what can be considered her "home statute". See *Eagle's Nest Youth Ranch v. Corman Park No. 344 (Rural Municipality)*, 2016 SKCA 20 at para. 49, 395 DLR (4th) 24. Such decisions are reviewed on the standard of reasonableness, unless they involve a broad question of decision maker's authority. See *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 54, 291 D.L.R. (4th) 577; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras. 38-42, [2011] 3 S.C.R. 654; and *Kerry (Canada) v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39 at para. 34, [2009] 2 S.C.R. 678.
- [44] A simple reading of what the complainant described as "Appendix 2 Issue 1" leads to the conclusion that the Integrity Commissioner's redraft of the complaint into four allegations parallels the language used by the complainant in his description of Issue 1.
- [45] As a result, the Integrity Commissioner's recasting of Issue 1 into four allegations easily passes a reasonableness standard of review.

Setting the Context for the Applicant's Objections

- [46] In an effort to contextualize further the applicant's objections to the Integrity Commissioner's Final Report and the City of Vaughan Council's decision to accept that report, I will set out the Integrity Commissioner's preliminary findings concerning the reformulated allegations and her further finding of misconduct based on the applicant's attempt to obstruct her investigation. I will set out the applicant's various responses to the

Integrity Commissioner's Draft and Final Reports. I will also set out how the Integrity Commissioner's Final Report came to be accepted by the City of Vaughan Council.

The Integrity Commissioner's Preliminary Findings Concerning the Reformulated Complaint

The reformulated first allegation

- [47] The first reformulated allegation was that there was an inappropriate relationship between the applicant and Maystar. The Integrity Commissioner found that this was on its face an allegation of a criminal nature and as a result she referred the complainant to the appropriate police service pursuant to section 6(3)(a) of the Complaint Protocol.
- [48] Needless to say the applicant disagrees with this allegation. The applicant does not, however, seek judicial review of the Integrity Commissioner's decision that the Complaint Protocol required her to refer the complainant to the police.

The reformulated fourth allegation

- [49] This allegation involved the applicant's voting record and was not pursued by the Integrity Commissioner

The reformulated second and third allegations

- [50] The Integrity Commissioner determined that two allegations made in Issue 2 Appendix 1 of the original complaint merited investigation:
- The applicant's improper interference with tendering processes to assist Maystar; and
 - An attempt by the applicant to exercise influence to benefit Maystar.
- [51] I will now outline generally the Integrity Commissioner's findings concerning these allegations.
- [52] The Integrity Commissioner made a preliminary finding that the applicant had interfered in the City of Vaughan's tendering processes in contravention of its procurement rules. The Integrity Commissioner's preliminary conclusion was that the applicant had contravened the City's procurement rules by inquiring with City Staff and third parties about particular tenders and prequalification results during the Blackout Period. The applicant's inquiries concerned Maystar.
- [53] For our purposes it is sufficient to say that the Blackout Period is the date between the call for bids and the date a contract award is recommended to City Council by the Committee of the Whole. For our purposes it is also sufficient to say that contractors who were not prequalified for the projects up for award could not bid on them.

- [54] The Integrity Commissioner also made a preliminary finding that after the prequalification process ended, the applicant provided information about actual procurements to a private citizen and used information in emails from that citizen to criticize Maystar's competitors to the Mayor, City Councillors, City Staff and as the basis for a Council resolution calling for re-examination of the procurement process. The Integrity Commissioner's preliminary finding was that the applicant had forwarded confidential information to this outside person along with a request for help with drafting emails back to staff and others.
- [55] The Integrity Commissioner made a preliminary finding that the applicant applied inappropriate pressure to Staff with a view to exercising influence or assisting Maystar with the business of the municipality. The Integrity Commissioner made a preliminary finding that the applicant had created a "culture of fear" for City Staff.
- [56] The Integrity Commissioner indicated that her preliminary finding was that the applicant had seriously undermined the Code of Conduct by his actions in both procurement matters and his improper conduct with staff.

The additional finding that the applicant attempted to obstruct her investigation.

- [57] In addition to her findings concerning the complainant's reformulated allegations, the Integrity Commissioner also made a separate finding concerning the applicant's attempts to interfere with her investigation.
- [58] The Integrity Commissioner made a preliminary finding that the applicant had breached Rules 19(1) and (2) of the Code of Conduct. Rule 19(1) of the Code of Conduct prohibits obstructing the Integrity Commissioner when she is carrying out her responsibilities. Rule 19(2) prohibits threatening or undertaking reprisals against persons providing information to the Integrity Commissioner.
- [59] The Integrity Commissioner set out her preliminary finding that during the course of her investigation, the applicant had made inquiries about individuals who had cooperated with her. Those persons advised the Integrity Commissioner that since speaking with her, the applicant had started scrutinizing their actions in an unusual way and disproportionately criticising their professional decision-making.

The applicant's response to the preliminary findings

- [60] In her March 27, 2015 letter to counsel for the applicant, the Integrity Commissioner asked counsel for his comments on the enclosed preliminary findings. The Integrity Commissioner indicated that her next step would be to report to the Committee of the Whole on April 14, 2015.
- [61] On April 13, 2015, counsel for the applicant provided a 7-page written response to the Integrity Commissioner's preliminary findings. In his letter, counsel advanced a number of propositions which I set out in the next few paragraphs.

- [62] Counsel for the applicant informed the Integrity Commissioner that she had no jurisdiction to place a report before the Committee of the Whole because her mandate had expired and, as a result, the Committee of the Whole had to reject her report.
- [63] Counsel informed the Integrity Commissioner that her actions demonstrated that she should not be allowed to continue with her investigation. Counsel complained that he was not given adequate time to respond.
- [64] Counsel claimed that the Integrity Commissioner “condemned” the applicant without giving him an opportunity to know the case against him. Counsel claimed that his client did not know the case against him because the Integrity Commissioner had failed to make adequate disclosure. Specifically, she had failed to provide copies of the materials that she reviewed at the beginning of her investigation, and which prompted her to interview 32 individuals and to look at the applicant’s emails. In addition, she failed to disclose the names of the persons interviewed, their witness statements and all documentation upon which she relied.
- [65] Counsel accused the Integrity Commissioner of illegally reviewing the applicant’s emails and failing to provide the applicant with copies of his own emails so that he could respond to them.
- [66] He accused the Integrity Commissioner of relying upon a complaint that failed to name witnesses or specific facts.
- [67] He accused the Integrity Commissioner of letting her desire to make her report public overtake her duty of fairness because she listed her investigation on the agenda of the Committee of the Whole, thereby making public the fact that she was investigating the applicant before she had the applicant’s response to her preliminary findings.
- [68] He accused the Integrity Commissioner of improperly relying on a previous complaint concerning the applicant that she informally resolved.
- [69] Counsel accused the Integrity Commissioner of conducting herself in a way that created a reasonable apprehension of bias. As a result, counsel demanded that the Integrity Commissioner not file her report and remove herself from the matter.
- [70] Counsel then listed a series 16 questions to which he required answers, before he could effectively respond. These questions attempted to highlight the lack of disclosure, the alleged lack of authority to “rummage through the Councillor’s emails”, and the lack of evidence supporting a finding of obstruction.

Counsel for the applicant makes a second response

- [71] Counsel for the applicant made a second response directed to the City of Vaughan Council. In addition to setting out counsel’s response I will set out the procedure which led to it. This procedure is also relevant to a further procedural objection advanced by the applicant.

[72] As indicated, when the Integrity Commissioner sent her preliminary findings to counsel for the applicant, she indicated that her next step would be to place a draft report containing those preliminary findings before the Committee of the Whole. And that is exactly what she did.

The Meeting of the Committee of the Whole

[73] The Integrity Commissioner placed her Draft Report without recommendations before the Committee of the Whole on April 14, 2015. The Integrity Commissioner did not place her recommendations before the Committee of the Whole because she was waiting for counsel for the applicant to provide any comments concerning those recommendations.

[74] Counsel's letter of April 13, 2015 was also placed before the Committee of the Whole.

[75] At the meeting of the Committee of the Whole, counsel for the applicant made an oral response to the Integrity Commissioner's preliminary findings. Counsel spoke for the allotted five minutes, during which he said that the Integrity Commissioner:

- had conducted herself like a "Court of Star Chamber";
- had been unfair from the outset of her investigation; and
- had made up her mind on the basis of allegations rather than evidence.

Finally, counsel asked the Committee of the Whole to reject the Integrity Commissioner's Draft Report and give the entire matter to an independent person with an open mind.

[76] The Committee of the Whole rejected counsel's submission but otherwise took no action on the Draft Report except to defer the entire matter to the City of Vaughan Council Meeting on April 21, 2015.

[77] The motion to defer was moved by the Mayor and seconded by Councillor Iafraite.

The City of Vaughan Council Meeting on April 21, 2015

[78] The Integrity Commissioner provided her Final Report to the City Clerk on April 17, 2015.

[79] Counsel for the applicant also provided a further written set of objections to the City Clerk for the City of Vaughan on April 17, 2015. In this set of objections counsel made a number of claims.

[80] Counsel claimed that the Integrity Commissioner's investigation was procedurally and jurisdictionally flawed, resulting in the City of Vaughan Council lacking jurisdiction to deal with her Final Report.

[81] Counsel objected to the fact that the Integrity Commissioner placed her Draft Report before the Committee of the Whole after her mandate as Integrity Commissioner had

expired. Counsel for the applicant advised the City of Vaughan Council that the Integrity Commissioner was “functus officio.”

- [82] Counsel complained that the Draft Report placed before the Committee of the Whole was different than the preliminary findings that he had received on March 27, 2015. Counsel accused the Integrity Commissioner of deliberately and unfairly trying to “blind side my client” at the Committee of the Whole.
- [83] Counsel complained about the release of the Draft Report to the public.
- [84] Counsel accused the Integrity Commissioner of going “out of [her] way to parade for public consumption” the fact that portions of the complaint were criminal in nature and accused the Integrity Commissioner of doing so to prejudice the case against the applicant.
- [85] Counsel complained that the Integrity Commissioner’s failure to provide the details of her investigation made it impossible for the applicant to properly respond. Counsel also accused the Integrity Commissioner of falsely stating that his client had an opportunity to respond to her report. Counsel reiterated that his client denied the allegations in the complaint.
- [86] Counsel criticized the Integrity Commissioner for failing to investigate how the complainant acquired copies of the applicant’s emails.
- [87] Counsel claimed that the Integrity Commissioner was influenced by a previous complaint against the applicant, which she had resolved on an informal basis.
- [88] Counsel repeated his allegation that the Integrity Commissioner’s behaviour had caused his client to have a reasonable apprehension of bias. Counsel demanded that this matter be turned over to an independent and unbiased person.
- [89] Counsel criticized the Integrity Commissioner for telling the Committee of the Whole that case law supported her decision to withhold the names and witness statements of the 32 persons she interviewed, without providing him with the cases upon which she relied.
- [90] Counsel referred at length to a Federal Court decision that counsel said supported his right to the names of witnesses, their statements and documents.
- [91] Counsel for the applicant demanded details of all communication that the Integrity Commissioner had with Councillors Iafrate and Schefman, claiming that comments made by those two Councillors at the Committee of the Whole meeting indicated they had predetermined the matter.
- [92] Counsel demanded that Councillor Iafrate not participate in any decision concerning the applicant, as a result of comments she had made at the Committee of the Whole meeting.

[93] Counsel demanded that the Mayor not participate in any decision concerning the applicant because comments made by the Mayor at the Committee of the Whole, indicated that the Mayor had prejudged his client.

[94] The City Clerk distributed counsel's 15 page April 17 submission to the City of Vaughan Councillors.

City of Vaughan Council rejects the applicant's submissions

[95] For the sake of completeness, The City of Vaughan Council unanimously accepted and endorsed the Integrity Commissioner's Final Report, which did contain her recommendations. There was one abstention by a council member who was, for unrelated reasons, precluded from voting on matters brought forward by the Integrity Commissioner.

The Applicant's Motion before this Court

[96] As indicated, the applicant unsuccessfully moves for two orders:

- an order quashing the decision of the City of Vaughan Council dated April 21, 2015 suspending the applicant's pay for his services as a member of Council for a period of 90 days; and
- an order quashing the decision of the Integrity Commissioner contained in her report dated April 17, 2015.

[97] In paragraph 35 of his factum, produced verbatim below, counsel for the applicant sets out the issues he raises.

- (i) Whether the Commissioner and the City denied the Applicant natural justice and breached procedural fairness by relying on a non-transparent investigation process that significantly prejudged him by finding that he had committed serious wrongdoing;
- (ii) Whether the City erred in law by relying on the Commissioner's errors in law in misinterpreting and misapplying the City's own Protocol for receiving and investigating complaints of breach of the Code of Conduct and the provisions in the Protocol and the Municipal Act 2001 in respect of providing disclosure of information necessary to allow the Applicant to be fully informed in order to make full answer and defence. The Applicant submits that he did not receive sufficient information of all the details regarding the manner in which the investigation was conducted in order to be able to defend himself and was thereby denied natural justice.
- (iii) Whether the decision of the City should be quashed as it was made in response to a motion of and a vote in participation with Councillor Iafrate whose comments made in response to the Commissioner's report demonstrated a predisposition against the Applicant and by it a reasonable

apprehension of bias. The Applicant submits that the decision of the City should be quashed as the process was tainted by reason of the bias of Councillor Iafrate.

(iv) Whether all of the Commissioner's actions taken subsequent to the expiry of her appointment were made without jurisdiction and precluded any lawful acts by the City in adopting and approving them. The Applicant submits that the acts of the City taken as a result of the approval of a report made by a person who no longer had legal authority to act rendered the City's acts being without jurisdiction.

[98] I set out the gist of each one of the applicant's submissions in bold and my reasons for rejecting them.

The Commissioner and the City denied the applicant natural justice and breached procedural fairness by relying on a non-transparent investigation process

[99] I reject this submission. The applicant knew the case against him; he decided not to respond to the substance of it.

[100] I begin by listing the information available to the applicant.

The Integrity Commissioner set out the conduct she found concerning

[101] The Integrity Commissioner found that Maystar failed to pre-qualify for two construction projects.

[102] The applicant approached staff within the Blackout Period and asked for the results of the prequalification process.

[103] The Integrity Commissioner found that the applicant was told by senior city officials and in particular the City Solicitor that his inquiries at all times, but particularly during the Blackout Period, posed a serious risk to the City of Vaughan because the applicant was at a critical time inappropriately inserting himself into the procurement process.

[104] The Integrity Commissioner found that when City Staff responded to the applicant's requests for information during the Blackout Period by advising him to respect the procurement process, they were met with defiance, abusive language and intimidating actions. Specific examples of the applicant's statements were provided. The Integrity Commissioner's finding was that some City Staff were outraged, others felt hopeless and some felt intimidated because the applicant, a veteran member of City Council, was insisting that city staff give him confidential information in direct contravention of the procurement rules.

[105] The Integrity Commissioner indicated that she received information about the applicant's interference from interviews she conducted. The Integrity Commissioner refused to identify the individuals, but did include the actual comments attributed to the applicant

that she found important. She also specified whether the source of her information was a City Staff person or a Board Member.

- [106] The Integrity Commissioner referred to specific emails of the applicant that suggested that the applicant responded to staff about the prequalification results using verbatim text originating from an individual who was not employed by the city. The emails demonstrated that the applicant cut and pasted the scripted responses from the private citizen into his own emails back to senior city staff and members of the Council. This outside person also drafted a motion that the applicant put before City Council concerning the procurement process. Specific examples of this cutting and pasting were included in the preliminary findings.
- [107] The Integrity Commissioner set out the specific Rules in the Code of Conduct that appeared to have been breached.

The Integrity Commissioner described her investigation

- [108] The Integrity Commissioner specified that her preliminary findings concerned the procurement process involving prequalification of contractors for the Father Ermanno Bulfon Community Centre Construction Project and the Civic Centre Resource Library Construction Project.
- [109] In her preliminary findings, the Integrity Commissioner indicated that she conducted interviews with 32 persons, six of whom provided her with documentary evidence.
- [110] The Integrity Commissioner indicated that she reviewed public and confidential city documents, the city's past and current procurement bylaws, emails, video surveillance, and audio recordings of committee and Council meetings, as well as minutes of in camera board meetings.
- [111] The Integrity Commissioner revealed that she searched the applicant's city email account by using key word search requests.

Information demanded by counsel for the applicant before he claimed to be able to respond

- [112] With that context in mind, I list everything demanded by the applicant's counsel before he claimed to be able to respond:
- copies of all materials relied upon by the Integrity Commissioner at the beginning of her investigation that prompted her to interview the 32 individuals and look at the applicant's emails;
 - the names and witness statements of the 32 witnesses interviewed by the Integrity Commissioner;
 - all documentation upon which the Integrity Commissioner relied;

- copies of the case law which the Integrity Commissioner claimed supported her position not to disclose the names and witness statements; and
- all information that passed between the Integrity Commissioner and Councillors Iafrate and Schefman with respect to the complaint against the applicant.

[113] At paragraph 35 of his factum, counsel for the applicant frames this as a procedural fairness/denial of natural justice objection, to the way in which the Integrity Commissioner had conducted herself.

[114] The degree of participation to which the applicant is entitled is determined by considering the factors enumerated by the Supreme Court in *Baker* at paras. 21-28.

The Baker Factors

(i) The nature of the decision and (ii) The role of the decision within the statutory scheme

[115] The Integrity Commissioner investigates complaints that Councillors violated the Code of Conduct and reports the results of her investigations to the City of Vaughan Council. The report contains factual conclusions and recommendations concerning penalty.

[116] The Integrity Commissioner's Report has no binding effect upon the applicant.

[117] The City of Vaughan Council considers the Report of the Integrity Commissioner along with the response to the complaint by the person concerned, and then accepts or rejects the Report. The City of Vaughan Council imposes the penalty.

[118] The Complaint Protocol, which is a City bylaw and therefore also part of the statutory scheme, does not contemplate participation by the applicant after responding to the complaint. It does not require that the subject of the investigation receive preliminary findings or get the opportunity to respond to those findings.

[119] Section 223.5 of the *Municipal Act*, which is also part of the statutory scheme, provides that the Integrity Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of her duties.

[120] The statutory scheme provides the Integrity Commissioner with significant autonomy regarding the disclosure of her investigation. Specifically, section 223.6(2) of the *Municipal Act* provides as follows:

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. 2006, c. 32, Sched. A, s. 98.

[121] This section recognizes that when deciding how much information must be disclosed, the Integrity Commissioner may take into account specific local concerns associated with such disclosure that require confidentiality or protection of informants' identities. In the case of the City of Vaughan, a survey tabled at the time of the Integrity Commissioner's Final Report, indicated that approximately one-third of responding City Staff strongly disagreed or disagreed with the statement that "staff can raise concerns to management without fear of reprisal." See Responding Application Record of the Respondent, the Integrity Commissioner of Vaughan, Tab 1AA at 232.

[122] Finally, the statutory scheme in section 223.7 of the *Municipal Act* provides that the Integrity Commissioner and her staff are not competent or compellable in connection with anything done by her in an investigation.

(iii) The importance of the decision to the individual affected

[123] The maximum penalty that may be imposed by the Council is a suspension of pay for 90 days. The applicant cannot lose his elected position, and the Integrity Commissioner cannot make the applicant civilly liable.

[124] The decision is important to the applicant because it affects his reputation.

(iv) The legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed

[125] The Integrity Commissioner was quite straightforward in this matter. The Integrity Commissioner did nothing that would give rise to any legitimate expectation that she intended to behave in a manner different from the manner in which she actually behaved.

[126] The Integrity Commissioner made the applicant aware of the original complaint and asked the applicant to respond.

[127] Although not required to do so by the Complaint Protocol, the Integrity Commissioner provided the applicant with her preliminary findings and asked the applicant's counsel for his comments "prior to finalizing [her] report and submitting [her] recommendations to Council for consideration."

[128] The Complaint Protocol did not require the Integrity Commissioner to identify the 32 witnesses she interviewed. It also did not require her to provide any of the documentation obtained from those individuals. The Integrity Commissioner never directly or by implication suggested that she would provide the applicant's counsel with the information he demanded.

[129] Section 223.5 of the *Municipal Act* provides that the Integrity Commissioner shall preserve secrecy with respect to all matters that come to her knowledge in the course of her duties.

[130] Neither the statutory scheme nor the conduct of the Integrity Commissioner created any legitimate expectation that the applicant would receive the disclosure that he demanded.

(vi) The choice of procedure

[131] The City of Vaughan Council is the master of its own procedure. Indeed, the members of the City of Vaughan Council are the persons investigated by the Integrity Commissioner. The Councillors have codified the procedure or protocol for investigations of complaints about themselves in a bylaw entitled Complaint Protocol for Council Code of Conduct, which I have referred to as the Complaint Protocol.

[132] Who better to decide the procedure or protocol governing those investigations?

[133] In devising the Complaints Protocol, the Councillors thought it prudent to provide for confidentiality. Specifically, section 18 of the Complaint Protocol provides as follows:

18 (1) The Integrity Commissioner and every person acting under his or her jurisdiction shall preserve confidentiality where appropriate and where this does not interfere with the course of any investigation, except as required by law and as required by this complaint protocol.

(2) At the time of the Integrity Commissioner's report to Council, and as between the parties, the identity of a complainant and the identity of the person who is the subject of the complaint shall not be treated as confidential information.

(3) All reports from the Integrity Commissioner to Council will be made available to the public.

[134] The Legislature also thought confidentiality was important. Section 223.5 of the *Municipal Act* provides:

223.5(1) The Commissioner 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. 2006, c. 32, Sched. A, s. 98.

[135] In short, there is nothing in the *Municipal Act* or the Complaint Protocol that suggests a procedure requiring the degree of disclosure, demanded by counsel for the applicant.

[136] In addition, there is no genuine basis for suggesting that the Integrity Commissioner failed to comply with the Complaint Protocol.

[137] The Integrity Commissioner thought that the inappropriate relationship allegation was criminal in nature and, pursuant to the Complaint Protocol section 6(3)(a), referred the complainant to the appropriate police service. The Integrity Commissioner provided the applicant with the complaint and the supporting material received from the complainant pursuant to section 10(1)(a) of the Complaint Protocol. The Integrity Commissioner complied with the timeline set out in the Complaint Protocol.

Conclusion concerning the Baker factors

- [138] When I consider all of the *Baker* factors, I am satisfied that the Integrity Commissioner exercised her discretion in a manner that properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City Staff who had cooperated in her investigation.
- [139] The applicant knew the case against him; he decided not to respond to the substance of it.
- [140] The applicant relied extensively in his correspondence and in argument before this Court upon the Federal Court decision of *Marchand v. Canada (Public Sectors Integrity Commissioner)*, 2014 FC 329, 452 F.T.R. 182 [*Marchand*].
- [141] I am satisfied that the City of Vaughan Council and the Integrity Commissioner were correct in deciding that this decision had no application to this matter.
- [142] The *Marchand* decision was an appeal from a decision of a Prothonotary ordering the disclosure of material that was not before the decision-maker, pursuant to Rule 317 of the *Federal Court Rules*. In *Marchand*, the applicant was seeking access to documents which were not before the decision-maker, and the decision-maker was resisting on the basis that on an application for judicial review, only the documents that were before the decision maker should be considered.
- [143] In the present case, the Integrity Commissioner disclosed the substance of the evidence of witnesses, including verbatim statements received from City Staff and Board Members that she thought important. She also provided examples of the applicant cutting and pasting, into his own emails and into a City of Vaughan Council motion, materials and comments prepared by an outside person.
- [144] In this case, unlike *Marchand*, we are dealing with a situation where the Integrity Commissioner reported that staff were "met with defiance, abusive language and intimidating actions" when they told the applicant that providing the information he requested would be contrary to the City of Vaughan's procurement policies. And the Integrity Commissioner stated that she could not "stress strongly enough the sentiments of worry and concern voiced by City Staff that [she] interviewed during the course of the investigation" and that staff implored her "not to disclose their identity".
- [145] In *Marchand*, unlike this case, there was a substantial response to the allegations. Specifically, Mr. Marchand's defence was that he was the victim of a political war waged by a group of individuals who were unhappy with their employer's decision to declare their positions surplus to meet mandatory budget cuts. In the current case, the only substantial response made by the applicant was that there were no reasonable grounds for the complainant's belief that a Code of Conduct violation had occurred and that the complainant was a disgruntled defeated former municipal candidate. Even after receiving the Integrity Commissioner's preliminary findings, the applicant made no attempt to offer a defence. For example, the applicant produced no affidavits from Board members or City Staff inconsistent with the preliminary findings.

[146] An administrative body that investigates and makes recommendations must disclose the substance of the allegations. The Supreme Court of Canada in two cases affirmed the following statement by Lord Denning in *Selvarajan v. Race Relations Board*, [1976] 1 All E.R. 12 (C.A.), p. 19:

The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.

Syndicat des Employés de Production de Québec et l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at para. 27.

Irvine v. Canada (Restrictive Trade Practices Commission), [1987] 1 S.C.R. 181, at para. 71, citing *Jenkins v. McKeithen*, 395 U.S. 411 (1969), Harlan J. (dissenting), pp. 442-443.

[147] Accordingly, the Integrity Commissioner and the City of Vaughan Council were correct in declining to follow the *Marchand* decision.

[148] When I consider the Baker factors, the case law to which I have referred, and the disclosure provided in this case; namely the original complaint, the preliminary findings, the Draft Report, anonymized portions of witness statements and copies of relevant emails, I am satisfied that the Integrity Commissioner exercised her discretion in a manner that properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City Staff who had cooperated in her investigation.

[149] The Integrity Commissioner was not, in the words of Lord Denning in *Selvarajan*, required to provide the applicant with "every detail of the case against" him. The Integrity Commissioner was not required to "name [her] informants". It was sufficient "if the broad grounds [were] given".

The Procedural Unfairness complaint at paragraph 24 of the Applicant's Factum

[150] At paragraphs 19 to 31 of his factum the applicant makes a complaint of procedural unfairness which does not seem to be referenced in the list of objections set out in paragraph 35 of his factum. If this is a separate objection, I reject it for the reasons that follow.

[151] I reproduce the gist of the objection below.

The Integrity Commissioner filed a report (the 28-page report) prior to the meeting of the Committee of the Whole that was different than the 10 pages of preliminary findings forwarded to counsel for the applicant on March 27, 2015 (the 10-page report) and to which the applicant had no opportunity to respond. The 28 page report did not contain counsel's letter of April 13, 2015. The applicant also claims that the Integrity Commissioner Final Report was different than both her Draft Report and her preliminary findings.

[152] I reject this argument.

[153] The applicant complains that the Integrity Commissioner's reports presented to the Committee of the Whole on April 14 and to the City Council on April 21, were not provided to him in time to allow him to respond before the hearings. The applicant feels that this denial of an opportunity to respond made the process unfair.

[154] At paragraph 24 of the applicant's factum, the applicant complains that the 28-page report provided to the City did not contain a copy of the applicant's letter of April 13, 2015. This letter represented the applicant's response to the Integrity Commissioner's preliminary findings of March 27, 2015.

[155] If this submission was intended to convey that the Committee of the Whole did not have counsel's letter of April 13, 2015, it seems at odds with the documentation.

[156] At page 103 of the Record of Proceedings there is an extract from Council Minutes of April 21, 2015. This extract contains the decision of the Committee of the Whole deferring the Integrity Commissioner's Report to the Council Meeting of April 21, 2015. This extract specifically recommends receipt of counsel's letter of April 13, 2015. This suggests that counsel's letter of April 13 was before the Committee of the Whole.

[157] In addition, at page 147 of the Record of Proceedings there is a transcript of an excerpt of the proceedings before the Committee of the Whole meeting. As indicated, counsel for the applicant made oral submissions at this meeting and stated at one point: "you will see in my detailed letter to her I have listed the correspondence that went back and forth and most particularly my request to be given the names of 32 people whom she claims made allegations and their statements" (emphasis added). While counsel does not give the date of the letter to which he refers, it is clear that his letter of January 30, 2015 contains no references to correspondence "that went back and forth." In addition, the January 30, 2015 letter contains no demand concerning the names of the 32 people interviewed by the Integrity Commissioner. It appears that the "detailed letter" to which counsel must have been referring was his 7-page letter of April 13, 2015.

[158] At paragraphs 19 to 29, the applicant complains that he did not receive the 28-page Draft Report presented by the Integrity Commissioner to the Committee of the Whole on April 14 until the day of the meeting. The applicant claims that the 28-page Draft Report "differed in a number of important aspects" from the preliminary 10-page report to which he provided a response earlier.

- [159] If this submission was intended to convey that the applicant was unable to respond to the 28 page report, I reject such a conclusion.
- [160] A comparison of the preliminary findings presented to the applicant on March 27, 2015 and the Draft Report presented to the Committee of the Whole on April 14, 2015 reveals that the Draft Report included more detail about the Commissioner's investigative process and jurisdiction as well as her observations about the underlying purposes of the Code of Ethical Conduct. The preliminary findings had slightly more detail about the applicant's actions.
- [161] Finally, in terms of timing, the Complaint Protocol in section 12 (1) required the Integrity Commissioner to file a final or interim report within 90 days of the start of an investigation. The Integrity Commissioner filed her Draft Report to comply with that time requirement.
- [162] The Committee of the Whole made no decision concerning the applicant, except to defer the matter to the City of Vaughan Council for consideration at its April 21, 2015 meeting. At that meeting, City of Vaughan Council had before it, counsel's 15-page April 17 response as well as his 7-page April 13 response, which was attached to it.
- [163] At paragraphs 30 to 31, the applicant complains that the Final Report presented by the Integrity Commissioner to the City Council on April 17, was also different from her two previous reports.
- [164] If this submission was intended to convey that the applicant was unable to respond to the Integrity Commissioner's Final Report, I reject such a conclusion.
- [165] The Final Report provided more information about the applicant's counsel's objection to the timeline suggested by the Integrity Commissioner for a response to her preliminary findings, than the Integrity Commissioner's Draft Report. The Integrity Commissioner originally wanted a response by April 2, 2015. Counsel for the applicant was out of the country and correspondence passed between the two about the timeline for a response. Details of this correspondence were included in the Final Report, but not in the Draft Report. Counsel was well aware of this correspondence.
- [166] The Final Report dealt with the allegations in a different order.
- [167] The Final Report contains the Integrity Commissioner's recommendations and her reasons for those recommendations. The Integrity Commissioner indicated in her Draft Report that she had refrained from tendering a Final Report and any recommendations to allow the applicant's counsel to provide comments.
- [168] Counsel was well aware of the Integrity Commissioner's recommendations. The Commissioner's email to the applicant's counsel dated April 10 and her letter dated April 13, indicate that the recommendations were provided to the applicant for his response.
- [169] The Final Report provides more detail to the Integrity Commissioner's finding that the applicant violated the obstructions and reprisals rule (section 19 of the Complaint

Protocol). According to the report, the applicant disproportionately called into question the professional decision-making of city employees who had cooperated with the Integrity Commissioner, and asked those employees to explain the basis upon which they had first been hired by the City of Vaughan. This finding was included in the preliminary findings forwarded to counsel on March 27, 2015. The Final Report adds the detail that the questioning took place at budget time.

[170] The applicant's counsel had the Final Report four days prior to the Council Meeting. The applicant's counsel had an opportunity to respond to the specifics associated with this finding and did not.

[171] I am satisfied that, prior to voting to accept the Integrity Commissioner's Report, City of Vaughan Council had before it all of the responses that counsel for the applicant chose to make to the Integrity Commissioner's findings and recommendations and that no significance attaches to any differences between the preliminary findings, that Draft Report and the Final Report.

The Decision of the City should be quashed because it was tainted by reason of the bias of Councillor Iafrate

[172] I reject this submission.

[173] Counselor Iafrate made the remarks to which the applicant objects at the Committee of the Whole Meeting. She made her remarks at that portion of the meeting where the Committee of the Whole was considering the Integrity Commissioner's Draft Report.

[174] Apparently, the City of Vaughan Council sets aside time when it sits as a Committee of the Whole for items of public interest and permits members of the public to speak to those items. One such item was the Integrity Commissioner's investigation of the applicant. As a result, when this matter came up on the Committee of the Whole agenda, counsel for the applicant spoke to the matter.

[175] Counsel for the applicant spoke for five minutes (the allotted time) and asked the Committee of the Whole to reject Integrity Commissioner's Report. Counsel referred the Committee of the Whole to the detailed response that he had provided. Counsel informed the Committee of the Whole that the Integrity Commissioner had refused his demand for the names and witness statements of the 32 people she interviewed. He accused the Integrity Commissioner of conducting herself like a "Court of Star Chamber", being unfair from the outset of her investigation and having made up her mind on the basis of allegations rather than evidence. Finally, he asked the Committee of the Whole to review his material and reject the Integrity Commissioner's Report and to give the entire matter affecting his client to an independent person with an open mind.

[176] The Integrity Commissioner then attempted to defend herself from this attack.

[177] When the Integrity Commissioner completed her remarks, Councillor Iafrate made the impugned comment which I set out in its entirety:

I was just going to say wow, well done. I am not going to be as eloquent as the Mayor, but I do want to thank the Integrity Commissioner, and you have my full support, never doubt that. This has been a very comprehensive review, and I do fully, fully, trust that no, no, doubt whatsoever that you followed every rule by the dot and by the crossing of the T, so I will await your final report and recommendations and I will respect what you come forward with. I also wish, and want to make this public statement for our staff at this point in time that I will continue to, and I am sure the rest of my colleagues will continue to, advocate for a safe and professional works place for all of them. Again I just want to thank you for the work that you have done.

- [178] The Committee of the Whole voted to defer this matter to the City of Vaughan Council. The motion to that effect was moved by the Mayor and seconded by Councillor Iafrate.
- [179] Obviously the Committee of the Whole rejected counsel for the applicant's submissions because it did not reject the Draft Report.
- [180] The test for finding a reasonable apprehension of bias is well known:
- ... what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. See *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282 at para. 20.
- [181] Councillor Iafrate indicated in her comment that she “will await your final report and recommendations”, coupled with a commitment to respect the Integrity Commissioner's final product. Her commitment to respect the final product, reflected the fact that she had rejected the only objection made to it; namely that it was the product of unfair process.
- [182] The balance of the Councillor's remarks, to the effect that she and her colleagues were committed to a safe and professional work environment, was an attempt to reassure members of staff that City Council was committed to those values.
- [183] Councillor Iafrate comments do not reflect the fact that she was going to decide unfairly; they reflect the fact that after listening to counsel for the applicant and considering his submissions, she did not think that Integrity Commissioner's Draft Report should be rejected for the procedural reasons advanced by the applicant's counsel.
- [184] Counsellor Iafrate confirmed her rejection of counsel's assertion that his client had been subjected to an unfair procedure by seconding the Mayor's motion to defer the matter to the City of Vaughan Council.
- [185] I recognize that it was not likely that anything would change between April 14, 2015 (the date of the Committee of the Whole meeting) and the Council meeting on April 21, 2015. Counsel for the applicant objected to the Integrity Commissioner's Report for the reasons he outlined. The Integrity Commissioner had no intention of producing the witnesses'

names and statements for the reasons she had given. The Committee of the Whole did not agree that the Integrity Commissioner had treated the applicant unfairly.

[186] There was no unfairness in this. There was simply a rejection of counsel for the applicant's procedural objections to the Integrity Commissioner's Draft Report.

Actions taken by the Integrity Commissioner after the expiry of her appointment were made without jurisdiction and precluded lawful acts by the City of Vaughan in adopting and approving them

[187] I reject this argument.

[188] The Integrity Commissioner's appointment expired on April 5, 2015. On April 13, 2015, the Committee of the Whole recommended that the Integrity Commissioner be re-appointed for a term coincident with the 2014-2018 Term of Council retroactive to April 5, 2015. On April 21, 2015, City of Vaughan Council approved this recommendation.

[189] Counsel for the applicant took the position during oral argument that the work done by the Integrity Commissioner between April 4 and April 21, 2015 was done by someone without authority to do it and what was required was a bylaw declaring that all of her work done within that period was authorized.

[190] I am satisfied that counsel's retroactive appointment amounted to an approval of all work done by the Integrity Commissioner during the period when her appointment had expired.

[191] Ontario municipalities may exercise their powers with retroactive effect unless the enabling legislation either expressly or impliedly forbids it. See *Toronto (City) v. Seemayer*, (1982) 24 M.P.L.R. 132 (Ont. Co. Ct.). The relevant provisions of the *Municipal Act* do not preclude Council from retroactively appointing an Integrity Commissioner.

[192] Council expressed its intention to retroactively appoint the Integrity Commissioner in clear and unequivocal language.

[193] If the Integrity Commissioner had done nothing during the period when her appointment was at an end, there would have been no need to retroactively appoint her. The only purpose in retroactively appointing the Integrity Commissioner had to have been to retroactively approve the work that she did and the actions that she took during the time when her appointment was at an end.

Other Objections advanced by the Applicant

The Integrity Commissioner did not comply with section 223.8 of the *Municipal Act* because once she found something criminal, no part of her inquiry could continue until the conclusion of the police investigation

[194] While this objection does not appear to be referenced in paragraph 35 of the applicant's factum, an argument to this effect was advanced at the hearing of this application.

[195] I reject this argument.

[196] Section 6(3)(a) of the Complaint Protocol provides as follows:

6(3)(a) If the complaint on its face is an allegation of a criminal nature consistent with the *Criminal Code of Canada*, the complainant shall be advised that if the complainant wishes to pursue any such allegation, the complainant must pursue it with the appropriate Police Service.

[197] Section 6 (3) of the Complaint Protocol refers to “the complaint” – not the Complaints Form in its entirety. Section 6(3)(a) does not say that all the complaints contained in the Complaint Form must also be treated as if they were criminal in nature, or that having decided to refer a complainant to the appropriate police service, the Integrity Commissioner can take no further action on other complaints in the Complaints Form which on their face are not of a criminal nature.

[198] Section 223.8 of the *Municipal Act* provides as follows:

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. 2006, c. 32, Sched. A, s. 98.

[199] The two provisions are consistent with each other and together provide a code for dealing with complaints which are criminal in nature:

- If the complaint on its face is an allegation of a criminal nature, the complainant is to be advised to pursue the allegation with the appropriate police service.
- If, during the course of an investigation, the Commissioner determines that there are reasonable grounds to believe there has been a contravention of the *Criminal Code* (or any other Act), the Commissioner must immediately refer the matter to the appropriate authorities. [Emphasis added.]

[200] Despite the fact that they form a complete code for considering allegations that are criminal in nature, neither section 223.8 of the *Municipal Act* nor section 6 (3) (a) of the Complaint Protocol, state that once an Integrity Commissioner decides that an allegation in the complaints form is on its face criminal in nature, she must take no further action on any noncriminal complaints in the Complaints Form.

[201] Accordingly, the Integrity Commissioner could continue to investigate redrafted allegations within the Complaint Form, which were not on their face allegations “of a

criminal nature”, unless or until her investigation revealed reasonable and probable grounds to believe that an offense had been committed.

- [202] The redrafted allegations dealing with the applicant’s interference in various tendering processes in a way that contravened the City of Vaughan’s procurement rules or the pressuring of staff to assist Maystar, were not on their face allegations “of a criminal nature”.
- [203] It is not sufficient for the alleged behaviour to be relevant to a criminal investigation; the allegation “on its face” must be of a “criminal nature” before section 6(3)(a) of the Complaint Protocol is engaged.
- [204] Finally, the Integrity Commissioner did not investigate the inappropriate relationship allegation and therefore has no knowledge whether it was true. As a result, she could not determine whether she had reasonable grounds to believe that the applicant had committed offenses contrary to section 122 or 123 of the *Criminal Code*, by interfering in the procurement process or pressuring staff to assist Maystar General Contractors.
- [205] Some aspects of the Integrity Commissioner’s jurisdiction in this regard require elaboration.

The Integrity Commissioner may conduct a preliminary investigation to determine whether the complaint must be referred to the police service or other appropriate authorities

- [206] According to section 8 of the Complaint Protocol, the Commissioner possesses a discretion to refuse to proceed with an investigation if she is of the opinion that the complaint is frivolous, vexatious or not made in good faith. Accordingly, the Complaint Protocol allows the Integrity Commissioner to make inquiries to determine whether there is an “air of reality” to the allegation and to clear the air of groundless allegations, including those of criminal conduct by Councillors. If the Integrity Commissioner decides that there is no air of reality to the allegation, the Commissioner may include such a conclusion in her report.
- [207] Before deciding that an allegation appears on its face to be criminal in nature, the Integrity Commissioner can engage in redrafting the complaint in an effort to make certain that only genuine allegations of criminal conduct are referred to the appropriate police service.
- [208] The decision that an allegation appears on its face to be criminal in nature, is a decision based upon a consideration of the allegation and the constituent elements of the *Criminal Code* offenses arising from the allegation. Such a decision goes to the jurisdiction of the Integrity Commissioner to continue her investigation of that complaint because the Complaint Protocol in paragraph 6(3)(a) states that a criminal allegation is to be pursued with the appropriate police service, which must mean that the Integrity Commissioner is not to pursue such an allegation. This type of decision is reviewable on a correctness standard. See *Dunsmuir* at paras. 54, 58 & 59.

The Integrity Commissioner's jurisdiction to deal with the complaint does not disappear even if the complaint is of a criminal nature

- [209] Allegations of a criminal nature will almost always allege conduct which also offends the Code of Conduct. For this reason, the Integrity Commissioner's jurisdiction does not disappear because she determines that the alleged free family cottage construction allegation is criminal in nature. Rather her jurisdiction is suspended until the appropriate police service completes its investigation.
- [210] The onus of proof in a criminal case is higher than the onus of proof in a civil matter. This means that a police service may decide not to lay charges, or charges may be dismissed because they are not provable beyond a reasonable doubt. Conduct that cannot be proven beyond a reasonable doubt may be provable on a balance of probabilities and thus a violation of the Code of Ethical Conduct may be proven despite an acquittal or a decision not to proceed with criminal charges.
- [211] If no charges are laid or the applicant is acquitted, the Integrity Commissioner's jurisdiction is restored and the Integrity Commissioner can, if she thinks it advisable, determine whether a violation of the Code of Conduct has nevertheless occurred. If charges are laid, the Integrity Commissioner will not proceed until the criminal proceedings have been completed.

The Integrity Commissioner was not under an obligation to investigate or refer the actions of the complainant to the police

- [212] Counsel for the applicant maintained that there were two violations of the *Criminal Code* disclosed by the complaint: the inappropriate relationship claim and the complainant's possession of the applicant's emails.
- [213] While not referenced in paragraph 35 of counsel's factum, at paragraph 90 counsel submits that:

Having received copies of the emails the Commissioner was on notice that she had an obligation in law to determine if the interception of private communications was lawful by determining whether there was consent or judicial authorization. The record does not reveal any interceptions in accordance with s.184 (2) of the Criminal Code. Therefore the Commissioner had information revealing that the complainant had committed Criminal Code offenses namely the unlawful interception of private communications pursuant to s.184 (1) of the Criminal Code and the further offense of disclosing information received from an unlawful interception contrary to s.193.1 (1) of the Criminal Code. This knowledge, in turn, required her to comply with the provisions of s.223.8 of the *Municipal Act*, namely to report the matter to the police, suspend any inquiry and notify Council of the suspension.

- [214] Accordingly, I propose to deal with this submission.
- [215] I reject this submission.

- [216] Section 223.2 of the *Municipal Act* authorizes a municipality to establish a code of conduct for members of municipal council. Section 223.3 authorizes a municipality to appoint an Integrity Commissioner to apply the code of conduct to members of Council. Specifically, the Code of Conduct for the City of Vaughan contains the following in its Introduction: “It is the purpose of this Code of Ethical Conduct to establish rules that guide Members of Council in performing their diverse roles...”
- [217] The applicant’s complaint about the fact that the complainant came into possession of some of the applicant’s emails, does not engage the Code of Conduct and the Complaint Protocol.
- [218] Section 223.8 of the *Municipal Act* provides as follows:
- 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.
- [219] Contrary to the assertion in paragraph 90 of the applicant’s factum, the Integrity Commissioner had no “obligation in law” to determine if the interception of private communications was lawful. Section 223.8 mandates the Integrity Commissioner to suspend her inquiry if she determines that there are reasonable grounds to believe that the Criminal Code has been breached. It is clear that the Integrity Commissioner did not make such a determination and until she did, section 223.8 of the *Municipal Act* was not engaged.
- [220] Finally, the Integrity Commissioner did not know the source of the emails provided by the complainant.
- [221] If the Integrity Commissioner, upon receipt of the complaint, had immediately suspended any inquiry into the complaint and called the police to investigate the complainant, her actions would have suggested that the City of Vaughan had no genuine interest in a robust complaints process.

The applicant objected to the seizure of the targeted search of his email address hosted on the City of Vaughan’s computer system.

- [222] Counsel for the applicant submits at paragraph 84 of his factum that neither the *Municipal Act* nor section 10 (2) of the Complaint Protocol permit an examination of the applicant’s emails. Counsel refers to the targeted search conducted by the Integrity Commissioner as a breach of privacy.
- [223] The applicant referred to these emails as his personal emails and claimed that the Integrity Commissioner exceeded her jurisdiction in searching those emails, without his consent or some form of judicial authorization.

- [224] I reject this argument.
- [225] There was nothing procedurally unfair or illegal about the Integrity Commissioner targeted search of the applicant's email address, hosted on the City of Vaughan's computer systems.
- [226] Section 223.4 of the *Municipal Act* confers broad powers on the Integrity Commissioner to obtain information from the municipality in the course of her investigation, including the statutory right to free access to all documents and information within the municipality that the Commissioner believes necessary for an inquiry.
- [227] The applicant's email address is hosted on the City's computer systems. The emails copied were not personal in nature. As a result, there is no reason to view them as anything other than "property belonging to the Municipality".
- [228] In addition, Section 10(2) of the Complaint Protocol provides as follows:
10. (2) If necessary, after reviewing the submitted materials, the Integrity Commissioner may speak to anyone, access and examine any other documents or electronic materials and may enter any City work location relevant to the complaint for the purpose of investigation and potential resolution.
- [229] In *R. v. Cole*, 2012 SCC 53 at para. 52 the Supreme Court recognized that although ownership of data is not determinative, an employee's expectation of privacy in relation to information stored on employer's equipment is diminished by the policies, practices, and customs of the workplace that relate to the use of computers by employees.
- [230] The purpose of the Code of Conduct is, according to its Introduction, "to establish rules that guide Members of Council in performing their diverse roles in representing their constituents and recognize Members accountability for managing City resources allocated to them."
- [231] The Code of Conduct is a guide which the City of Vaughan Council chose to impose and enforce upon itself, through the application of the procedures set out in Complaint Protocol.
- [232] The applicant, as a Member of the City of Vaughan Council, agreed and consented to the procedures in the Complaint Protocol, with the result that it binds not only the Integrity Commissioner but also those Members of Council who are investigated.
- [233] The applicant cannot now, in view of section 10(2), complain about the targeted search of the email account provided to him for his use as a Councillor.

The City of Vaughan erred in law in accepting the Integrity Commissioner's Final Report

[234] Because I am satisfied that there is no merit in any of the applicant's submissions, I reject the applicant's contention that the City of Vaughan erred in law in accepting the Integrity Commissioner's Final Report.

Conclusion

[235] This application is dismissed. The parties advised that they are not seeking costs.



MARROCCO A.C.J.S.C.



HORKINS J.



VARPIO J.

Released: SEP 19 2016

CITATION: Michael Di Biase v. City of Vaughan; Integrity Commissioner of the City of
Vaughan, 2016 ONSC 5620

DIVISIONAL COURT FILE NO.: 309/15 JR

DATE: 20160919

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J.S.C., C. HORKINS & VARPIO JJ

BETWEEN:

MICHAEL DIBIASE

Applicant

– and –

CITY OF VAUGHAN

-and-

THE INTEGRITY COMMISSIONER OF THE CITY
OF VAUGHAN

Respondents

REASONS FOR JUDGMENT

Released: DATE: 20160919