

Principles
Integrity

City of Hamilton
Report of the Integrity Commissioner regarding
Code of Conduct Complaint Against Councillor Merulla
December 11, 2020

Introductory Comments

- [1] Principles *Integrity* was appointed the Integrity Commissioner for the City of Hamilton in July 2018. We are also privileged to serve as Integrity Commissioner for a number of Ontario municipalities. The operating philosophy which guides us in our work with all of our client municipalities is this:

The perception that a community's elected representatives are operating with integrity is the glue which sustains local democracy. We live in a time when citizens are skeptical of their elected representatives at all levels. The overarching objective in appointing an integrity commissioner is to ensure the existence of robust and effective policies, procedures, and mechanisms that enhance the citizen's perception that their Council and local boards meet established ethical standards and where they do not, there exists a review mechanism that serves the public interest.

- [2] The City of Hamilton has as part of its ethical framework a Code of Conduct which is the policy touchstone underlying the assessments conducted in this report. It represents the standard of conduct against which members of Council are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one which is required in all Ontario municipalities, is an inquiry/complaints process administered by an integrity commissioner.
- [3] Integrity commissioners carry out a range of functions for municipalities. They assist in the development of the ethical framework, for example by suggesting content or commentary for codes of conduct. They conduct education and training for members of council and of local boards and can provide educational information to the public. One of the most important functions is the provision of advice and guidance to members of councils and local boards, to help sort out ethical grey areas or to confirm activities that support compliance. And finally, but not principally, they investigate allegations that a member has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report. In the City of Hamilton, Council has delegated

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the authority to the integrity commissioner to impose sanctions on members of council where warranted, following investigation.

- [4] It is important that this broad range of functions be mentioned at the outset of this investigation report. Our goal, as stated in our operating philosophy, is to help members of the City of Hamilton community, indeed the broader municipal sector and the public, to appreciate that elected and appointed representatives generally carry out their functions with integrity. In cases where they do not, there is a proper process in place to fairly assess the facts and, if necessary, recommend appropriate sanctions. In every case, including this one, the highest objective is to make recommendations that serve the public interest, if there are recommendations to be made.
- [5] Our role differs from other 'adjudicators' whose responsibilities generally focus, to state it colloquially, on making findings of fact and fault. While that is a necessary component when allegations are made, it is not the only component.
- [6] Our operating philosophy dictates the format of this report. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations, and we have done that. Procedural fairness also requires us to conduct a process where parties can participate in the review. Where possible and appropriate, informal resolution of a complaint may occur.
- [7] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have provided an opportunity to the respondent named in this Report to respond to the allegations, and where findings were made, to review and provide comment on the draft findings

The Complaint

- [8] On September 3, 2020 we were contacted by telephone by the complainant who wished to file a complaint against Councillor Sam Merulla with respect to his alleged use of foul language, swearing at her, and using his title as Hamilton City Councillor to threaten her.
- [9] We explained to the complainant that the City of Hamilton requires complainants to pay a \$100 fee before a complaint may be filed via the City Clerk's Office, and referred the complainant to the City Clerk.
- [10] On September 4, 2020 we received the Complaint Form from the City of Hamilton wherein it was alleged that Councillor Merulla used inappropriate and offensive language with the complainant, identifying himself as a member of Hamilton Council. It is alleged that these comments and conduct breach the standards expected under the Code of Conduct.

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Process Followed for this Investigation

- [11] In conducting this investigation, Principles *Integrity* applied the principles of procedural fairness and was guided by the complaint process set out under the Code of Conduct.
- [12] This fair and balanced process includes the following elements:
- Reviewing the complaint to determine whether it is within scope and jurisdiction and in the public interest to pursue, including giving consideration to whether the complaint should be restated or narrowed, where this better reflects the public interest
 - Notifying the Respondent, and providing him with an opportunity to respond in full to the allegations
 - Reviewing the Code of Conduct and other documentation including emails and internet postings
 - Conducting interviews of persons with information relevant to the complaints
 - Providing the Respondent with the opportunity to review and provide comments to the Integrity Commissioner's Preliminary Findings Report, which we forwarded on November 8, 2020.
 - On November 23, 2020 we received the Respondent's lawyer's response and have taken the comments into consideration in finalizing our Report.

Background and Context:

- [13] Great Lakes Gyrta is a company which distributes weight training equipment. Customers can go on-line and place orders for equipment. The company sells equipment manufactured in China.
- [14] On their website, there is an option to obtain a 20% discount by Pre-ordering. There is also a page explaining in detail that a pre-order may take months for delivery, and is non-refundable:

SAVE 20% WHEN YOU PREORDER

Dynamic preorder timeline = Orders will be shipped out as soon as we can fulfill them! We have put large purchase orders in and have products arriving almost weekly. Timelines for orders can range anywhere from 1 to 5 months. We have stopped putting expected timelines on the preorder info page as they were not being met (due to fluctuating timelines given to us

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from our suppliers and COVID -19 complications) so it wasn't working out very well. But rest assured, you WILL get your order.

We have put very large purchase orders in and are waiting for them to arrive. Upon arrival our priority is to send out your order as quickly as possible. This may mean partial fulfillment until the next shipment arrives.

If you can work with us on this flexible basis you can preorder your high quality products and save.

Great Lakes Girya as a company strives to sell top quality items at a fair price. When you add in a preorder sale of 20% that equates to unique situation where you can save lots of money while not compromising quality.

Win Win! You get high quality gear (at a wicked price) in exchange for your preorder.

If you want a custom preorder please email info@greatlakesgirya.com or call: 1 833 GO GIRYA

The margins on these products are very thin. We have marked them down to help people get quality gear at a very fair price. In exchange we ask you to understand the following:

A preorder is an order placed that secures the product in advance to ensure you get it. It also is discounted 20% in exchange for the uncertainty of the delivery date.

This ISN'T a regular order. It's a PREORDER that is non refundable.

We truly appreciate your business, your understanding and your cooperation.

Sincerely

The Great Lakes Girya Team

- [15] There is no 'bricks-and-mortar' retail location; rather, there is a warehouse in Kitchener, Ontario where equipment arrives from China, and is then shipped to individual customers.
- [16] On August 22, 2020 the Respondent placed a preorder of \$397 for dumbbells with the company.

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Events of September 2, 2020

- [17] On September 2, 2020 the Respondent left a voicemail message with the company, to inquire about the status of his order.
- [18] The complainant, who was employed at the company's warehouse in Kitchener, returned the Respondent's call. She pulled up the order and noted that it was a preorder. She asked if he had read the preorder information on the company's website.
- [19] He responded, 'obviously not if I'm calling you'.
- [20] The complainant proceeded to explain that delivery for preordered items may take several months, given the COVID-19 situation. She explained that this is set out in detail on the webpage, and that is the reason for the 20% discount.
- [21] When the Respondent claimed this was fraud, she suggested he should have read the website information more diligently.
- [22] The Complainant advised that he became upset and stated "*Listen here, you F***ing little punk*". The complainant advised that she cut him off, saying he could not talk to her that way, he responded: "*I am a F***ing Hamilton City Councillor and I can talk to you however the F*** I want*".
- [23] He then told her he knows the address where she works and would be "paying her a visit".
- [24] When she told him not to threaten her, he repeated that he would be visiting her at her workplace, and that she and her boss would be going to jail.
- [25] She advised that she then hung up on the Respondent and called her boss, the owner of the company.
- [26] The owner advised that he immediately called the Respondent back, and that the Respondent berated the owner in the same manner he had spoken to the complainant, calling him a F***ing punk, and identifying himself again as a Hamilton City Councillor.
- [27] The owner advised us that, following the Respondent's "rant", he waived policy and refunded the Respondent his money, advising the Respondent that they did not want him as a customer.
- [28] Documentation discloses that a refund was processed at 3:06 pm.
- [29] At 3:11 pm the owner emailed the Respondent as follows:

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Dear Sammy,

You are no longer a customer of Great Lakes Giryra. We do not wish to do business with you ever again. The way you treated my staff and myself is inexcusable, totally unprofessional and we have reported you to the Police. You have been refunded for your PREORDER.

If we hear from you privately or publicly you will hear from our lawyers.

[30] At 3:16 pm the Respondent replied, using his City Councillor email, as follows:

Your business practices are dubious and your lack of transparency should be investigated by police.

Your reviews speak for themselves and you should indeed retain a lawyer because you need one.

God bless
Thank you
Sam,

[31] Meanwhile, the complainant, upset about the incident and concerned that the Respondent might follow through on the threat to show up at her place of work, contacted the Hamilton Mayor's Office to complain, in her words, about the irate, abusive customer who claimed to be a City Councillor.

[32] The Mayor's Office, contacted on September 2, referred the complainant to the Clerk's Office to file a complaint with the Integrity Commissioner.

[33] Later that afternoon, the complainant contacted the Hamilton Police who referred her to the Waterloo Regional Police, given that her workplace is in Kitchener. She feared that the Councillor might show up at her place of work as threatened.

[34] At 5:26 pm on September 2 her call was logged by Waterloo Regional Police who initiated an Occurrence.

Events of September 3, 2020

[35] On September 3, 2020 at 8:55 a.m. Police attended at the business address of the Complainant, to follow up on the complaint of intimidation.

[36] The Occurrence report discloses that Police spoke with the Complainant and her boss, and then spoke on the phone with the Respondent.

[37] Information noted in the Occurrence report confirms that the complainant and her boss both advised the Police that the Respondent used vulgar language in his verbal exchanges with them, called her a name, identified himself as a Hamilton

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City Councillor, and told her that he would be ‘paying a visit’ to her at her place of work.

- [38] The Respondent told the Police that he did advise the Complainant he was a City Councillor, but that his reference to “*paying a visit*” was not meant to be threatening but only intended to mean “*through legal services*”.
- [39] Police cautioned the Respondent not to attend the business place, and not to have further contact through phone calls.

The Applicable Code of Conduct Provisions, and their Interpretation:

- [40] The City of Hamilton Council Code of Conduct provides an ethical guide and framework for Members of Council for conduct and behavior which promotes confidence in the office which they hold as elected officials of municipal government.

- [41] That Code of Conduct sets out as the Purpose:

A legislated Code of Conduct helps to ensure that the Members of Council share a common basis for acceptable conduct. The Code of Conduct is not intended to replace personal ethics. The Code of Conduct:

serves to ensure public confidence that the City’s elected representatives operate from a base of integrity, transparency, justice and courtesy.

- [42] Key Statements of General Principles Underlying the Code provides:

s.3(3) every Member shall perform his or her duties in office and arrange his or her private affairs in a manner that promotes public confidence and will bear close public scrutiny;

- [43] The provisions which are most relevant to our findings and analysis in this investigation are:

10.(2)(a) ...use of status as a Member of Council to influence, or try to influence, improperly, any action or decision of another person or entity to the private advantage of the Member.

11.(1)(4)(c)(i)...every Member shall treat...members of the public, appropriately and without bullying, abuse, intimidation or violence;

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Analysis and Findings:

- [44] In making findings of fact, Integrity Commissioners in Ontario adhere to the standard of proof for fact-finders in civil cases known as the ‘Balance of Probabilities’.
- [45] That standard is clearly explained in *F.H. v. McDougall*, [2008 SCC 53 \(CanLII\)](#), [2008] 3 SCR 41, 61; 2008 SCC 53 (SCC):
- In civil cases in which there is conflicting testimony, the judge must decide whether a fact occurred on a balance of probabilities, and provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result on an important issue because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on an important issue. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant...
- [46] This means it is more likely true than not that the alleged conduct occurred. This is a lower threshold than the criminal standard of proof “beyond a reasonable doubt”.
- [47] We are satisfied, on a balance of probabilities, that the alleged events occurred as reported by the complainant.
- [48] We are aware that the complainant shared the substance of her complaint with media in the City of Hamilton on the date she filed it with us. In our view, while it is neither desirable nor in the public interest to ‘try a matter in the media’, neither is it a barrier to our conducting a fair and independent investigation of the complaint.
- [49] We are also aware that the Respondent advised the media that the complaint fell outside the jurisdiction of the integrity commissioner as it was not captured by the Code of Conduct. Again, while not in our view a desirable position to be taking during the course of an investigation, neither has it been a barrier to our conducting a fair and independent investigation of the complaint.
- [50] In the course of our investigation, we carefully reviewed the timelines of the events, including times indicated on email exchanges, and probed the evidence of those interviewed.
- [51] The Respondent claims that he was calling out fraudulent sales activity – a ‘bait and switch’ technique – which lures unsuspecting purchasers.

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- [52] We are not persuaded by that assertion. Rather, the terms and conditions for preorders on the company's website, in large font, provides clear explanation for would-be purchasers to inform themselves prior to placing a preorder.
- [53] The Respondent denies that he used inappropriate language, that he called the complainant a "F***ing punk", identified himself as a Hamilton City Councillor, or threatened to come over to her place of work to 'pay her a visit'.
- [54] We find that the Respondent did utter the phrases and statements alleged in the complaint, including using the expletive in calling the complainant (and later, her boss) a "F***ing punk".
- [55] The Respondent's response is that the company is misleading and possibly dishonest in its practices, that our investigation failed to properly investigate the business practices of that company, and that they were rude to him first, so he responded in kind.
- [56] The Respondent's view is that, if a member has a "true belief", he has "an inherent right to react strongly", as he did in this case.
- [57] We find that the language used by the Respondent was inappropriate, discourteous and vulgar, and does not meet the expected standard which may 'bear close public scrutiny'.
- [58] We find that the Respondent's use of this pejorative name-calling incorporating an offensive expletive ("F***ing punk") constitutes a breach of s.3(3) of the Code of Conduct.
- [59] We find that the Respondent did identify himself as a member of Hamilton City Council in the course of his telephone call with the complainant, and then subsequently, on the telephone with her boss, the company owner.
- [60] It is reasonable to believe that he did so to intimidate the complainant in order to obtain a refund where clearly there is a no-refund policy.
- [61] We find that this use of his title and position as an elected official constitutes an improper attempt to use his status as a member of Council to try to influence the company to his private advantage, that of obtaining a refund where a no-refund policy is clearly in effect.
- [62] This constitutes a breach of section 10.(2)(a) of the Code of Conduct.
- [63] The Respondent's view is that the entire incident was a personal and private matter – "nothing to do with politics" - and therefore constitutes conduct which falls outside the Code of Conduct.

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- [64] This is not our view of the proper application of the Code of Conduct. It must be recognized that Codes of Conduct apply not only to conduct and behaviour inside City Hall, but also to the conduct and behaviour of members outside of City Hall.
- [65] There may be some circumstances where the conduct of a person who is recognized as a member of council would not be held to the standard in the Code, but most elected officials recognize that the office they hold is a 24/7 role – in other words, members do not get to ‘take off the council hat’ at the end of the day when they leave City Hall.
- [66] Under the circumstances, where the Respondent himself, by his own statement, invoked his status, there can be no question that his conduct falls within the scope of the Code of Conduct.
- [67] Elected officials are held to a high standard - some would say a *higher* standard – than the general public. The public expects this of their elected leaders.
- [68] At the very least, the public is entitled to expect civility from their elected officials.
- [69] There is no explicit provision in the Hamilton Code of Conduct which articulates an expectation that members of Council will treat the public with decorum and respect, a standard which is commonly found in other municipal codes of conduct.
- [70] Nevertheless, s.11(1)(4)(c)(i) requires members to ‘treat ...members of the public, appropriately, and without bullying, abuse, intimidation or violence’.
- [71] We find as a fact that the Respondent did not treat the complainant appropriately. His treatment of her was, in fact, abusive and intimidating.
- [72] We find that this constitutes a breach of s.11(1)(4)(c)(i) of the Code of Conduct.
- [73] The use of expletive name-calling, threatening, and use of his position to get some special treatment, in this case a refund not normally available to others, has the effect of undermining public confidence in elected office and, by extension, brings disrepute upon Hamilton City Council.
- [74] We find that the conduct of Councillor Merulla has violated the Code of Conduct in regard to conduct and behaviour that meets the standard expected of members of Council. In summary, we find that Councillor Merulla’s behaviour in this matter results in breaches of:
- s.3(3) which requires that members arrange their private affairs in a manner that promotes public confidence and will bear close public scrutiny;

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- s.10.(2)(a) which prohibits members from improperly attempting to use their influence, to the private advantage of the Member;
- s.11.(1)(4)(c)(i) which requires members to treat members of the public appropriately and without bullying, abuse or intimidation.

Concluding Remarks:

[75] An Integrity Commissioner's investigation report is not simply the conclusion of a technical exercise to determine whether there has been a breach of codified standards of behaviour. Our role is more than simply the task of bringing adjudication to grievances between individuals. As noted at the outset, we see as our highest objective in concluding an investigation to be the making of recommendations that serve the public interest.

[76] One of the most important functions of an integrity commissioner is providing training, advice and guidance to members to help sort out ethical grey areas or to confirm activities that support compliance. The integrity commissioner's role is as much about education as it is about investigation, so that municipal government can function better, and that members of the public are able to confidently conclude that members of their municipal council are acting with integrity.

[77] Sometimes we are able to resolve complaints on the basis of course correction by the member. Where the member acknowledges inappropriate conduct and commits to meaningful change, a public report may not be necessary. In such cases, only the complainant and respondent are made aware of the disposition of the matter.

[78] However, where the Respondent flatly denies the misconduct alleged, a resolution is virtually impossible.

[79] As detailed above, we are of the view that the Respondent's behaviour falls below the standard expected of the City's elected representatives.

[80] As noted, sometimes it is appropriate to allow the member an opportunity to correct his behaviour. In the appropriate circumstances, it is fair to give the member the benefit of the doubt. This is particularly true where the member acknowledges the transgression and commits to course correction in the future.

[81] That said, where there is no acknowledgement, or where there is a repeated pattern of behaviour, informal resolution is no longer in the public interest. A reasonable person who observes patterns of behaviour which is contrary to the code would

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conclude that such conduct is not to be tolerated and that there should be consequences.

- [82] This is not the first complaint involving the Respondent which we have seen during our term as integrity commissioner for the City. An earlier complaint was resolved with the cooperation of the Respondent and the complaining party, which included an acknowledgement from the Respondent that he had learned from the experience and would reign in his temper.
- [83] In the circumstances of the present matter, it is our view that a sanction is warranted.
- [84] The sanctions that may be imposed following a finding of contravention by an integrity commissioner are a reprimand, or a suspension of remuneration for up to 90 days.
- [85] The purpose of a sanction is to reinforce Council's ethical framework when education, or acknowledgement, is insufficient. In other words, the Code of Conduct must ultimately have 'teeth'.
- [86] A monetary penalty, although not remedial, can have a salutary effect and serve as a deterrent. In this regard, we would admonish the Councillor to be more mindful of his interactions with members of the public and avoid making inappropriate and threatening statements.
- [87] The conduct of the Respondent has had a significant impact on the complainant, upsetting her and making her feel fearful of her safety, so much so that she felt she needed to engage law enforcement to feel secure at her place of work. The impact this behaviour has on a complainant is a significant factor in assessing the quantum of sanction to be imposed.
- [88] We have considered the complainant's action going to the media, against our advice, as a mitigating factor in reducing the sanction. Complainants who can avail themselves of an independent integrity commissioner to handle their complaints should not seek to have the matter 'tried' in the media.
- [89] Recognizing the principles of progressive discipline which are applied when employees are disciplined for violating policies in the course of their employment, and in assessing the relevant factors, we feel it appropriate that on this occasion, there should be more than a reprimand for this violation.

Penalty:

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- [90] Recognizing that this is not the first time that we have interacted with the Respondent regarding his strong reactions in the heat of the moment, but taking a remedial approach, we would assess a 5-day suspension of pay.
- [91] The Hamilton Council Code of Conduct provides as follows:
- s.14 If the Integrity Commissioner concludes that, in his or her opinion, a Member has contravened the Code of Conduct, he or she may:
- (1) Impose the penalty of a reprimand upon the Member; or
 - (2) Impose the penalty of 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.
- [92] Having found that Councillor Merulla, the Respondent, contravened the Code of Conduct, we impose a penalty of suspension of his remuneration for a period of 5-days, to be implemented by administrative staff.
- [93] We wish to conclude by publicly thanking the parties and administrative staff, and all those who participated in our investigation. We express genuine appreciation for the sharing of time, knowledge and perspective by everyone concerned.
- [94] We will be available to introduce this report and respond to questions during the Council meeting at which this report is considered.