

Principles
Integrity

City of Hamilton

Code of Conduct Complaint Against Don Jackson,

Member, Hamilton Veterans Committee

Recommendation Report

October 21, 2021

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 Municipal Act requires that municipalities adopt a code of conduct for members of Council and for the people appointed by council to the variety of committees and other bodies that serve Council. The Act also requires that municipalities appoint an integrity commissioner responsible for overseeing the application of the applicable codes of conduct.
- [3] The Hamilton Veterans Committee is subject to the code of conduct and oversight by the integrity commissioner.
- [4] 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 and outreach for the community. One of the most important functions is the provision of advice and guidance to members 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

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recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report.

- [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 and resolution of a complaint.
- [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 the allegations, and to review and provide comment on the preliminary findings.

The Complaint

- [8] On July 14, 2021 we received a complaint submitted to us by the City Clerk on behalf of Council for the City of Hamilton which alleges that on June 29, 2021, at the respondent-member participated in a livestreamed meeting of the Hamilton Veterans Committee while driving a vehicle.
- [9] The complaint asserts that this conduct in this regard is contrary to the Hamilton Advisory Committee/Task Force Code of Conduct.
- [10] While Council’s power to appoint members to a committee, such as the Hamilton Veterans Committee, includes the power to remove that member, with respect to allegations of ethical breaches Council does not have a mechanism for ensuring procedural fairness to a member, other than through an independent investigation by the Integrity Commissioner.
- [11] Removal of a member without providing procedural fairness would in many circumstances be unfair and open to criticism that the decision to remove was arbitrary.
- [12] Council quite properly referred the complaint to the attention of the Integrity Commissioner, to ensure procedural fairness to the member, and to seek the Integrity Commissioner’s findings and recommendation following investigation of the facts.

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Process Followed for the Investigation

[13] Our investigation was governed by the principles of procedural fairness. 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 of the complaint and providing him an opportunity to respond either in writing or by speaking with the Integrity Commissioner
- Reviewing the Hamilton Advisory Committee/Task Force Code of Conduct, relevant legislation, archived meeting, and other relevant resources or documents
- Attempting unsuccessfully to engage with the Respondent for an interview
- Providing the Respondent with an opportunity to review and provide comments regarding our draft findings, although none were received
- Finalizing our Recommendation Report and transmitting it to the Respondent and Council.

Background and Facts:

[14] During the on-going COVID-19 pandemic, municipalities along with other organizations have adjusted their meeting procedures to accommodate virtual electronic meetings of council and committees in order to allow members and other participants to maintain physical distancing for safety reasons.

[15] The City of Hamilton, like most municipalities, livestreams its council and committee meetings for public viewing.

[16] The Respondent in this complaint is a member of the Hamilton Veterans Committee (the Committee).

[17] On June 29, 2021 there was a virtual electronic meeting of the Committee which was livestreamed.

[18] The Committee is supported by an administrative staff who publish the agenda, provide technical support for the virtual meeting, and record the minutes of the meeting.

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- [19] The meeting was opened to members of the Committee approximately 15 minutes in advance of the streaming start time, to allow for troubleshooting of potential connection issues.
- [20] Staff liaison supporting the meeting noticed that the Respondent was driving when he logged into the meeting.
- [21] Staff liaison asked the Respondent to pull over as it was apparent he was driving, and the meeting was about to start.
- [22] The Respondent replied that he was almost home and would just listen.
- [23] Once the livestreaming began, viewers began posting on social media about the meeting and the fact that the Respondent appeared to be driving a truck while participating in the meeting.
- [24] Posts of both screen shots and video of the livestream show that the Respondent was operating a truck while participating in the livestreamed meeting. Although a few moments into the meeting the background was adjusted to display a beach scene, it was apparent he was continuing to wear a seatbelt and move his steering wheel.
- [25] A social media post of the livestreamed meeting indicates that the Respondent participated in these deliberations, viewing and contributing to the discussion.
- [26] During the meeting, viewers exchanged views on social media posts about the conduct, while it was occurring.
- [27] For almost the entirety of the 22-minute meeting, the Respondent participated in the electronic meeting by utilizing a mobile device while operating his truck, before finally arriving home at 21:47 minutes into the meeting, just before the meeting concluded.

Relevant Policy Provisions: Advisory Committee Handbook and Code of Conduct

- [28] The issue at the heart of the complaint is whether the Respondent's conduct in operating his truck while participating in a virtual electronic meeting on a mobile device constitutes distracted driving contrary to sections 78 of the *Highway Traffic Act*, and if so, whether that breach constitutes a contravention under the Code of Conduct applicable to the Committee.
- [29] Section 78 the *Highway Traffic Act* provides as follows:

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(1) No person shall drive a motor vehicle on a highway if the display screen of a television, computer or other device in the motor vehicle is visible to the driver.

[30] The Hamilton Advisory Committee/Task Force Code of Conduct is Appendix “G” to the Advisory Committee Procedural Handbook.

[31] This Code of Conduct is a brief document, consisting of six short provisions, the most relevant of which provide as follows:

1. Good Conduct

Appointees shall act with honesty and integrity including:

- Acting in a manner that contributes to the public’s confidence in the Advisory Committee or Task Force; and
- Not engaging in conduct that may, or may appear to, constitute an abuse of their position as an Appointee.

Analysis:

[32] Once we had initiated our investigation on July 15, 2021, the Respondent was instructed to respond to us regarding the complaint, and cautioned not to communicate publicly regarding the matter.

[33] On July 26, 2021 the Respondent sent a letter of apology explaining that he was not holding the mobile device, and was merely watching the meeting. He forwarded a copy of that apology to the Clerk and asked that it be provided to Council.

[34] The apology letter offered an exculpatory statement, that he was not holding the mobile device, asserted his unblemished driving record, promised that the Respondent would not repeat the conduct (using mobile devices during future meetings while operating motor vehicles), and invited Council to treat the matter as resolved.

[35] We understand that the Respondent’s letter of apology was prompted by advice from a member of Council, which had been supported by a discussion in Council. However, it would have been inappropriate for the Clerk to place the letter on a Council agenda while the investigation was on-going. We communicated this to the Clerk, and requested the letter of apology not be provided to Council at that moment. A copy of the letter of apology will be attached to the Recommendation Report.

[36] Although an apology may be appropriate, an apology does not automatically supplant or conclude a complaint investigation, nor can it stand in the place of

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responding to the Integrity Commissioner. However, an apology coupled with the Respondent's cooperation would have allowed an expedited conclusion.

- [37] On July 28, 2021 we reiterated to the Respondent his obligation to respond to us and asked for the contact information regarding the individual who was in the truck with him during the meeting.
- [38] Despite repeated requests August 5 and August 20, we have been unable to obtain contact information from the Respondent for this witness, in order to corroborate the assertion.
- [39] The Respondent advised in his letter of apology that he is a professional AZ licensed driver with a 25-year unblemished driving record.
- [40] It is not possible in viewing the video of the livestreamed meeting to determine to what degree the Respondent focused on the operation of his truck. We did note that he had both hands on the steering wheel most of the time.
- [41] We did also note, however, that the Respondent frequently looked at his mobile device to participate in the meeting. His conduct clearly breached the acceptable standards of motor vehicle safety, and appears to break the law against distracted driving. The public display of his conduct warrants public condemnation, if not sanction.
- [42] This cannot be less so because the action is that of a professional driver.
- [43] It must also be noted that the City of Hamilton has promoted, as recently as this spring, the importance of avoiding distracted driving.
- [44] On April 8, 2021, the City of Hamilton launched a campaign to curb distracted driving. Part of the Vision Zero Action Plan, the following media statement was promoted on the City's website:

Just Drive: City launches distracted driving education campaign

APRIL 8 2021

HAMILTON, ON – This month, the City of Hamilton is launching an educational initiative targeting distracted drivers. As part of the joint Vision Zero Action Plan, this initiative is focused on transforming roadway safety with a simple goal: zero fatalities or serious injuries on roadways. Vision Zero emphasizes safe speeds, safe roads, safe vehicles and safe drivers.

Distracted driving is more than just using cell phones for calls or texting. It can include any activity that impairs a driver from safely operating their vehicle.

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Throughout the month of April, the City is sharing the following tips for a safer commute:

- Only use your cell phone when you're parked, have a passenger make/take the call, or let it go to voicemail.
- Turn your cell phone on silent or leave it in your bag to reduce the urge to reach for it.
- Set your GPS and preset your radio before leaving.
- Avoid other distractions like reading, grooming, eating/drinking, tending to children/pets.

[45] As noted, 'distracted driving' is an offence under s. 78 of the *Highway Traffic Act*.

[46] The *Municipal Act*, s.223.8, provides that, where there are reasonable grounds to believe that there has been a contravention of any other Act or of the Criminal Code, the Integrity Commissioner, shall "*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*".

[47] The legislation has been interpreted by the Divisional Court¹ to clarify the powers of the Integrity Commissioner in these types of circumstances. The court has held that although the Integrity Commissioner must refer allegations of a criminal nature to the appropriate police service, and suspend investigation of those matters, the integrity commissioner retains jurisdiction. Following disposition of any charges, the Integrity Commissioner may continue the investigation.

[48] In such circumstances, even where the charges are dismissed, withdrawn, or are not proceeded on, the Integrity Commissioner may still make findings on whether the Code of Conduct was violated. This is because:

- Bearing in mind the available evidence and the standard of proof required of criminal proceedings, it may well have been that the police or the Crown decided not to pursue charges because of the insufficiency of the evidence for proof in Criminal Court. The conduct and behaviour however, can still constitute a serious breach of ethical standards expected of Members of Council or of Council committees (adjudged at the civil standard of proof), and warrant a public reprimand or monetary sanction
- The matter may give rise to an opportunity for relevant recommendations from the Integrity Commissioner in addition to any that might involve the imposition of a sanction on the respondent councillor, or for public education, or for a 'clearing of the air' should the matter have been a matter of public discussion.

¹ Michael Di Biase v. City of Vaughan, 2016 ONSC 5620, Divisional Court, pg.28, paras.194-221

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- [49] In all circumstances, where inappropriate conduct or behaviour of a member is alleged, it is appropriate that the complaint be made to the Integrity Commissioner. The Integrity Commissioner can then determine which aspects of the complaint are, on their face, criminal or quasi-criminal in nature (such as with respect to *Highway Traffic Act* matters) and refer those to the appropriate police service, while potentially pursuing an investigation of the balance of the complaint.
- [50] Such a process recognizes that public resources supporting the administration of justice are scarce, and where warranted an administrative law solution is more appropriate than one involving an over-burdened court system. It also recognizes that a timelier outcome better serves the public interest.
- [51] When the matter was brought to the attention of the GTA Traffic division of the OPP, the responding officer indicated that they were disappointed upon seeing the video, but that no charges were being laid. Had there be an intention by the OPP to pursue charges under the HTA, we would have held our investigation in abeyance pending their disposition.

The Respondent's Lack of Cooperation

- [52] It is important to note for Council's information that the Respondent refused to answer reasonable questions we asked in seeking to understand and corroborate the Respondent's justification for his actions.
- [53] While we are aware that the Respondent travels for a living, his failure to respond to our repeated requests impeded our investigation.
- [54] A failure to respond also denies any opportunity to seek a purposeful informal resolution.
- [55] We have been left, therefore, to make recommendations on sanctions.

Summary of Findings

- [56] We are satisfied that there is sufficient evidence, both on video and through the corroborating admission by the Respondent, to indicate that he was indeed operating his truck while participating in a virtual electronic Committee meeting using a mobile device.
- [57] This is not a situation where a member used his cell phone while driving in breach of distracted driving laws, when going about his personal business.
- [58] Rather, it was the member's participation in the livestreamed Committee meeting which captured the attention of viewers, staff and other members of the Committee.

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- [59] That conduct bears on the public's confidence in the Committee and its members.
- [60] We find that the conduct contravened the Respondent's obligations under the Code of Conduct to act with *integrity*, in a manner that "*contributes to the public's confidence in the Advisory Committee or Task Force*".
- [61] An apology from the Respondent is certainly in order, but more importantly, an acknowledgment that participating in a meeting using a mobile device while driving constitutes inappropriate and unsafe conduct, regardless of whether the mobile device is held stationary or by another person.

Recommendations and Concluding Remarks:

- [62] An integrity commissioner may recommend that sanctions be imposed, including a reprimand, or a suspension of pay for up to 90-days. The position on the Hamilton Veterans Committee being unpaid, a sanction which included suspension of the Respondent's pay would be of no practical effect.
- [63] In our view, although we are prepared to accept that the Respondent sincerely regrets the repercussions of having been observed participating in the virtual meeting while operating his vehicle, that is not a full response to the allegation. His lack of cooperation, particularly his failure to respond to our requests for information and corroboration, made it impossible to properly assess the circumstances outlined in his apology.
- [64] A reprimand might be appropriate for the inappropriate conduct of participating in a virtual meeting while operating a commercial vehicle. However, the Respondent's dis-engagement during our investigation raises a further concern. At best, it reflects a clear failure to understand adherence to ethical standards, and his responsibility to respond to a complaint when one is made to the proper authority. At worst, it is tantamount to contempt or obstruction.
- [65] In the circumstances, given the Respondent's breach of the code of conduct in relation to a matter of significant public interest, his failure to participate in our investigation, to acknowledge the applicability of the code of conduct, and to engage with us on whether the apology represented a meaningful resolution, it is appropriate that the Respondent be requested to relinquish his role on the Hamilton Veterans Committee.

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- [66] In the event that the Respondent does not resign, it falls within Council's jurisdiction to determine whether to revoke his appointment.
- [67] The Respondent has been in possession of our draft Findings report since October 5, 2021, and will receive a copy of this Report, including its recommendation, on the day it is provided to the City Clerk.
- [68] Accordingly, it is recommended:
1. That in the event Don Jackson does not resign his appointment to the Hamilton Veterans Committee by the date this Recommendation Report is considered by Council, that Council consider revoking the appointment.
- [69] We wish to conclude by publicly thanking everyone who participated in our investigation.
- [70] We will be pleased to be available virtually at the Council meeting where this report is considered.

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Letter of Apology Transmitted July 26, 2021
(not circulated)

“Attention of the City Clerk, could you kindly add this letter to the next Council agenda. Thank you

To the attention of the City clerk and the Integrity commissioner for the City of Hamilton

I would like to take this opportunity to apologize for any repercussion this may have brought to City Of Hamilton it's employees or Councillors. I will ensure there will be no use of mobile devices during future meetings while in operation of a motor vehicle of any kind. I now know this has caused some repercussions fir the city and I deeply apologize for such.

I would like to take this opportunity to explain the situation that occurred on June 29, 2021 during the Hamilton Veterans committee online zoom meeting.

I was driving my own personal company vehicle, however I was not in anyway touching my mobile device while in operation of the truck. I did have one of my laborers in the truck with me that was controlling and changing what I needed on the device. If need be, I can obtain a written statement from my labour [redacted] that will confirm he was the one that was operating my mobile device from the passenger seat of my personal work truck. I had a Bluetooth headset in my ear to listen to the conversation of the meeting. I also had my seatbelt on at all times. It may look like I was focusing on the screen however I was watching my mirrors which I do every 20-30 seconds as a professional AZ licensed driver I was taught to do so in my training and has become a usual thing for me.

I am the owner of Sign Service & installations and that was my personal Ford F550 work truck. I was on my way back from Burlington to Hamilton area at which time I had already been connected to the meeting which the general public had not seen as our meeting starts about 15 minutes before the general public is invited to view. At this time is when the media made references to what was thought I was operating my motor vehicle while using a handsfree device.

I want to reassure everyone that I had my full attention on the road during the entire meeting. Please note, I have been driving for 25 years and have never had an accident or even a fender bender nor been charged with a traffic violation (more then 15km over).

If there is anything I can do further, please do not hesitate to either contact me directly at [redacted]

Don Jackson
Operations manager
Sign Service & Installations”