



April 27, 2015

Ms. Kimberley Kitteringham
City Clerk
City of Markham
Anthony Roman Centre
101 Town Centre Boulevard
Markham, ON L3R 9W6

Dear Ms. Kitteringham:

Re: Integrity Commissioner Complaint Reference Number MIC-001-1214

I was retained by Mr. Howard Shore to represent him with respect to the above-referenced *Code of Conduct* Complaint against him. In accordance with the Complaint Protocol, and correspondence received from the Integrity Commissioner, Mr. Cameron, Mr. Shore was provided with a draft of the Report now coming before Council, and given until Monday April 20 to respond thereto. On April 20, 2015, I provided to Mr. Cameron a detailed 10 page written submission, along with 18 further pages of additional information, all of which was delivered to him via email at 3:43 pm that day, and acknowledged by his office at 3:59 pm.

On Friday, April 24, 2015 at 10:45 am, Mr. Shore received the final Report via email from the City and provided it to me shortly thereafter. Upon receipt of the Report, I was dismayed to see that it appears to be identical to the original draft report to which I had responded four days earlier, and even more disappointed to see that the report was in fact dated April 20, the very date of my timely submission, leaving me, reluctantly, to question the extent to which that detailed submission was in fact considered by the Integrity Commissioner at all prior to his issuance of the Report.

My client and I are of the view that it is essential for Council members now exploring this matter to be aware, not only of the above-referenced concern, which would appear to render the protections provided in section 4. VI. of the Investigation Protocol (requiring an opportunity for the subject of the Investigation to comment on proposed findings and recommended sanctions) somewhat illusory, but also to apprise them of the full nature and extent of the submissions that appear not to have been taken into account in the Commissioner's Report, and certainly not addressed in its body.

What follows, then, for the benefit of Council Members, is a re-framing and supplementation of those submissions into a response to the Report, on behalf of Mr. Shore.

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Preliminary Objection:

Jurisdiction in Respect of a Complaint Against a Former Member

It is the position of Mr. Shore that the Integrity Commissioner had no jurisdiction to investigate the Complaint against him, as he is not presently, nor was he during the course of the investigation, a Member of Council. As a former Member, the Code of Conduct, and the Investigation Protocol are of no application to him.

This assessment is consistent with the specific terms of the Council *Code of Conduct*, the *Municipal Act, 2001*¹, and the *Public Inquiries Act, 2009*². None of these instruments makes reference to or otherwise grants jurisdiction in respect of a former member of the City Council, and “former members” should not be implied into the specific wording adopted by Council and the Ontario Legislature.

In particular, the relevant provisions of the *Municipal Act*, Sections 223.1 to 223.8, make no reference whatsoever to “former members”, only to “members”. Similarly, the Markham *Code of Conduct* contains a specific definition of “Member” in section 1, as meaning “a Member of Markham City Council”. This is in contrast to comparable legislation regulating the conduct of members and former members of the Legislative Assembly of Ontario, the *Members Integrity Act, 1994*³, which in fact contains abundant references throughout, making specific references to former members of Cabinet or the Legislature when specific reference to such individuals is required, and in other places, making specific references to members, when only current members are intended.

A similar pattern exists in the *Municipal Conflict of Interest Act*⁴, which makes repeated and express references to “members” and to “former members”, wherever both are intended. Indeed, it is clear from a reading of Section 10 of that legislation that the Legislature was most careful, when it intended to capture the conduct of both members and former members, to set that out in the most explicit of terms. I would submit that it borders on the inconceivable to think that the Legislature would have been so precise in its references in legislation that overlaps the Code of Conduct so closely in subject matter, and yet would leave the term “former members” out of the *Municipal Act*, if it had in fact intended that they be included at all.

The very nature of the penalties contemplated in the applicable sections of the *Municipal Act* (reflected in section 19.2 of the Code) is consistent with this view. If one is found to have contravened the Code of Conduct, one may either be reprimanded, or have his or her pay suspended for a period of up to 90 days. But by virtue of the fact that a former member does not currently hold office and receives no pay, a former member cannot be subject to a suspension of pay, and there is little internal coherence in a scheme that

1 SO 2001, c 25

2 SO 2009, c 33, Sch 6

3 SO 1994, c 38

4 RSO 1990, c M.50

provides only for the lesser penalty of a reprimand, based only on the differentiation between a member and a former member, even where that differentiation appears nowhere in the legislation or in the Code. This point is reinforced, if one considers how easy it would have been to write the law so as to impose a direct financial penalty or fine instead of a suspension of pay.

In fact, the Conflict of Interest Commissioner for the Province of New Brunswick recently came to that exact conclusion in his December 5, 2014 report on a conflict of interest claim against a former member of the New Brunswick Legislature⁵.

Commencing at page 4 of that report, the Commissioner provides an extended consideration of his jurisdiction to consider the complaint after the MLA who was the subject of the complaint no longer held office. In particular, the Commissioner pointed out that the definition of “Member” within the enabling legislation was framed only in the present tense. He identifies a number of provisions in that legislation that do make reference to a “former member”, but then points out in paragraph 37, that apart from those specific sections, “There are no references, direct or indirect, that give the Commissioner the authority to pursue an investigation and inquiry into an allegation of conflict of interest of [sic – it appears “or” was intended] a breach of the Members’ Conflict of Interest Act.”

The Commissioner went on to draw further support for his conclusion in finding that of the four possible sanctions contained in that legislation, two of them could only apply to a sitting member. As a result the Commissioner concluded that he had no jurisdiction to consider the Complaint.

It is my contention on behalf of Mr. Shore, that his case is indistinguishable from the New Brunswick matter, and that the reasoning of Mr. Justice Landry applies here. If this is so, then as a matter of law, the Commissioner had no jurisdiction to investigate the matter or to submit the Report of April 20, 2015. Council should therefore decline to consider it outside of an *in camera* meeting, and should decline to adopt it or distribute in any form whatsoever.

Please be advised that, should Council release the Report in any form to any person not already privy to it, Mr. Shore has been advised that, because of the lack of jurisdiction of the Commissioner, the City of Markham has no authority to do so, and may be held liable by him for its defamatory content. Mr. Shore has confirmed to me his instructions to commence legal action against the City should it be so published.

5 Report to the Speaker of the Legislative Assembly of New Brunswick of the Investigation by the Hon. Alfred R. Landry Q.C., Conflict of Interest Commissioner into Allegations by Mr. Domenic Cardy, Leader of the New Brunswick New Democratic Party of Violations of the Members’ Conflict of Interest Act by Mr. Greg Davis, MLA for Campbellton-Restigouche Centre
<https://www.gnb.ca/legis/business/currentsession/58/58-1/LegDoc/Eng/December58-1/ReportCardy-Davies-e.pdf> (hard copy enclosed).

Compliance with the Process Mandated in the Code of Conduct and the Investigation Protocol

It is, further, most troubling to Mr. Shore, and I would suggest, it should be most troubling to Council members, that the Commissioner appears not to have complied with the Investigation Protocol mandated by the Markham City Council. The Protocol requires, in section 1, paragraph III, that a request for an inquiry must set out all reasonable and probable grounds for the allegations, and include a supporting affidavit setting out the evidence in support of the complaint. Section 2, paragraph II provides that if such an affidavit is not included, the Integrity Commissioner shall defer further review until such an affidavit is received. Section 4, paragraph IV provides that when the Integrity Commissioner is proceeding with the matter, he is to serve the complaint and supporting material upon the Member whose conduct is in question. In this context, “supporting material” must include any affidavit.

Mr. Shore was provided with no supporting material whatsoever, just a letter from the Integrity Commissioner, setting out some details of the Complaints, but in fact, there are in some cases, more details about the Complaint in the Report, than in the initial correspondence he received, notifying him of the case having been brought against him. He was provided with no names of his accusers, and no affidavit, despite the fact that the Protocol requires one, and if one were to presume that one exists, then one must presume that it constitutes “supporting material” that the Commissioner was required to serve upon Mr. Shore.

Moreover, if there was no affidavit, then the Protocol required that the investigation not continue in its absence, and for the Commissioner to have continued the Complaint nevertheless, would be without proper jurisdiction. Please see the previous section with respect to our position on the implications of the release of a Report issued without proper jurisdiction to do so.

Findings as to Credibility

In the Report, the Commissioner made adverse findings about the credibility of Mr. Shore. He did so without ever having spoken to Mr. Shore, although he indicates that he spoke to others who had negative things to say about him. The Commissioner appears to have obtained this “information” from them without so much as taking their evidence under oath, something he had the authority to do under the *Public Inquiries Act*. Mr. Shore had no opportunity whatsoever to respond to those accusations, given that his accusers were not named, and that the circumstances of their allegations were never disclosed to him.

Nor did Mr. Shore have any opportunity to cross-examine any of these witnesses, either personally, or through legal counsel. Further, while the Commissioner heard directly from several individuals, presumably including the Complainant, a similar opportunity was not extended to Mr. Shore as the individual under investigation, and whose reputation is at risk as a result of this process.

Accordingly, the comments contained in the Report under the heading, “Credibility”, are

improper, and are made in clear violation of the Commissioner's obligation to hear both sides of the story and to permit someone accused of doing something wrong to confront his accusers, or at least challenge the validity of what they are saying. In coming to an adverse conclusion about Mr. Shore's credibility, the Report's conclusions are defamatory of Mr. Shore, and unjustifiable as a proper exercise of the Commissioner's jurisdiction, in light of the failure to permit Mr. Shore an adequate opportunity to respond to the accusations. They are, in short, actionable.

The Specific Complaints

Complaints 1, 2, 3, 4, 5, 6, 11, and 12

The Commissioner concluded that all of the above-referenced complaints lacked merit insofar as there was insufficient evidence (Complaint 1), the facts alleged predated the coming into effect of the Code (Complaints 2, 3, 4 and 11), he was unable to determine the facts to his satisfaction (Complaint 5) and no violation of the Code was made out (Complaints 6 and 12).

None of the details of those Complaints should properly be included in the Report.

Section 3 of the Protocol sets out the principle whereby if the Commissioner is of the opinion that there are no sufficient grounds for an investigation, either before, or during the course of an investigation, the investigation is to be terminated, and the Commissioner is not to report to Council in respect of such complaint except in exceptional circumstances, or as part of an annual or periodic report. The principle is further reflected in Section 5, which directs that where a complaint is dismissed, the Commissioner is not to report to Council, with the exception again, of exceptional circumstances, or annual or periodic reports. The reporting of ANY of the details of these Complaints is, accordingly, in violation of the Protocol.

It may be helpful in this context, to review for the benefit of Council Members, the principle underlying the non-disclosure of Complaints that are not sustained.

Regardless of who is complained of, it should be apparent that complaints about elected (or formerly elected) politicians may be anticipated to be motivated at least in part by political factors, if not outright political partisanship. Indeed, in many cases, the making of a complaint may itself be seen to be a political act, taken for the purpose of impeding or impairing that politician's future electoral prospects in some way.

Moreover, in the political context, I would assert that an accusation can be as damaging to a reputation and to future prospects as can be a conviction or an adverse finding. I draw that conclusion because of the ability of media to present allegations almost as if they are fact, and to give credence to clusters of accusations as supporting the conclusion that with such a large amount of smoke, there must be a fire. Accordingly, as discussed below, accusations against sitting politicians or candidates that are found to be without merit are rarely if ever disclosed by investigatory authorities at other levels of the political process.

In the context of allegations made against politicians at both the federal and provincial levels, the Chief Electoral Officer of Canada, the Commissioner of Canada Elections, and the Chief Electoral Officer of Ontario all have investigatory models that do not disclose for public consumption the fact that an accusation has been made or an investigation commenced. With the most limited of exceptions, these investigations are carried out by the respective agencies with a high degree of discretion, if not outright secrecy, in order to avoid besmirching the reputation of the affected candidate.

These complaints should not be referenced in any way, in the Report. For the Commissioner to have done so is outside of his authority granted in the investigation Protocol, and specifically contrary to the direction given to him in Sections 3 and 5.

Complaint 7

This Complaint relates to a community meeting at Glencrest Park on August 14, 2014.

While at the end of the day, Mr. Shore reimbursed the City for his estimate of the expense, there remains, at minimum, some ambiguity as to where the line is to be drawn between the role of a City Councillor who continues in office during the election campaign (in stark contrast to federal and provincial politicians, who cease to hold office when writs of election are issued) and the proper constraints that must exist upon that individual as a candidate. In the municipal context, the Councillor continues to have duties to perform in representing and in assisting constituents, and it appears from the undisputed information provided by Mr. Shore to the Commissioner, that Mr. Shore had, at the request of some residents, been convening a meeting of constituents who live near this park, regarding which there was an issue of some sort. At its worst, the characterization of the event as either a proper service of the Councillor to his constituents, or as a campaign event, is a debatable point.

The Commissioner found a technical contravention. The Commissioner did not, however, address the point made in the previous paragraph, as presented to him in my prior submission on Mr. Shore's behalf. Councillors should therefore conclude that there is simply no means of determining whether a breach of the Code took place, and that this Complaint should have been completely dismissed. It should not, accordingly, be disclosed, or made public in any form.

Complaint 8

This Complaint relates to the Movie in the Park event held on September 6, 2014.

As Councillors will recognize, during the campaign period, the activities of a City Councillor must be looked at in the context of the Councillor's dual character, as both Councillor and candidate. The movie event in question was an annual event that Mr. Shore had conducted for the benefit of his constituents from the time he was initially elected. While it is acknowledged that an event of this nature should remain nonpartisan, this requirement was in fact acknowledged through Mr. Shore's conduct in attempting to obscure with duct tape the electoral exhortation on the recycled signs that he was using

from the previous campaign. Further, the website referenced in the Draft Report, www.howardshore.ca, was in fact the same website that he had used on material for the event in previous years, as it was a personal website that he utilized during those times for purposes of constituency relations. It is conceded that, in an ideal world, he might have established, for his re-election campaign, a separate web domain, or might have thought to use more copious amounts of duct tape to cover the web address on these recycled signs.

Mr. Shore made good faith efforts to keep the event non-partisan, and the Commissioner concluded those good faith efforts to have been insufficient.

As referenced above, Mr. Shore has been unable in some respects to identify his accusers from the sparse information provided to him by the Commissioner. In particular, this has placed him at a significant and unfair disadvantage in attempting to respond to the statement in the Draft Report to the effect that: "He also asked at least one person at the event for her support and she replied that she would not support him and that she would stay out of the election". He has no idea who claims this to be so, and cannot respond to an accusation of this nature in the abstract. The Commissioner, in the response to him of April 20, was asked to provide the identity of the accuser, and the full detail underlying the accusation quoted above. The Commissioner did not reply, and simply issued his report. This denial of sufficient information to permit a coherent response constitutes a denial of natural justice.

The former Councillor's efforts to conduct himself properly in good faith are reflected in the enclosed email exchange of August 11, 2014 to August 12, 2014, between Mr. Shore and Martha Pettit, the Deputy Clerk of the City of Markham, responsible for the election in her capacity as Deputy Returning Officer, in which he solicited her advice and direction with respect to the nature of the publicity for this event and another. Enclosed with his email to Ms. Pettit was a copy of the promotional material for the previous Movie in the Park, as well as the material for his annual community ball hockey tournament. It is of particular note that the material for the ball hockey tournament included both Mr. Shore's usual graphic, and the website address at issue. In her response to Mr. Shore, Ms. Pettit did not identify the website address as a concern at all, focusing instead upon the use of official portraits of Mr. Shore paid for by the City. He complied with her direction.

Mr. Shore continued to make good faith best efforts to operate within proper applicable constraints throughout the campaign. He has provided a further example of this, contained in an additional email exchange between himself and Ms. Pettit, of September 8, 2014 to September 9, 2014 (copy enclosed). In that exchange, he sought the input of the Deputy Returning Officer with respect to an annual advertisement that he had run for the Thornhill Village Festival and the Terry Fox Run. During the election period, he intended to run the ad and pay for it from his personal funds. Ms. Pettit identified no concern, other than that he should anticipate the ad being seen as electoral in nature, something that would be acceptable if paid for as part of the campaign. This level of diligence should be seen as a *bona fide* effort to comply with rules that are not always crystal clear.

Incidental campaign related references on the signage, and a single reported (but not fully disclosed) claim that Mr. Shore asked somebody for their support that day, are insufficient

to convert the community event into a campaign event. Coupled with Mr. Shore's due diligence in consulting with the Deputy Clerk, if Mr. Shore erred at all, it is clear that his conduct falls within the "Not Blameworthy" provision, Section 6 of the Investigation Protocol.

Complaint 9

This Complaint relates to Mr. Shore's alleged conduct at City Hall on September 17, 2014.

For the reasons discussed above, relating to the sensitivity of accusations against a politician, it is respectfully submitted that the recounting of the circumstances giving rise to this Complaint, as contained in the Report, should have been limited to those aspects of the issue of particular relevance to the contravention identified. In this circumstance, the essence of the complaint is of campaigning on municipal premises. It is therefore problematic that the Report contains a vivid passage about the aftermath of the admittedly relevant allegation, of Mr. Shore having asked an individual well known to him as a personal acquaintance (referred to below as "Mr. D"), to accept an election sign. While that element of the episode might have been relevant to section 17.1 of the Code, it is notable that the Report neither makes comment nor implicitly rules upon that aspect of this Complaint, and accordingly, the inclusion of this part of the encounter in the Report is unwarranted and inappropriate. It certainly should not be included or repeated in any document made accessible to the public.

The entire gist of the adverse finding is that Mr. D, a personal acquaintance of Mr. Shore, complains that Mr. Shore "casually" approached him and asked for support and to place an election sign on his lawn. This, it is asserted, falls afoul of section 12.1 mandating that Councillors not use city resources for election-related activities. I would strongly suggest to Council Members that the entire purpose of this provision is to prevent Councillors from utilizing unfairly and for partisan purposes, City resources to which they have access. It was never intended to cover, nor can it possibly be seen to limit, any and all communication at public events taking place upon city property. Given that this was, in fact, a public event, any candidate for elected office was entirely free to attend and converse with others who were in attendance. If this provision were to be applied to such conversations, it would have the opposite of its intended effect, in that candidates for office who were not incumbents (and who were not therefore subject to the Code of Conduct) would be free to have such conversations, while at the same time the incumbent candidates would not. I cannot possibly think that this was the intention of Council in adopting this provision of the Code. In fact, an interpretation that prohibits such discussions, but only for incumbents, would be outright absurd. The provision cannot possibly constrain interpersonal dialogue at a public gathering. To the contrary, Section 12.1 can only apply, and must only have been intended to apply, to prevent incumbent Councillors from gaining an unfair advantage through the inappropriate utilization of City resources.

For this reason alone, Council should reject the conclusion drawn in the Report on this matter. But even if there were to be seen to be some degree of overstepping, the fact of the matter is that the Complaint still relates only to a single brief conversation that would fall

within section 6 of the Investigation Protocol, as “trivial or committed through inadvertence or an error of judgment made in good faith.”

There was no breach, and no penalty should be imposed in any event.

Complaint 10

This Complaint relates to the alleged conduct of Mr. Shore in his role as Chair of the German Mills Meadow Natural Habitat Liaison Committee.

Specifically, this Complaint alleges a contravention of Section 17.2 of the Code. The provision reads as follows:

“Members will be respectful of other Members, staff, and the public and their views and will encourage others to do the same.”

The allegations, as set out in the initial correspondence that Mr. Shore received from the Commissioner, and in the Draft Report that was shared, are essentially that in chairing this Committee, Mr. Shore adhered to the view that only the Council members who sat upon this Committee were voting members. In his response to the Commissioner of February 17, 2015, Mr. Shore set out some detail of the guidance on this subject provided by the City Clerk to Mr. Bob James in an email dated June 4, 2014 (copy enclosed). It is of note to point out the Clerk’s characterization of the concerns in full:

“In terms of the operational rules for this Committee, I was advised that at the first meeting of the Committee, members consented to dispense with procedural formalities and operate on a more informal basis (especially given that the intent of the Committee was to focus on communication issues). I have now had an opportunity to speak with the Committee Chair as well as staff representatives to clarify the governance framework for the Committee. I am confident any procedural concerns you have raised with respect to quorum of voting right for members will be resolved for future Committee meetings.”

After this guidance and clarification was provided, Mr. Shore followed the Clerk’s direction, except insofar as Committee members attempted to overstep the jurisdiction of the Committee and override a formal decision already made by City Council.

Mr. Shore has never been made aware of any allegation to the effect that he had asserted his opinion in a manner that was disrespectful of anyone involved. To the contrary, in the context of a situation that was most assuredly contentious, the matter appears in its entirety to be about a difference of opinion. Section 17.2, in its meaning and intention, establishes a rather desirable rule about civility. It cannot be read so as to suppress disagreement, even if spirited, and as such, it does not capture the facts of this Complaint as it has been made known to Mr. Shore. If there is more to it, the Commissioner has not shared that information with Mr. Shore and provided him with an opportunity to respond to it. Again, he has never seen an affidavit as required by the Protocol, nor even so much as a word

from his accuser. Accordingly, Council should reject the conclusions drawn by the Commissioner, and take no action on the Complaint.

Conclusion

This is, as I understand it, the first Integrity Commissioner matter to be considered by the City of Markham. It is understandable in that context that errors might have been made and that the process mandated in the Investigation Protocol was not followed with the precision that its wording requires. It is harder to understand that the timely response to the Draft Report provided on behalf of Mr. Shore appears not to have been addressed in the slightest by the Commissioner. Under the circumstances, and for the reasons set out in detail above, it is requested that the Integrity Commissioner's report be received but not acted upon in any way. The Complaints should be dismissed.

Thank you very much for your kind consideration of this matter.

Yours very truly,

Blaney McMurtry LLP



Jack B. Siegel

JBS/aa

c. Howard Shore
Members of Markham City Council
Andy Taylor, CAO, City of Markham

encl.: Report to the Speaker of the Legislative Assembly of New Brunswick of the Investigation by the Hon. Alfred R. Landry Q.C., Conflict of Interest Commissioner into Allegations by Mr. Domenic Cardy, Leader of the New Brunswick New Democratic Party of Violations of the Members' Conflict of Interest Act by Mr. Greg Davis, MLA for Campbellton-Restigouche Centre, December 5, 2014

Email exchange of August 11, 2014 to August 12, 2014, between Howard Shore and Martha Pettit

Email exchange of September 8, 2014 to September 9, 2014, between Howard Shore and Martha Pettit

Email from Kimberly Kitteringham to Bob James, June 4, 2014