

Township of Madawaska Valley Integrity Commissioner File 2016-03

REPORT ON COMPLAINT

The Complaint

Mrs. Beverley Moore (the Complainant) alleges that Councillor Shelley Maika (the Respondent) breached the Code of Conduct, By-law Number 2014-138, in comments made at a meeting of a committee of council.

Specifically, the Complainant alleges that the Respondent breached four separate provisions of the Code:

- “Council Team Vision”
- Purpose
- section B.3(ii) (abuse of power or discrimination, intimidation, harassment, verbal abuse, or adverse treatment of others)
- section D.1 (treat every person with dignity, understanding and respect for the right to equality, and the right to an environment that is safe and free from harassment and discrimination)

The last provision was cited during the making of submissions to me, after the original complaint had been filed.

Summary

I find as a fact that incorrect statements were made about Mrs. Beverley Moore. Mrs. Moore deserves an apology. She is a dedicated volunteer who did not deserve the things said about her. I am recommending that Council apologize to her.

I do not, however, find that this situation is one properly addressed under the Code of Conduct. Conduct at meetings is properly addressed under the Procedural By-law. I am recommending additional training so that Council Members, including presiding officers, are able to ensure that meeting conduct rules are respected, upheld and enforced.

Background

The Respondent was represented by legal counsel, Mr. David Little. The Complainant represented herself.

The Complainant agreed to be identified by name in this report.

By-law Number 2017-71 appointed me as Integrity Commissioner for the Township effective June 6, 2017. It repealed By-Law Number 2016-67, which had appointed the previous Integrity Commissioner. As of that date, I inherited several complaints, including this one, filed with the previous Integrity Commissioner.

The complaint arises from a November 3, 2016, Finance and Administration Committee meeting discussing the Lakeshore Tennis Club (the "Club"). The Committee was discussing an October 21, 2016, report by the Treasurer/Deputy Clerk that provided a breakdown of the Club's revenues and expenditures and highlighted a series of unbudgeted items.

The clubhouse and tennis courts used by the Club are owned by the Township. The Complainant was the President and a long-time member of the Club.

The Club has a budget. Prior to the November 3 committee meeting, the Club budget for the 2016 year had already been approved by Council.

At the time of the committee meeting, there was no consistent reporting structure between the Club and Council. No Council Member sat on, or was required to attend, meetings of the Club.

The Club's budget comes from several sources. Some of the revenue is derived from membership fees, but fees alone are not enough to make the Club self-sustaining. Considerable amounts of volunteer labour and materials are donated to the Club and its budget is also supported by funds from the Township. Typically, the funding level was determined through consultations between the Township and the Club.

Ultimately, balancing the budget for the Club requires assumptions about anticipated revenues – membership fees, donated materials and labour – and making expenditure decisions that fall within the revenue.

Revenue for the 2016 year turned out to be substantially below what had been projected and there was not enough money to cover expenditures incurred. This was due in part to a delayed resurfacing project that resulted in lower membership fees for the year.

The parties disagree on whether the Club or the Township would be expected to bear the burden of costs when municipal employees perform work on the tennis courts, grounds and club building. The Respondent asserted that it is common sense that municipal employees have costs and, when they perform work on a project with its own budget, would draw on that budget. The Complainant, on the other hand, stated she had no authority over municipal staff workload; if Township employees performed work on the courts, grounds and club building then it was never understood that the cost would come from the Club budget.

The Club requested that the Finance and Administration Committee recommend to Council that it cover some of the shortfall. A list of expenditures over \$3000 was submitted and discussed at the November 3 Finance and Administration Committee meeting.

Members participating in the November 3 Finance and Administration Committee meeting discussed the reporting structure between the Council and the Club which, as

has been noted, is a Committee of Council. Among the topics discussed at this meeting was the limited communication between the Club and Council and lack of clarity in the reporting structure between the two bodies.

During this meeting, the Respondent made the two statements that give rise to this Complaint.

When the Mayor commented on the absence of a formal reporting structure to Council, the Respondent stated:

The problem here is that we have a woman who is going crazy buying and spending and we are paying for it.

In her attempt to establish that the reporting structure was clear, the Respondent continued:

Bev Moore is overseeing the tennis club ...The problem here is that Bev is going off on her own tangents and buying and doing and assuming that we are paying for it all. There is a budget; she was here when this budget was passed. I think that was quite clear.

These are the two comments that the Complainant alleges breached the Code.

The comments were reported in the November 9, 2016, issue of *The Valley Gazette*.

As I explain below, I find as a fact that these comments were inaccurate. Mrs. Moore was not recklessly buying and spending, she was not going off on a tangent, and she was not purporting to make spending decisions for the Township.

On November 13, the Complainant emailed the Respondent outlining her disappointment with the comments and expressed concern about how they may damage her reputation, as well as that of the Club. She requested that the Respondent provide a full retraction at the next meeting of Council and in a future edition of *The Valley Gazette*. The Respondent never acknowledged or complied with this request.

During the course of the investigation I received a large amount of evidence, information and submissions from both parties, both through written submissions and phone and in-person interviews. I have taken all of the evidence, information and submissions into account.

Positions of the Parties

In this section I am summarizing the positions of both parties. This section does not contain my findings. Everything in this section of the report is a position taken by either the Complainant or the Respondent.

Complainant's Position

The Complainant appears genuinely hurt by the comments of the Respondent. In her opinion, the comments incorrectly portrayed her as self-serving, irresponsible with

taxpayer funds, and exacerbating the financial difficulties of the Club and community. Moreover, the Complainant takes issue with the Respondent's use of the phrase "woman who is going crazy buying and spending." She feels this language evokes a stereotypical misperception that women are incapable of managing money and are prone to overspend.

To the Complainant, many of the difficulties arising in the present situation are the result of "lack of transparency and accountability" in the financial records of the Township as well as serious governance gaps between the Club – a valuable community asset – and Council.

To support her position, the Complainant has shared a considerable amount of information about the finances of the Club. She has done so in order to be transparent and to establish the lack of any financial impropriety on the part of the officers and members of the Club.

According to the Complainant, in 2016 the Club was a financial asset to the community and not a liability. She also stated that the Township incorrectly posted unrelated Township budget items to the Club account and stressed that she pre-cleared all expenditures through the Township office.

The Complainant points out that by obtaining sponsorships and donations, working with the local Member of Parliament and Township staff on a government grant, and through membership drives, organizing volunteers and contributions, accessing volunteer support and Ontario Tennis Association expertise and resources, organizing new tennis programming, and improving facilities, she generated in excess of \$104,000 on behalf of the Club. Under her leadership, the Club provided the following amounts of revenue to the Township: 2013, \$3314.10; 2014, \$6036.30; 2015, \$29,190.97; 2016, \$15,948.23. The Complainant also explains that she undertook a sponsorship programme that in two years (2015-2016) yielded donations amounting to \$35,080.36.

The Complainant notes that the Respondent's remarks were publicized through the community newspaper, online activity and by word-of-mouth in a relatively small community. In addition to serious personal distress, she believes these comments have damaged her personal image and she has since become fearful of continuing or taking on any leadership or role within the community.

She also states that the Respondent's comments were inconsiderate of the serious volunteer work that she and other Club volunteers have put in for the Community. She finds all of this to be especially problematic given the Respondent's privileged role within the community as a Councillor.

Respondent's Position

The Respondent has a very different opinion of how her comments were intended. Her central and consistent position is that she reasonably held a belief that the Complainant bore some responsibility for the financial issues being discussed at the November 3, 2016, committee meeting.

The Respondent draws attention to the staff report¹ that was being considered at the November 3 meeting. That report outlined the issue of unbudgeted expenses:

For 2016, as the court resurfacing was the project earmarked to be completed this expenditure was the only project that was placed in this departmental budget. Following the passing of the budget and at the request of the club, additional expenditures relating to the building of a deck, flower beautification and painting were incurred. As the expenses was not budgeted and had not been brought to the Committee for approval, staff made the assumption that the club understood that they would be taking the responsibility to fund these costs.

The Respondent concedes that both she and the Complainant reasonably held their beliefs. To quote the Respondent's position, communicated through counsel, she:

reasonably believed that the Complainant was part of an organized drive to improve the tennis club, and in doing so, the Complainant made assumptions about who would pay for what. She was mistaken in those assumptions. The Complainant had a reasonable view that she would get approval use membership money for purposes she recommended to Council and that Council would, or at least should, make certain decisions about budgeting.

The Respondent submitted that it does not matter who is right about the underlying disagreement as to who should pay for the various upgrades, the state of the finances of the Club, or whether sufficient governance practices are in place at Council. What matters, according to the Respondent, is that she reasonably held her views, which she says are reflected in the October 26 report from the Deputy Clerk/Treasurer that was before committee at the November 3 meeting.

The Respondent also questions the alleged impact of the statements on the Complainant, pointing to a large time gap between when the comments were made and when time the Complainant felt the consequences of the statements. In light of this gap, the Respondent believes it is wrong to attribute the alleged impact to her statements at the meeting.

Process Followed

In operating under the Code, I follow a process that ensures fairness to both the individual bringing a complaint (Complainant) and the Council Member responding to the complaint (Respondent).

¹ October 21, 2016, report of the Treasurer/Deputy Clerk.

The fair and balanced process I normally use is consistent with the requirements of the Code. The process includes the following elements:

- The Respondent receives notice of the Complaint and is given an opportunity to respond.
- The Respondent is made aware of the Complainant's name. I do, however, redact personal information such as phone numbers and email addresses.
- The Complainant receives the Respondent's Response and is given an opportunity to reply.
- The Respondent receives the Complainant's Reply and is also given the opportunity to Reply.
- After the Reply stage, I often accept supplementary communications and submissions from the, but only on the condition that parties generally get to see each other's communications with me. I do this in the interest of transparency and fairness.

This investigation differs from others in that I assumed responsibility for it after it was referred to the previous Integrity Commissioner. The previous Integrity Commissioner had already started to investigate the Complaint, interview the parties, and had prepared a draft report of factual findings.

The reason for the referral from a previous Integrity Commissioner is not at issue in this proceeding and it has no impact on my findings. It did, however, alter my process.

As Integrity Commissioner, I am responsible for ensuring that an investigation is both complete and fair to all parties involved. I also take economy and efficiency into account as I conduct my investigation to avoid unnecessary duplication of activities that may be costly to the Township.

In light of these responsibilities, I shared the previous Integrity Commissioner's draft findings of fact with the two parties and invited their comments on the factual findings. Further, that I give them the opportunity to provide me with input on how the provisions of the Code apply to those facts. I proposed this in the interest of fairness to both parties and in order to be respectful of the work that had already been done.

Both parties agreed to proceed on this basis.

I sent to both parties a letter containing draft findings of fact from the previous Integrity Commissioner. It also included additional questions on matters of fact and on how the Code should be interpreted and applied to the facts. The question of how the Code should be interpreted and applied is fundamental to this proceeding, because my authority is limited to alleged contraventions of the Code.

I provided a reasonable extension of time so that both parties could submit full and complete answers.

Both parties then had an opportunity for reply. I received reply material from both parties.

Additionally, I spoke to the Respondent by phone and travelled to Barry's Bay to interview the Complainant.

Throughout the process, I received numerous pieces of correspondence from the parties. I ended up reviewing and taking into account a large volume of material. This includes the official submissions of the parties, subsequent letters and emails, and the evidence I received during telephone and in-person interviews.

While not all material is specifically mentioned in this report, I have reviewed and considered it all, and taken it all into account in this report.

Both parties were given an opportunity to comment on a draft of this report. The Complainant has provided comments. The Respondent's counsel has indicated that the Respondent is not commenting on the draft.

Finally, it is important to note that while I invited the parties to comment on the previous Integrity Commissioner's draft findings of fact, all the findings of fact in this report are my own, made based on the evidence and information before me.

Findings of Fact

I find that the statements made about the Complainant were not accurate.

I find as a fact that the Complainant was not buying or spending on behalf of the Township. I find as a fact that the Complainant was not purporting to make spending decisions for the Township. When Township employees performed work in relation to the clubhouse, the tennis courts and the grounds, the Complainant reasonably believed they were operating based on some sort of municipal approval.

It follows, and I find, that the Complainant was not recklessly buying and spending and she was not going off on a tangent.

I find that the Complainant was a dedicated volunteer who was motivated by public service and not self-interest.

I find that that Complainant is transparent, forthcoming and committed to the cause of building up the Club for the broader community. I also find, and she had demonstrated, that she devoted a considerable amount of effort in fundraising and in volunteering for the Club, as detailed at page 4, above.

In 2016 the Complainant and her husband received the Tennis Canada Distinguished Service Award. The citation for their award read as follows:

Beverley and John Moore have operated the Lakeshore Tennis Club for five years, growing it into a flourishing community in Barry's Bay, Ontario. Increasing membership from 20 to over 200 players, the club has hosted more than 15 tournaments in the last two years and initiated week-long youth tennis camps in the summers. They have been active members of the Barry's Bay community, using the National Bank "On the Ball" program to donate used tennis balls to elementary schools and supporting Communities in Bloom. In addition, they have raised money towards replacing the courts and creating an even better environment for their members. The Moores truly have brought people together in their community and promoted healthy living through tennis.

I observe that the comments have had a serious effect on the Complainant. I find that the Complainant genuinely feels the comments have harmed her reputation and her ability to volunteer in the community.

The parties devoted a great deal of time and energy arguing whether the Respondent had a reasonable belief in her comments. I am not making a finding on this point because it is not relevant to my findings. Specifically:

- Whether or not belief in the comments was reasonable, the fact remains that the comments were inaccurate and therefore an apology is warranted.
- As I explain later in this report, whether the Respondent reasonably believed the comments does not affect whether the Code was contravened.

Issues Raised in the Investigation

I have considered the following issues:

Preliminary

- (A) Does an Integrity Commissioner have jurisdiction over statements made during a meeting of Council or a committee?
- (B) Should I consider a section of the Code not mentioned in the original Complaint?

Analysis and Findings

- (C) Is it possible to contravene the "Vision" or "Purpose" of the Code? Do these provisions create substantive obligations that Council members must follow?
- (D) If the answer to (C) is yes, did the Respondent's comments breach the "Vision" of the Code?
- (E) If the answer to (C) is yes, did the Respondent's comments breach the "Purpose" of the Code?

- (F) Did the Respondent breach section B.3(ii) by abusing power or harassing or verbally abusing another person?
- (G) Did the Respondent breach section D.1 by failing to treat every person with dignity, understanding and respect for the right to equality, and the right to an environment that is safe and free from harassment and discrimination?

Preliminary Issues

(A) *Jurisdiction: Does an Integrity Commissioner have jurisdiction over statements made during a meeting of Council or a committee?*

I do not believe that I do.

In the City of Toronto, integrity commissioners have consistently taken the position that they do not have jurisdiction over the behaviour of Council Members during Council and committee meetings. Professor David Mullan, the first municipal integrity commissioner ever appointed in Canada, noted that the *Municipal Act* requires that each municipality pass a procedure by-law² and that the procedure by-law provides a clear mechanism for enforcing decorum and orderly conduct during meetings. Integrity Commissioner Mullan concluded:³

In general, the Integrity Commissioner does not have authority under the Code of Conduct to review complaints about the behaviour of Councillors at Council and Committee meetings. The behaviour of Councillors at Council, while regulated by the Code of Conduct, is the responsibility of Council (acting primarily through the Mayor or his deputy). Absent a resolution of Council requesting the Integrity Commissioner to become involved, this self-policing is part of the statutory rights and privileges of Council.

Subsequently, Toronto's Interim Integrity Commissioner Lorne Sossin,⁴ Integrity Commissioner Janet Leiper⁵ and Integrity Commissioner Valerie Jepson⁶ have all declined to exercise jurisdiction over comments made during meetings. As Integrity Commissioner Jepson has explained:

The strong policy principle behind this approach is that the Integrity Commissioner ought not to interfere with the conduct and management of any particular meeting. This makes good sense. The Speaker, or any Chair of a meeting, requires a certain degree of autonomy to ensure that a meeting is conducted in accordance with the procedural bylaw

² *Municipal Act, 2001*, subsection 238(2).

³ City of Toronto, Report on Complaint (April 6, 2005), Integrity Commissioner David Mullan, at 4.

⁴ City of Toronto, Integrity Commissioner Annual Report-2009 (July 29, 2009), Interim Integrity Commissioner Lorne Sossin, at 12.

⁵ City of Toronto, Integrity Commissioner Annual Report-2010 (June 28, 2010), Integrity Commissioner Janet Leiper, at 4.

⁶ City of Toronto, Report from the Integrity Commissioner on Violation of Code of Conduct: then-Mayor Rob Ford (September 22, 2015), Integrity Commissioner Valerie Jepson, at 10.

and as specifically stated therein, to oversee order and behaviour of members (s. 27-43(C)). So, if a councillor uses an insulting term against another councillor, in an effort to ensure decorum, the speaker might rule the question out of order and seek some remedial measure such as an apology or – in a serious case – an ejection from the meeting. In most cases, these issues are resolved and the meeting proceeds. There would be little gained by a subsequent referral to the Integrity Commissioner to review the actions.⁷

I also note, as Toronto's integrity commissioners have observed, that federal and provincial integrity commissioners/ethics commissioners do not exercise jurisdiction over comments made in the House or in committee. In Parliament, the Legislature, and committees, responsibility for enforcing order rests with the Speakers and the committee chairs.

Madawaska Valley's Procedural By-law (see Appendix 2) sets clear rules of decorum and gives a committee chair all the tools necessary to enforce order.

Paragraph 2 of section 11 of the Procedural By-law provides that no member shall use indecent, offensive or insulting words, profanity or unparliamentary language against any individual.

Paragraphs 7 and 8 of section 10 make it the presiding officer's duty to restrain Members within the rules of order and to enforce the observance of order and decorum. Paragraphs 9, 10, 16 and 17 of section 10 give the presiding officer wide powers to maintain order, including the authority to expel from a meeting anyone who engages in improper conduct.

Section 11 of the Procedural By-law governs the conduct expected of Members of Council, Boards and Committees. It includes, among other things, a prohibition of offensive or insulting words.

It seems evident that the subject matter of this Complaint falls squarely within the boundaries of the rules and enforcement mechanisms of the Procedural By-law. Under these circumstances, and following precedent, I do not believe that I have jurisdiction over the Complaint, or, if I do, that I should exercise it.

In response to a draft of this report, the Complainant noted that she had been told that a Code of Conduct complaint to the Integrity Commissioner was the appropriate method to address her concerns, the previous Integrity Commissioner accepted jurisdiction, and at no time in the last two years was she told that the Procedural Bylaw applies instead of the Code of Conduct. I understand the Complainant's position that this can be frustrating, even (in her words) a "hardship," especially for a layperson. I want to make clear that limits of my jurisdiction in no way reflect on the Complainant or on her decision to file a Code complaint.

⁷ *Ibid.* Note that in Toronto a Speaker, chairs meetings of Council.

The Complainant suggests that, if my finding on jurisdiction is correct, then the Township Website should provide information to the public that issues arising under the Procedural By-law cannot be the subject of a Code of Conduct complaint. I agree with that suggestion and have reflected it in my recommendations, though I note that the best way to achieve clarity is to amend the Code.

To my knowledge this is the first time that this jurisdictional issue has been considered in the Township of Madawaska Valley. I will, therefore, proceed to set out my investigative findings, so that they are on the record in the event that I am wrong about jurisdiction.

(B) *Expansion of grounds: Should I consider a section of the Code not mentioned in the original Complaint?*

In this instance, yes.

In one of her letters to me, the Complainant appears to allege that the Respondent breached Code section D.1 (“Interpersonal Behaviour”) by failing to “treat every person with...dignity, understanding and respect for the right to equality, and the right to environment that is safe and free from harassment and discrimination.”

While section D.1 was not mentioned in the original complaint, it is reasonably related to the content of the original complaint. More importantly, the Respondent was made aware of the section D.1 allegation and had full opportunity to address it. There is no prejudice to the Respondent.

Analysis and Findings

(C) *Is it possible to contravene the “Vision” or “Purpose” of the Code? Do these provisions create substantive obligations that Council members must follow?*

No.

As their names indicate, the “Council Team Vision” and “Purpose” of the Code do not contain rules. The former is a statement of principle. The latter is a statement of purpose.

The Code is part of a by-law. Ordinary principles of statutory interpretation apply.

As a general matter, a statement of principle does not create an obligation. It merely states the principle(s) that may be used to interpret obligations created elsewhere in the law.⁸

⁸ *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 309 BCAC 124, 2011 BCCA 345 (CanLII), at para. 45: “Section 3(c) purports only to state a principle ... It is plain and obvious that s. 3(c) creates no legally enforceable obligation ...”

As explained in *Sullivan on the Construction of Statutes*, 6th ed.:

Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out the governing principles, norms or policies. ... However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation – that do apply to facts – are to be interpreted.⁹ [emphasis added]

I find that the Code's "Vision" and "Purpose" provide interpretive direction only, and they do not create rules or obligations on Council Members that can be the subject of a complaint. Thus, even though the "Council Team Vision" says Members "shall" do certain things (such as utilize the diverse knowledge, expertise and talents of all council members, or value congeniality, teamwork and a sense of humour) I find that the Vision and Purpose do not contain enforceable rules.

Another reason that I am not prepared to treat the Vision and Purpose as binding rules is that they are too general and unspecific to be treated as clear, enforceable obligations. Council Members are subject to penalties if they contravene the rules in the Code; it necessarily follows that the rules must be clear, certain and unambiguous. Council Members must be able to understand clearly the conduct that is required. In this respect I refer to the observations of Integrity Commissioner Swayze in City of Brampton Report L05 IN (May 12, 2015):

In my experience members of councils in Ontario are busy people serving their community and want certainty in the interpretation of the many rules that apply to them. A code, by definition, is a set of rules of behaviour and should not be interpreted by each councillor according to subjective values. The rules need to be clear and where possible, capable of only one meaning. [emphasis added]

While I do not agree that being busy is relevant to interpretation of the Code, I accept and adopt Integrity Commissioner Swayze's comments about the need for clarity, certainty and lack of ambiguity in the rules.

As for the word "shall" in the Vision, it applies to the *Council* as an entity, not to individual *Members*. Further, the language of the Vision (e.g., "value congeniality, teamwork and a sense of humour") obviously was not intended to establish substantive rules that an individual Member could contravene.

I find that the Vision and Purpose of the Code cannot be contravened and cannot give rise to a complaint.

In response to a draft of this report, the Complainant suggests that if I am correct that the Vision and Purpose of the Code cannot give rise to a complaint then the Township Website should provide this information to the public. I agree with that suggestion and have reflected it in my recommendations, though I note that the

⁹ Sullivan, R., *Sullivan on the Construction of Statutes*, 6th ed. (2014), at 454, §14.39.

best way to achieve clarity is to amend the Code.**(D) If the answer to (C) is yes, did the Respondent's comments breach the "Vision" of the Code?**

The answer to (C) is no and therefore the "Vision" of the Code is not a provision that can be contravened.

(E) If the answer to (C) is yes, did the Respondent's comments breach the "Purpose" of the Code?

The answer to (C) is no and therefore the "Purpose" of the Code is not a provision that can be contravened.

(F) Did the Respondent breach section B.3(ii) by abusing power or harassing or verbally abusing another person?

The relevant provision of the Code reads as follows:

B. Standards of Conduct:

...

3. Members of Council shall refrain from behaviour that could constitute an act or [sic] disorder or misbehaviour. Specially [sic], Council officials shall refrain from conduct that:

...

(ii) Is an abuse of power or otherwise amounts to discrimination, intimidation, harassment, verbal abuse, or the adverse treatment of others.

Section B.3(ii) consists of six separate elements, and each must be considered:

- Was there abuse of power?
- Was there discrimination?
- Was there intimidation?
- Was there harassment?
- Was there verbal abuse?
- Was there adverse treatment of others?

Abuse of power

"Abuse of power" is a legal term with a specific meaning.¹⁰ It involves intentionally injuring a member of the public through deliberate and unlawful conduct in the exercise

¹⁰ Abuse of power is also known as abuse of public office and misfeasance in public office.

of public functions.¹¹ It occurs when a public official engages in deliberate and unlawful conduct in her capacity as a public officer while knowing that the conduct is both unlawful and likely to cause harm.¹²

Abuse of power entails more than merely exceeding the limits of a statute and more than making a decision that has an adverse impact on someone. The abuse must include some element of bad faith or dishonesty.¹³

In my view, the facts do not disclose an “abuse of power” as that term is understood in Canadian law.

Discrimination

Section D.2 of the Code of Conduct elaborates on what is meant by discrimination and specifically mentions the *Human Rights Code*. Section D.2 identifies race, ancestry, place of origin, colour, ethnic origin, citizenship, religious affiliation or faith, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status, and disability as prohibited grounds of discrimination.

There is no indication that this was a situation of discrimination.

Intimidation

Intimidation means frightening or overawing someone, especially to make that person do what one wants.¹⁴ The evidence does not support a finding of intimidation.

Harassment

Section D.3 of the Code defines harassment as “engaging in a course of vexatious comment or conduct that is known, or ought to be known, to be unwelcome.”

As the definition indicates, typically harassment involves a *course of conduct* or a pattern. Unless the incident is severe,¹⁵ a single incident does not amount to a course of conduct and therefore is not harassment.¹⁶

I do not find that back-to-back comments at a single committee meeting constitute harassment within the meaning of the Code.

¹¹ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at para. 30.

¹² *Ibid.*, at para. 23.

¹³ David Stratas, “Damages as a remedy against administrative authorities: an area needing clarification” (2009), at 10.

¹⁴ Oxford Living Dictionaries.

¹⁵ *B.C. v. London Police Services Board*, 2011 HRTO 1644, at paras. 46-48.

¹⁶ *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39, at para. 73.

Verbal abuse

The Code does not define “verbal abuse.”

Author Patricia Evans has developed the following oft-quoted definition:

Verbal abuse: Words that attack or injure, that cause one to believe the false, or that speak falsely of one. Verbal abuse constitutes psychological violence.¹⁷

No standard definition of verbal abuse is found in court decisions or in human rights jurisprudence, but the human rights cases reveal a consistent approach: incidents found to constitute verbal abuse almost always included one or more of the following factors: insults based on a prohibited ground of discrimination, foul language (including foul insults), and yelling (including yelling of insults).¹⁸ Verbal abuse can sometimes consist of just a single comment, such as, in one notable case, police officer Richard Elkington calling a suspect a “f**king foreigner.”¹⁹

The human rights cases are consistent with the observation of Patricia Evans that, “Verbal abuse is hostile aggression.”²⁰

I have already found that the comments about the Complainant were inaccurate and deserving of an apology. I do not find that the comments constituted “verbal abuse” as that term has been used in Canadian jurisprudence.

Adverse treatment

Government decision-making often affects different members of the public differently. According to the Supreme Court of Canada, “public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens.”²¹ An adverse effect, *even a known adverse effect*, in and of itself, does not constitute a wrong under Canadian law; a wrong is committed when a public official acts in bad faith or dishonestly or deliberately contrary to the obligations of her office.²²

I find that “adverse treatment” in section B.3(ii) of the Code must be interpreted in a manner consistent with the foregoing principle of Canadian law. In other words, the term “adverse treatment of others” in section B.3(ii) does not apply to all adverse

¹⁷ Patricia Evans, *The Verbally Abusive Relationship: How to Recognize It and How to Respond*, 3rd ed. (Avon, MA: Adams Media, 2010), at 77.

¹⁸ *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10 (CanLII); *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRTO 14 (CanLII); *MacLeod v. Lambton (County)*, 2014 HRTO 1330 (CanLII); *Bushek v. NRS Quay Pacific Management and another*, 1997 BCHRT 5 (CanLII); *Jack v. Nichol*, 1999 BCHRT 33 (CanLII); *Fiallos v. PWD-Division of Instore Focus Inc.*, 2017 HRTO 469 (CanLII).

¹⁹ *Nassiah v. Peel (Regional Municipality) Services Board*, note 18.

²⁰ Patricia Evans, note 17, at 24.

²¹ *Odhavji Estate v. Woodhouse*, note 11, at para. 28.

²² *Ibid.*

impacts that arise from Council Members' conduct, but only to an adverse effect that results when a Council Member acts in bad faith, dishonestly, or deliberately inconsistently with the obligations of office.

The comments made at the committee meeting did not constitute adverse treatment.

(G) Did the Respondent breach section D.1 by failing to treat every person with dignity, understanding and respect for the right to equality, and the right to an environment that is safe and free from harassment and discrimination?

According to section D.1 of the Code:

Members of Council shall abide by the provisions of the *Human Rights Code* and, in doing so, shall treat every person, including other members of council, corporate employees, individuals providing services on a contract for service basis, student on placements, and the public with dignity, understanding and respect for the right to equality, and the right to an environment that is safe and free from harassment and discrimination.

As already explained, I find that the comments made at the committee meeting did not constitute harassment or discrimination. Further, there is no suggestion that the comments contravened the *Human Rights Code*.

The remaining question is whether the comments breached the requirement to treat everyone with "dignity, understanding and respect for the right to equality."

There is no indication that the comments were related to the Complainant's equality rights, and, therefore, they cannot be found to be disrespectful of the Complainant's "right to equality." The words "dignity [and] understanding," meanwhile, must be understood in the context of the entirety of section D.1. The section deals with human rights, equality, and freedom from harassment and discrimination; the meaning of "dignity [and] understanding" must be appropriate in this context. In particular, the words must be interpreted as parts of the longer phrase, "dignity, understanding and respect for the right to equality."

As the comments do not offend the *Human Rights Code* or equality rights, and do not amount to discrimination or harassment, they also are not inconsistent with the "dignity [and] understanding" obligations in the same section.

As I already have noted, I find that the comments were inaccurate and deserving of an apology. They did not, however, breach section D.1 of the Code.

Conclusion

Inaccurate statements were made about the Complainant. She deserves an apology.

In my view, however, comments made at a Council meeting or a committee meeting should not be handled under the Code of Conduct. Conduct at meetings is properly addressed under the Procedural By-law.

In the event that I am wrong on this point, I have considered whether the comments contravened the Code. While I find that the comments were incorrect and worthy of an apology, they did not contravene the Code. Because of this conclusion, it does not matter to the Code issues whether the Respondent reasonably believed the comments to be true.

Recommendations

Mrs. Moore deserves an apology for the incorrect statements. Because I find no breach of the Code, and because the matter should have been addressed under the Procedural By-law, it is not appropriate for me to recommend that an individual Council Member apologize. Instead, I recommend that Council should apologize.

In future, should offensive or insulting comments be made at a Council meeting or a committee meeting, the matter should be addressed by the presiding officer under the authority of the Procedural By-law. I recommend that Council Members be trained in the responsibilities of presiding officers.

In response to a draft of this report, the Complainant comments that a process that is supposed to be accessible to the general public has been difficult, confusing, long, intimidating, and frightening. In part based on this feedback, I am making recommendations that should in future provide clarity to both the public and Members of Council.

I recommend as follows:

- 1. That Council apologize to Mrs. Beverley Moore for incorrect comments about her that were made during the November 3, 2016, meeting of the Finance and Administration Committee.**
- 2. That the Township provide training to all Council Members in the duties of presiding officers (under the Procedural By-law) to restrain Members within the rules of order and to enforce on all occasions the observance of order and decorum.**
- 3. That, to provide greater clarity, the Code of Conduct be amended to make clear that conduct that is contrary to the Procedural By-law should be dealt with under the Procedural By-law and not as a Code of Conduct complaint.**
- 4. That, to provide greater clarity, the Code of Conduct be amended to state that the "Vision" and "Purpose" sections are aids to interpretation of the Code but are not provisions that can give rise to complaints.**

5. That the Township Website provide information to the public on how to file a Code of Conduct complaint, including information (quoting from the Code if it is amended as recommended above) on what matters do not give rise to a Code complaint.

Respectfully submitted,



Guy Giorno
Integrity Commissioner
Township of Madawaska Valley

August 9, 2018

APPENDIX 1: RELEVANT PROVISIONS OF CODE OF CONDUCT, BY-LAW NUMBER 2014-138

COUNCIL TEAM VISION:

The Township of Madawaska Valley serves the community through the provision of effective, responsible and visionary leadership.

The Council shall:

- focus on achieving a common vision and goals for the municipality;
- make sound, effective and timely decisions based upon objective data and open debate of issues;
- develop and maintain a climate where integrity, mutual support, trust and professionalism are valued;
- utilize the diverse knowledge, expertise and talents of all council members to optimal advantage;
- conduct its activities in an orderly, professional and businesslike manner;
- benefit from strong and effective leadership from the Mayor and individual council members;
- value congeniality, teamwork and a sense of humour;
- enjoy the benefits of effective communication and open sharing of information among its members;
- balance effective and diverse values, aspirations and competing interests within the community; and
- work effectively in partnership with a capable executive and staff to provide excellent service to residents and ratepayers.

A. PURPOSE OF THE CODE OF CONDUCT:

The Code of Conduct sets minimum standards for the behaviour of Council members when carrying out their functions on behalf of the municipality. It has been developed to assist council members to:

1. Understand the standards of conduct that are expected of them and the law that applies in relation to these standards;
2. Fulfil their duty to act honestly and exercise reasonable care and diligence;
3. Act in a way that enhances public confidence in local government; and

4. Identify and resolve situations which might involve a conflict of interest or a potential misuse of position and authority.

B. STANDARDS OF CONDUCT:

1. Members of Council shall at all times seek to advance the common good of the community that they serve.
2. Members of Council shall truly, faithfully and impartially exercise the office to which they have been elected or appointed, to the best of their knowledge and ability.
3. Members of Council shall refrain from behaviour that could constitute an act or disorder or misbehaviour. Specially, Council officials shall refrain from conduct that:
 - (i) Contravenes Federal or Provincial statutes or legislation, the Municipal Act, Municipal by-laws, associated regulations, and the Municipality's Code of Conduct.
 - (ii) Is an abuse of power or otherwise amounts to discrimination, intimidation, harassment, verbal abuse, or the adverse treatment of others.
 - (iii) Prejudices the provision of a service or services to the community.

...

D. INTERPERSONAL BEHAVIOUR OF MEMBERS OF COUNCIL:

1. Treat every person with Dignity, Understanding and Respect:

Members of council shall abide by the provisions of the *Human Rights Code* and, in doing so, shall treat every person, including other members of council, corporate employees, individuals providing services on a contract for service basis, student on placements, and the public with dignity, understanding and respect for the right to equality, and the right to an environment that is safe and free from harassment and discrimination.

**APPENDIX 2: RELEVANT PROVISIONS OF PROCEDURAL BY-LAW,
BY-LAW NUMBER 2013-12**

10. Duties of the Presiding Officer:

THAT it shall be the duty of the Mayor or other presiding officer:

...

7. To restrain the Members within the rules of order when engaged in debate.
8. To enforce on all occasions the observance of order and decorum among the Members.
9. To call by name any Member persisting in breach of the rules of order of the Council or Board/Committee, thereby ordering the Member to leave the Meeting.
10. To expel from a Meeting anyone who engages in improper conduct.

...

12. To inform the Council or Board/Committee, when necessary or when referred to the purpose, on a point of order or usage.

...

16. To order any individual or group in attendance at the Meeting to cease and desist any behaviour which disrupts the order and decorum of the Meeting and to order the individual or group to leave the Meeting where such behavior persists.
17. To adjourn the Meeting without question in the case of any disorder arising at the Meeting.

...

11. Conduct of Members of Council or Board and Committees:

THAT no member shall:

...

2. Use indecent, offensive or insulting words, profanity or unparliamentary language in or against the Council or against any Member, staff, guest or individual;

3. Disturb another or the Council, staff, Member, guest or individual by any disorderly conduct disconcerting to the speaker or assembly;

...

5. Resist the rules contained in the Procedural By-Law of Council or disobey the decision of the Presiding Officer or of Council or the Board/Committee on questions of order or practice or upon the interpretation of the rules of Council;

...

8. Be permitted to retake their seat after being ordered to leave a Meeting, having committed a breach of any rule of the Council and without making an apology to Council and having the consent of Council or the Board/Committee expressed by a majority vote of the other Members present, determined without debate;

...