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TOWNSHIP OF MADAWASKA VALLEY INTEGRITY COMMISSIONER,  
GUY GIORNO

**Citation:** Darbyson v. Maika

**Date:** April 8, 2019

## REPORT ON COMPLAINT

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Note: The format of this report differs from the format of previous reports to Council.

The new format corresponds to the case reporting standards of the Canadian Legal Information Institute (CanLII).

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## THE COMPLAINT

Ms Christine Darbyson (the Complainant) alleges that former Councillor Shelley Maika (the Respondent) breached the Code of Conduct, By-law Number 2014-138, during an incident that occurred in the Township office, May 2, 2018.

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

- section B.3(ii): abuse of power, discrimination, intimidation, harassment, verbal abuse, or adverse treatment of others
- section D.1: treat people with dignity and respect
- section D.2: do not discriminate
- section D.3: do not engage in harassment or bullying

## SUMMARY

A \$25 issue over karate club rent escalated into a shouting match between two individuals. Both were yelling. Both used foul language. Both threw insults.

Only one of the two individuals was subject to the Code of Conduct, but both contributed to the incident. The evidence does not support a finding that only one of them was responsible. Under the circumstances I will not find a breach of the Code of Conduct.

The incident also involved a physical struggle over a door. The *Municipal Act* is clear: if I have reasonable grounds to believe that a crime was committed then I must refer the matter to the police. I have concluded that the evidence before me does not give me reasonable grounds to believe a crime was committed. However, the Complainant remains free to take the matter to the police if she wishes.

## BACKGROUND / FINDINGS OF FACT

Findings of fact are made on the standard of the balance of probabilities, based on all the evidence before me.

In her comments on a draft of this report, the Complainant takes issue with the long review of the facts leading up to May 2, and disagrees they are relevant. I have

considered her perspective, and am including in this report the background facts that I believe are relevant to its analysis, findings and conclusions.

The terms of reference for the Combermere Recreation Committee are established by By-law Number 2013-86, as amended.

On October 4, 2017, Council amended a Finance and Administration Committee recommendation to dissolve the Combermere Recreation Committee and form a new one.<sup>1</sup> Noting that the Committee still had four active members, Council decided not to dissolve the Combermere Recreation Committee but instead to restructure it.<sup>2</sup> Councillors Carl Bromwich and Ernie Peplinski were to facilitate a public meeting to recruit new members and restructure the Committee.

I note that during the relevant time period the Committee referred to itself as the Combermere and Area Recreation Committee but the official Township minutes and agendas refer to it as simply the Combermere Recreation Committee. The distinction is not material to this proceeding.

The first meeting of the restructured Committee was held October 26, 2017, and Ms Elaine Schweig was elected as Chair. Ms Christine Darbyson was a Committee member prior to the restructuring and continued on the Committee afterward.<sup>3</sup>

At its first meeting, the Committee resolved “to form a sub-committee for Karate, to be formed at a later meeting.”<sup>4</sup>

At the next meeting, the Committee noted that the Combermere Karate Club was seeking “funding for equipment, belts and insurance twice yearly,” but it deferred consideration of the request because Ms Darbyson was absent.<sup>5</sup>

The minutes of the following Committee meeting reflect the following:<sup>6</sup>

**“Combermere Karate Club:** Christine Darbyson – request for funding for equipment, belts and insurance twice yearly.

“Christine Darbyson presented a list of club members who would be participating in the Combermere Karate Club, a registered member of the Canadian Jiu Jitsu Council, next year. Instructors pay no fees, and fee

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<sup>1</sup> Minutes of Finance and Administration Committee Meeting (September 26, 2017), item 7.2 (part).

<sup>2</sup> Minutes of Regular Council Meeting (October 4, 2017), resolution 2017-07-410.

<sup>3</sup> Council accepted the minutes of the Combermere Recreation Committee’s October 26, 2017 meeting: Minutes of Regular Council Meeting (November 8, 2017), resolution 2017-03-0811.

<sup>4</sup> Minutes of Combermere Recreation Committee Meeting (October 26, 2017), page 2.

<sup>5</sup> Minutes of Combermere Recreation Committee Meeting (November 13, 2017), item 8.

<sup>6</sup> Minutes of Combermere Recreation Committee Meeting (December 13, 2017), pages 2-3.

collection for others varies as to number of times attending the club and when they can pay. The format has been changed to reflect a yearly (based on calendar year) member commitment rather than the sessions which now exist. Christine submitted to the Treasurer the sum of \$130.00 to pre-pay insurance for the Combermere Karate Club for the year 2018. Paula will submit the monies to the Township Treasurer, and Christine will ensure correct insurance registration.

“Let the record reflect that:

“a) Christine will obtain and provide a copy of the Canadian Jiu Jitsu Council policies, procedures and guidelines and insurance policies for the committee.

“b) Christine and Paula will submit a cheque requisition for insurance/membership fees to the Canadian Jiu Jitsu Council, and Christine will provide a list of members in good standing to the Township of Madawaska Valley for insurance purposes, on behalf of and to the Committee.”

Through December 2017 and January 2018, a number emails passed among the Complainant (Ms Darbyson), the Committee Chair (Ms Schweig), the Finance Clerk (Ms Amanda Hudder), the Acting Deputy Clerk (Ms Gwen Dombroski) and several members of Council, including the Respondent and Councillors Bromwich and Peplinski. Not everyone was part of each email exchange. Many of the emails dealt with insurance coverage, including the requirements to be covered under the Township’s insurance policy and whether and how the karate instructors would be covered.

On January 8, 2018, the Committee resolved that:

“It is the recommendation of the Combermere and Area Recreation Committee that it is in the best interests of the Combermere and Area Recreation Committee and the Combermere Karate Club that the Combermere Karate Club no longer be affiliated with the Combermere and Area Recreation Committee.”<sup>7</sup>

Further emails indicated that several members of the Karate Club wished to join the Combermere Recreation Committee, but neither Ms Darbyson nor anyone from the Karate Club attended the next meeting of the Committee (February 6, 2018).<sup>8</sup>

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<sup>7</sup> Minutes of Combermere Recreation Committee Meeting (January 8, 2018), page 2.

<sup>8</sup> Minutes of Combermere Recreation Committee Meeting (February 6, 2018), page 1.

Committee meetings were held in the Combermere Community Centre. The Karate Club also used the Combermere Community Centre. The Committee had booked its February 6 meeting for 7:00 p.m. (downstairs in the community centre) after being informed that the Karate Club rental (upstairs in the community centre) ended at 7:00 p.m. The February 6 Committee meeting was called to order at 7:06 p.m. and adjourned at 9:00 p.m.

At 3:49 a.m., February 7, the Complainant sent the following email to the Respondent, Councillors Bromwich and Peplinski, the Acting Deputy Clerk, the Finance Clerk and the Fitness Facility Coordinator:

**“Our classes disturbed!!!**

“I just wanted to let you know that the NEW rec committee decided to come into the center at 15 minutes to 7 (during our rental period) and made a huge mess on the floors while we are going downstairs in our socks or bare feet with their boots... full of slush... We have the rental period until 7 pm and do not expect having strangers in our rental time.. They made themselves quite at home during this period — we have young children maybe using the bathrooms etc and do not want strangers in the hall during our rental time ... we felt violated!!!! The parents were pretty upset!

“We will not be paying for this session... as it was rudely interrupted !!!!

“Please let me know of the credit asap that we have towards our fees the parents want to know where their money is!!! Thanks very much,,, I know this is not your fault but you cannot put back to back meetings like this – we have to clean up and put things right before we leave as well... something to consider.”

She followed up with another email at 3:53 a.m:

“ps: Our quiet mediation time at the end of session could not be done from the noise and talking talking downstairs !!!!! :(”

The Respondent responded internally, to the Mayor, Councillors Bromwich and Peplinski, and a couple of others, as follows:

“I was in attendance at last night’s meeting, I will categorically state that there was NOT a HUGE mess or slush or anything of the sort from the shared stair landing to the bottom stairs and floor in the basement. There was some sand and small amount of water as one would expect in the entrance to a public building at this time of year. My compliments to our

roads staff for having the parking lot very well plowed, packed, and heavily sanded.

“Members of the committee including myself entered the building and went directly downstairs into the basement and at no time left the basement. As well, other than Christine [Darbyson] coming down into the Basement just prior to the meeting starting at 7:01 pm to question who came in with their boots on, and to generically state this was very rude, then proceed across the basement and up the backstairs, no other parent or child came downstairs at any time. In addition I will note that there are two sets of stairs into the basement. Front door and back stairs in which to get to the washrooms. Backstairs were never used by any committee member.

“But, with the above statement in mind, please share with me any policy for our public buildings that require facility users to remove their footwear at the door. Should this policy exist we will need to immediately post signage in the entrance for all members of the public entering the said building.

“In addition, if you could confirm the times of the (I am assuming pre-paid rental) of the hall by the Karate Club and if the rental was for the upstairs area or for the entire facility that would be great.

“I will assure you that, as I was the last person to exit the building last night I can confirm that the basement area was left as clean as it was found.”

The evidence also indicates that there was a disagreement over finances of the Karate Club, including whether the Club’s finances were to be separate from those of the Combermere Recreation Committee and the Township. On December 7, 2017, the Committee chair explained to the Complainant that:

“All deposits and withdrawals dealing with the Recreation Committee must go through the Committee treasurer who then deposits it with the Treasurer of the Township of Madawaska Valley. All receipts and invoices must also go through the Committee treasurer. We are responsible for keeping our books, and this gives the committee real time knowledge of our financial status which allows us to make informed decisions.”

The Complainant replied, a few days later:

“Hi Elaine, You don’t get it... the Township was our Treasurer because we didn’t have one....”

Once the Combermere Recreation Committee officially disaffiliated the Karate Club, both entities agreed that amounts (accumulated membership fees) held by the Township on account of the Club should be paid back to the Club, less the cost of any expenses that had been paid on the Club's behalf.

On this basis, the Township's Acting Interim Treasurer negotiated an agreement in which the Township would pay back to the Club the accumulated amounts (less expenses incurred) and the Club would, effective January 1, 2018, pay directly for the cost of renting space in the Combermere Community Centre.

The Acting Interim Treasurer's proposal was recommended to the Finance and Administration Committee and approved, April 30, 2018. The minutes note that the Acting Interim Treasurer, "would ensure he received a cheque for the rentals prior to releasing the payable to the Karate Club."<sup>9</sup>

The cheque for payment from the Township to the Karate Club was prepared May 1. The next day, the Complainant visited the Acting Interim Treasurer to pay the Karate Club's rental fees for the period starting January 1. The Complainant told the Acting Interim Treasurer that the Karate Club had decided to deduct \$25 from the amount because of the slush allegedly tracked into the Combermere Recreation Centre on February 6, 2018.

The Acting Interim Treasurer felt he was unable to complete the cheque exchange because of his commitment to Council to "ensure he received a cheque for the rentals prior to releasing the payable to the Karate Club."

The Complainant was inside the Treasurer's office loudly complaining about the February 6 alleged slush incident (which, as noted, was the reason for deducting \$25 from the rent) and about the Combermere Recreation Committee generally. The Respondent, from outside the office, heard the Complainant and loudly responded.

I make no finding about who yelled first, swore first or threw the first insult. To focus on initiation would be to miss the big picture of what transpired.<sup>10</sup> As I explain below, it does not matter who was first. What matters is the evidence of witnesses that each one was yelling. Each yelled the f-word. Each called the other a "liar" and "f-ing liar." Each was visibly and clearly agitated.

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<sup>9</sup> Minutes of Finance and Administration Committee Meeting (April 30, 2018), item 6.1. Council would subsequently approve the recommendation, after the amount had been paid: Minutes of Regular Council Meeting (May 7, 2018), resolution 2017-08-0507.

<sup>10</sup> In her comments on the draft report, the Complainant argues that I must make a finding that the incident was initiated by the Respondent and, therefore, was the Respondent's fault. I disagree, both because the evidence is otherwise, and because initiation is not synonymous with fault.

The two individuals also struggled over the door to the Treasurer's office. The Complainant says she closed the door out of fear for her safety, and the Respondent pushed hard to get in. She also suggests this was some form of assault. On the other hand, the Respondent says the Complainant tried to shut the door in her face and she (the Respondent) was only trying to avoid getting hit in the face with the door. Based on their evidence, it is clear that both individuals were pushing on the door. Several witnesses heard banging sounds.

I took time to consider whether the evidence gave me a reasonable belief that an assault or other crime had taken place. This was necessary because section 223.8 of the *Municipal Act* states:

"If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act, other than the *Municipal Conflict of Interest Act*, or of the *Criminal Code* (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council."

I weighed the evidence and whether I was required to suspend the investigation and refer to the police. I concluded that there was no reason for me to believe a crime had been committed.

At the same time, the Complainant (or the Respondent for that matter) still has the right to take the matter directly to the police. Indeed, anyone who believes a crime was committed should report it to the police.

Later that morning, Mayor Kim Love took \$25 from her own purse and gave it to the Acting Interim Treasurer. She said it was worth paying this amount to the Township to spare Council from having to spend more time on the issue.

Shortly after the incident, the Respondent apologized to a bystander for what had just taken place. (This occurred just outside the Township building.) According to the bystander, the apology for losing her temper included profanity and a personally disparaging comment about the Complainant. The Respondent acknowledges being upset in the aftermath of the shouting match with the Complainant. She says that any disparaging comments (she does not recall exact words) were made while she was talking to herself, but they might have been overheard.<sup>11</sup>

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<sup>11</sup> In her comments on the draft, the Complainant submitted that this conversation is relevant and should be included.

The Complainant did not initially complain to me under the Code of Conduct. Instead, the Complainant insisted that the Mayor ought to complain under the Code. In fact, the Complainant insisted that it was the Mayor's duty to complain under the Code.

I take this opportunity to explain that this is not what the *Municipal Act* says and not how the Code of Conduct works. Anyone who feels the Code was contravened has the right to complain. That's how the system operates. Nobody can force somebody else to complain for her.

In this case, the evidence indicates that both Complainant and Respondent were involved in the yelling, name-calling and cursing. Given that there were two parties to the shouting match, it was disingenuous to insist that the Mayor must file a complaint against one of them.

Eventually, the Complainant filed a complaint directly.

## **RELEVANT PROVISIONS OF CODE OF CONDUCT, BY-LAW NUMBER 2014-138**

...

### **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.

**2. Not to Discriminate:**

In accordance with the *Human Rights Code*, members of council shall not discriminate against anyone on the basis of their 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, or disability. "Age", "disability", "family status", "record of offences", "same sex partnership status", shall be defined in *Human Rights Code*.

**3. Not to engage in Harassment or Bullying (Psychological Harassment):**

In accordance with the *Human Rights Code*, harassment shall mean engaging in a course of vexatious comment or conduct that is known, or ought to be known, to be unwelcome. Bullying is the ongoing health or career-endangering mistreatment of an employee, by one or more of their peers or supervisors. Unlikely to involve physical violence, it usually takes the form of psychological abuse. Often, verbal and strategic insults are intended to prevent targets from being successful in their job.

The exercise of performance management tools with respect to corporate employees for legitimate purposes by council is not harassment or bullying.

## PROCESS

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). 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.
- After the reply stage, I often accept supplementary communications and submissions from the parties, 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.

Each of the Complainant and Respondent has seen the other's witness statement and had an opportunity to address it.

The Complainant asked to see statements of other witnesses; I did not share them. Fairness requires that each party know what is being alleged about the party's conduct and have the right to respond. Both the Complainant and the Respondent were given this opportunity.

In addition, both the Complainant and the Respondent were given the opportunity to comment on a draft of this report. The Respondent did not comment on the draft. The Complainant asked for a time extension (from March 28 to April 11) to make submissions on the draft, and was given an extension to April 5. I received comments from the Complainant April 1, April 2, April 4 and April 5. Her submissions on the draft have been taken into consideration, and are mentioned at various places in this final report.

This is not the type of proceeding in which the parties get to cross-examine witnesses. It is unusual in an integrity commissioner inquiry to share witness statements with the parties. According to the Divisional Court, there is no obligation to share this sort of information: *Michael Di Biase v. City of Vaughan*, 2016 ONSC 5620 (CanLII).

The Complainant emailed me a statement, June 2, 2018. Her statement did not, however, allege that the Code of Conduct had been violated, or cite any specific sections of the Code.

On June 13, the Complainant clarified that she was alleging contraventions of sections B.3(ii), D.1, D.2 and D.3. June 13 is, therefore, deemed to be the official complaint date.

The Respondent submitted a response, July 9. It was shared with the Complainant.

The Complainant replied August 19.

I told the parties that I would schedule interviews with them *after*, not before, their written submissions were exchanged. This is my usual practice.

The Complainant urged that a report be issued prior to the election. After my August reports to Council, I did not issue any reports until after the election, so as not to interfere or be seen to interfere in the process. (I paused the process voluntarily; the *Municipal Act* has now been amended to force the termination of code of conduct proceedings after nomination day.)

The Respondent was not re-elected. An election result has no effect on a Code of Conduct investigation (unless the parties reach a settlement or a complainant seeks to withdraw). The case continued.

I interviewed both parties. I reviewed numerous witness statements and interviewed some of them. I reviewed extensive documentation as well as minutes of numerous meetings.

While not all materials and information are specifically mentioned in this report, I have reviewed and considered them all, and taken them all into account in this report.

The issue of criminal conduct was raised during one of the interviews. This required that I consider the impact of section 223.8 of the *Municipal Act*. After reviewing the evidence I concluded that I do not have reasonable grounds to believe that a crime was committed. However, if either party believes that a law was broken then she should report the matter to the police.

## ISSUE RAISED IN THE INVESTIGATION

I have considered the following issue:

- (A) *Did the Respondent contravene section B.3(ii), section D.1, section D.2 or section D.3 of the Code?*

## ANALYSIS AND FINDINGS

**(A) *Did the Respondent contravene section B.3(ii), section D.1, section D.2 or section D.3 of the Code?***

No.

The evidence is that both the Complainant and the Respondent took part in the verbal altercation. Both contributed to what happened.

Only one participant, however, is subject to the Code of Conduct. Only one participant filed a Complaint against the other. Nonetheless, the evidence is that both individuals were involved in what took place.

A finding that only one of the two individuals contravened the Code would be inconsistent with the evidence and would not fairly reflect what occurred. It would be unreasonable and inaccurate to find that only one individual is responsible for the incident.<sup>12</sup>

Because of shared responsibility for the yelling, swearing, insulting and pushing against the door, I cannot find that only one individual is at fault.

The parties were given an opportunity to comment on a draft of this report. The Respondent did not make submissions. The Complainant did.

The Complainant maintains that the Respondent initiated the altercation. I recognize that, from her vantage point, *the question of who started things* is paramount. Having considered the evidence, I disagree. First, the issue of initiation is a matter of perspective.<sup>13</sup> Second, fault is not just about initiation: other factors, such as escalation and continuation, are also relevant. I find on a balance of probabilities that fault for the verbal altercation is shared.

In her comments on the draft, the Complainant also argues that I should give priority to the evidence of what she calls the only independent witness (that is, the only witness who is not a Council Member or a Township employee). In this report I am not going to name individual witnesses or compare their recollections. I do observe that there were multiple witnesses, that some were in better positions than others to see and hear the incident, and that several sources of evidence support the finding that fault was shared. Several witnesses recall hearing both individuals shout and swear. My finding of shared responsibility is based on the standard of a balance of probabilities taking into account all the evidence.

I should add that the Respondent accepts the fact that fault is shared. In her words, "I own my part in this altercation." The Complainant maintains that the incident was "unprovoked" and that only the Respondent contributed.

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<sup>12</sup> In her submissions on a draft of this report, the Complainant argues that I am relying on the events prior to May 2 to conclude that both parties were responsible for what happened on May 2. On the contrary, I make my findings of what occurred on May 2 based on witness evidence from May 2.

<sup>13</sup> The Complainant's view is that the incident only began when the Respondent spoke, so the Respondent started it. The Respondent's view is that the incident began while the Complainant was complaining to the Acting Interim Treasurer, and thus was already underway when the Respondent arrived.

In response to the draft, the Complainant also makes assertions about the Respondent's propensity to act in a certain way and about the Respondent's reputation in the community. I do not believe these comments are relevant. Also, as a matter of fairness, I cannot accept them at this late stage.

The Complainant also feels that this report's conclusion amounts to justification of the Respondent's May 2 conduct. Clearly, that is *not* what this report says. Failure to find that the Respondent contravened the Code is not an endorsement of what anyone did that day.

## CONCLUSION

I do not find that the Respondent has contravened the Code of Conduct.

## RECOMMENDATION

I recommend that this report be received.

## CONTENT

Subsection 223.6(2) of the *Municipal Act* states that I may disclose in this report such matters as in my opinion are necessary for the purposes of the report. All the content of this report is, in my opinion, necessary.

Respectfully submitted,



Guy Giorno  
Integrity Commissioner  
Township of Madawaska Valley

April 8, 2019

## ADDENDUM

### Cost of this Investigation

The total cost to the Township of the investigation and report, not including HST, is as follows:

Hours (to Oct. 31, 2018): 3.3 @ \$300/hour (previously reported to Council)

Hours (Nov. 1 to present): 11.2 @ \$300/hour

Total: \$4350