
CITY OF OSHAWA INTEGRITY COMMISSIONER, GUY GIORNO

Citation: Foster v. Chapman, 2020 ONMIC 17

Date: December 14, 2020

REPORT ON COMPLAINT

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THE COMPLAINT

1. The Complainant, Mr. Ronald Foster, Auditor General of Oshawa between September 2006 and September 2013, alleges that Councillor Bob Chapman, the Respondent, contravened the Code of Conduct for Members of the Council of The Corporation of the City of Oshawa and of the Board of Management for the Oshawa Central Business District Improvement Area, being By-law 51-2015, as amended.
2. Specifically, Mr. Foster alleges that Councillor Chapman contravened the Code of Conduct when on three separate occasions he participated in Council decision making related to Mr. Foster's application for judicial review.
3. The Complaint alleges contraventions of sections 4, 5(b), 5(c), 5(d), 5(e,) and 30 [now 33] of the Code. For reasons outlined below, I conducted an inquiry only into the allegation under section 30 [now 33] (No Improper Use of Influence).
4. After the Complaint was filed, By-law 36-2020 amended the Code of Conduct. The amendments did not affect the text of any provision relevant to this proceeding (though in any event an amendment would not apply to past events), but did renumber section 30 of the Code as section 33.

SUMMARY

5. The judicial review application was brought against the City as a Respondent, not Councillor Chapman. It challenged decisions of City Council adopted by majority vote and subsequently confirmed by by-law. Councillor Chapman did not have a personal interest or private interest in Council decisions and duly enacted by-laws of the corporation, any more than any other Member of Council. He did not have personal or private interest in the judicial review application,
6. I find that Councillor Chapman did not contravene the Code of Conduct by participating in Council decision making related to Mr. Foster's judicial review application.

BACKGROUND

7. On May 16, 2013, Auditor General Foster presented Report AG-13-09, titled "Independence of the Auditor General." A copy of that report is also available here: http://app.oshawa.ca/agendas/city_council/2013/2013_05_21/ag-13-09.pdf

8. Report AG-13-09 made four recommendations:

1. That an Audit Committee be established with formal terms of reference ...
2. That the revised multi-year audit plan at Attachment 5 be approved to allow the Auditor General to reprioritize his activities ...
3. That the Auditor General and City Solicitor be asked to hold an education session with members of Council and the Mayor to review their respective statutory roles; and
4. That the City Manager be asked to explain to the Mayor and Council why he approved Confidential Reports CM-12-32 and CM-13-29 when he knew they excluded important facts and contained both inaccurate and materially misleading information.

9. Report AG-13-09 was considered at the May 21, 2013, Council meeting. Council received a dozen correspondence items commenting on the report and was addressed by four individuals. The correspondence and presentations were mostly supportive of Auditor General Foster and/or Report AG-13-09. One presenter recommended that a third party be engaged to investigate the situation.

10. Councillor Chapman moved, Councillor Nancy Diamond seconded, and Council adopted the following resolution (Resolution 308):

That the recommendation contained in Report AG-13-09 be replaced with the following:

Whereas the City's Auditor General has made serious allegations about both individual employees and City departments in Report AG-13-09; and,

Whereas these concerns include issues from 2007 to 2013; and,

Whereas it is critical that these allegations be immediately investigated;

Therefore be it resolved that a full investigation be undertaken by an independent expert authority with the direction that a comprehensive report be prepared clearly outlining the findings, conclusions and any recommended actions judged necessary in the best interest of the Corporation and the citizens of Oshawa; and,

That the inquiry report be presented as soon as possible in an open session of Council, subject to applicable law, thereby enabling full public disclosure of findings and recommended actions; and,

That in view of his recognition as one of the top authorities in municipal law in Canada, his direct experience as a municipal solicitor, as well as his role as an Integrity Commissioner, George Rust-D'Eye be appointed to undertake this investigation; and,

That for the purposes of this investigation so authorized by Council, George Rust-D'Eye shall also have the powers and duties of an Integrity Commissioner as set out in Sections 223.3 to 223.5 of the *Municipal Act, 2001*, as amended, with respect to the subject matter of his investigation, including the conduct of employees and officers of the City; and,

That George Rust-D'Eye be provided with absolute co-operation from all staff, including all information, public or confidential, relative to the allegations or other matters, as he deems necessary to complete his inquiry; and,

That all documents, files, correspondence, voice mail messages, and other records potentially related to this inquiry be preserved; and,

That the costs of the inquiry be charged to the appropriate account, as determined by the Director, Finance Services/Acting Treasurer; and,

That George Rust-D'Eye commence immediately and present a status report on his investigation to City Council no later than the Council meeting of June 25, 2013; and,

That the Minister of Municipal Affairs, and any other authorities as George Rust-D'Eye deems appropriate, be advised that this investigation has been committed to and authorized by the Council of the City of Oshawa.

11. Resolution 308 to appoint Mr. Rust-D'Eye as Investigator exercising the power and duties of Integrity Commissioner was carried on a 5-4 vote.

12. Of the current members of City Council, only the Respondent (Councillor Chapman) and Councillors Tito-Dante Marimpietri and John Neal participated in that May 2013 vote. Councillor Chapman voted for the motion. Councillor Marimpietri and Councillor Neal voted against it.

13. At the end of the meeting, Council passed By-law 62-2013, *A By-law to confirm the City Council meeting of May 21, 2013.*¹ The decisions taken at the meeting, including the appointment of Mr. Rust-D'Eye, were thereby incorporated into by-law.

14. On August 9, 2013, Auditor General Foster sent Council what he called an "amendment" to his Report AG-13-09. The amendment read, in part, as follows:

The Auditor General's Office concluded within Report AG-13-09 that Confidential Reports CM-12-32 and CM-13-29 were materially misleading due to inaccuracies and incomplete information. It should be noted, however, that no evidence of criminal wrongdoing was identified within either our audit or Report AG-13-09.

While there is reasonable audit evidence to demonstrate that the City Manager knew that Confidential Reports CM-12-32 and CM-13-29 were misleading, the possibility remains that he did not know these reports were misleading and that the errors and omissions within these reports arose for a number of other reasons. Regardless, he remains accountable for ensuring that reports to Council are reasonably complete and free from significant errors.

For the above reasons, I told Mr. Rust-D'Eye on August 7, 2013 that I wished to amend recommendation 4 on page 1 of Report AG-13-09, to state 'That the City Manager be asked to explain to the Mayor and Council why he approved Confidential Reports CM-12-32 and CM-13-29 when he knew "**or ought to have known**" they excluded important facts and contained both inaccurate and materially misleading information.' I also wish to make a similar amendment to the recommendation at the end of section 5.0 on page 9 of Report AG-13-09.

¹ Councillor Chapman moved and voted for the motion to pass the confirming by-law. Councillor Marimpietri voted against. Councillor Neal declared a pecuniary interest and did not vote.

The comments above and requested amendments should not be construed as a 'significant abandonment' of the findings and conclusions contained within AG-13-09. They are provided to clarify the audit process; to identify other findings and conclusions not stated within the report; and to assist with resolution of the concerns identified.

15. Meanwhile, Mr. Rust-D'Eye, the Investigator exercising the power and duties of Integrity Commissioner, had commenced his investigation. He delivered an interim report dated June 20, 2013.

16. A Durham Regional Police spokesperson told the news media that some preliminary inquiries had been made but there was yet no "official police investigation" pending Mr. Rust-D'Eye's final report.²

17. Investigator Rust-D'Eye submitted a final report, August 23, 2013. A copy of the public version of the report is available here:

http://app.oshawa.ca/agendas/city_council/2013/2013_09_03/Final%20Investigation%20Report%20August%202023,%202013.pdf

18. According to the final report, "none of the Auditor General's allegations suggesting misconduct or impropriety on behalf of the City Manager have been corroborated or supported."

19. Auditor General Foster composed a detailed rebuttal of the final Rust-D'Eye report and emailed it to Council members. A copy of Mr. Foster's rebuttal was also obtained by the *Toronto Star*.³

20. The final Rust-D'Eye report and two reports of Auditor General Foster (AG-13-11 and AG-13-12) were placed on the agenda of the September 3, 2013, Council meeting. In Report AG-13-11, Mr. Foster recommended that his employment be extended beyond September 5, when his contract was due to expire.⁴ Report AG-13-12 recommended amendments to the Auditor General's duties and the establishment of an Audit Committee to which the Auditor General would functionally report.⁵

21. To show support for Auditor General Foster, approximately two dozen residents attended the September 3 meeting wearing black T-shirts with the following message in white letters:

² Jessica McDiarmid, "Oshawa auditor cries foul over investigation," *Toronto Star* (August 23, 2013).

³ *Ibid.*

⁴ Report AG-13-11 is available here:

http://app.oshawa.ca/agendas/city_council/2013/2013_09_03/AG_13_11_Contract%20of%20AG.pdf

⁵ Report AG-13-12 is also online: http://app.oshawa.ca/agendas/city_council/2013/2013_09_03/AG-13-12_Duties%20of%20AG.pdf

MISSING
at Oshawa City Hall
Transparency
Accountability
Strong Leadership
Trust
Fiscal Responsibility
Business Efficiency
Integrity
Support of Auditor General!

22. Council heard four delegations, all of them critical of the final Rust-D'Eye report and/or supportive of Auditor General Foster. It also received three items of correspondence that opposed the Rust-D'Eye report and/or supported the Auditor General. The first delegation to address Council in support of Auditor General Foster was Ms Rosemary McConkey, who currently serves on City Council, having been elected in 2018.

23. During the delegations, Mayor John Henry ordered two individuals to leave the gallery for interrupting the meeting. Multiple videos show a chaotic scene as security guards and undercover police officers attempted to remove them from the chamber. According to one news report, "What started as a regular city council meeting in Oshawa came to more closely resemble a barroom brawl that left two men facing charges and sporting minor injuries."⁶

24. Two local residents were charged with assault and trespass but charges against them were dropped in January 2014.⁷ Separately, Councillor Bruce Wood laid charges against two City security guards present that evening.⁸ The Crown eventually dropped those charges, too.⁹

25. Investigator Rust-D'Eye's final report made the following eight¹⁰ recommendations:

1. The Council of the City of Oshawa consider amending its Procedural By-law to rationalize and clarify procedures determining whether or not, at first instance, staff reports dealing with confidential matters involving subject matters listed in section 239(2) of the *Municipal Act, 2001*, be

⁶ Jessica McDiarmid, "Oshawa council ousts auditor general in wake of controversial report," *Toronto Star* (September 4, 2013).

⁷ Reka Szekely, "Security expert analyzes Oshawa council arrest tapes: Security guards charged with assault have Feb. 10 court appearance," *Oshawa This Week* (February 6, 2014).

⁸ Reka Szekely, "Oshawa councillor files assault charges against City security guards: Actions follow contentious September council meeting when citizens were ejected, arrested," *Oshawa This Week* (January 15, 2014).

⁹ Reka Szekely, "Assault charges against Oshawa security guards dropped: 'Time to move on' with City business, says mayor," *Oshawa This Week* (May 8, 2014).

¹⁰ The final Rust-D'Eye report did not number the recommendations. Numbering was added in the September 3, 2013, minutes, presumably for ease of reference.

referred at the outset to a closed meeting of Council and/or its Committee of the Whole or other body;

2. That Council give due notice to its staff of their responsibilities to report to Council as a whole and not to individual members of Council;
3. That Council give consideration to the role of the Auditor General, whether or not the City should continue to appoint such an accountability officer and if so, delineating the role of the Auditor General and distinguishing his or her responsibilities from those of other officers of the corporation. The appointment of an Auditor General, if such is to be made, should be made by a specific by-law and not through the adoption of an employment contract;
4. That Council consider clarifying its definition of 'records' in its Records Retention By-law to address security and accessibility with respect to e-mails and other electronic records of the corporation;
5. That Council give consideration to the adoption of a Code of Conduct for members of Council and the establishment of the office of Integrity Commissioner. Such latter accountability officer could provide ongoing assistance to the Council, not only in terms of enforcement of the Code of Conduct, but with respect to educational functions and assistance to members of Council in the performance of their duties;
6. If the Council decides to maintain the office of Auditor General that it give consideration to clarification of the relationship between the role of the Auditor General, on one hand, and that of internal or external auditors appointed under section 296 of the *Municipal Act, 2001*, on the other;
7. That Council confirm its adoption of the policy for the acquisition and disposal of land, and communicate the terms of that policy to all staff whose responsibilities may involve its subject matter;
8. That Council emphasize to its members the importance of maintaining confidentiality over documents and subject matters discussed at in-camera meetings to prevent 'leaks' of confidential information to the public or to persons not authorized to have access to such information.

26. Councillor Chapman moved, Councillor Doug Sanders seconded, and Council adopted the following motion (Resolution 404):

Whereas on May 21, 2013 Council directed Mr. George Rust-Eye to investigate the serious allegations about both individual employees and City departments made by the Auditor General in Report AG-13-09 dated May 16, 2013; and,

Whereas Mr. Rust-D'Eye has completed his investigation and made a number of recommendations in his final report dated August 23, 2013;

Now therefore be it resolved:

1. That recommendation #1 by Mr. Rust D'Eye regarding the rationalizing and clarifying of the City of Oshawa's Procedural By-law related to confidential matters be referred to City Clerk Services for a report to the Corporate Services Committee; and,
2. That recommendation #2 by Mr. Rust-D'Eye regarding notice to staff of their responsibilities to report to Council as a whole be referred to the City Manager; and,

3. That upon the expiry of the term of employment of the current Auditory General, the position of Auditor General be eliminated; and,
4. That recommendation #4 by Mr. Rust-D'Eye regarding e-mails and other electronic records be referred to City Clerk Services for a report to the Corporate Services Committees; and,
5. That recommendation #5 by Mr. Rust-D'Eye regarding a Code of Conduct and establishment of an Integrity Commissioner be referred to Legal Services for a report to the Strategic Initiatives Committee; and,
6. That recommendation #7 by Mr. Rust-D'Eye regarding the policy related to acquisition and disposal of land be referred to the Commissioner of Development Services to ensure staff involved in these transactions are aware of their responsibilities related to the policy; and,
7. That Council has an Education Session to review the legal responsibilities and consequences of maintaining confidentiality over documents and subject matters discussed at in-camera meetings.

27. Each part of the motion was voted on separately. Each carried on an 8-3 vote. Councillor Chapman voted for each part of the motion. Councillors Marimpietri and Neal voted against each part.

28. Council then adopted, on the same 8-3 vote (with Councillor Chapman voting in favour and Councillors Marimpietri and Neal voting against), Resolution 407, moved by Councillor Roger Bouma, seconded by Councillor Amy England:

That the contract of employment between The Corporation of the City of Oshawa and Ronald C. Foster for a fixed term of three years commencing September 6, 2010 not be renewed at the end of its term.

29. Resolution 407 was effectively City Council's response to Report AG-13-11, in which Auditor General Foster had recommended a contract extension.

30. Councillor Bouma then moved, Councillor Diamond seconded, and Council adopted the following motion (Resolution 408):

That Report AG-13-12 concerning the Duties, Authority and Reporting Relationship of the Auditor General be referred to the Acting City Treasurer, to consider and make recommendations for effective internal processes that would ensure continued financial stewardship of taxpayers' funds, for a report to the Corporate Services Committee.

31. The vote on Resolution 408 was 9-2. Councillors Chapman and Marimpietri voted with the majority. Councillor Neal was opposed.

32. At the end of the meeting, By-law 85-2013, *A By-law to confirm the City Council meeting of September 3, 2013*, was passed on a vote of 8-3. Councillor Chapman moved the motion and voted with the majority. Councillors Marimpietri and Neal voted against.

33. The September 3, 2013, Council decisions were, therefore, confirmed by by-law.

34. Mr. Foster’s last day of employment as Auditor General was September 5, 2013. He currently serves as Auditor General of the City of Greater Sudbury.

35. On April 24, 2019, Mr. Foster commenced a judicial review application, naming the City of Oshawa as respondent. The application sought an order quashing City Council Resolution 404, adopted September 3, 2013, and an order “expunging the Rust-D’Eye Report from the minutes of Council.”

36. The judicial review application was dismissed, January 30, 2020, with costs of \$75,000 awarded to the City.¹¹ The reason for dismissal was the delay of more than five years, seven months, between the adoption of Resolution 404 and the commencement of the application.

POSITIONS OF THE PARTIES

COMPLAINANT’S POSITION

37. Mr. Foster contends that Councillor Chapman breached his duties under the Code by participating in discussing, debating, and voting on motions related to the judicial review application. He argues that Councillor Chapman was in a conflict of interest and blatantly disregarded his obligation to refrain from discussing or voting on Mr. Foster’s application.

38. Mr. Foster points to three occasions in 2019 (May 21, June 10, and October 15) when Councillor Chapman “influenced the outcome of discussions and votes about the City’s response to Mr. Foster’s court application.” In each case, he notes that Councillors Marimpietri and Neal, the other two remaining members of Council on Council from 2013, either declared a conflict of interest or were not present for the discussion, debate, and vote.

39. Mr. Foster argues that a conflict of interest is “an interest held by a member of council that is so related to the exercise of his or her public duty that a reasonably well informed person would conclude that the interest might influence the exercise of that duty.” He states that, given the above, Councillor Chapman was in a clear conflict of interest.

40. According to Mr. Foster, Councillor Chapman had a personal interest in defending against Mr. Foster’s application and would have obtained a corresponding personal advantage if the City successfully defended against the application. This advantage arose, he contends, because Councillor Chapman supported the 2013 decisions of Council that Mr. Foster challenges. A successful challenge of the 2013 decisions would project the image that Councillor Chapman participated in unfair or

¹¹ *Foster v. Oshawa (City)*, 2020 ONSC 681 (CanLII) (Div. Ct.)

unreasonable decisions making in 2013. According to Mr. Foster, Councillor Chapman had a personal interest in preventing this from occurring.

41. Mr. Foster relies on section 30 of the Code of Conduct, which prohibits a Councillor from using the position on Council to influence or attempt to influence a decision for the Councillor's "private advantage."

42. He notes that "private advantage" is not defined in the Code. He argues that a "private advantage" must be construed based on the principles of legal interpretation, which includes reference to the rest of the Code, including the Code's principles in sections 4 and 5, the exclusions in section 31 [now section 34], and the broader factual context.

43. Mr. Foster points out that section 4 of the Code states that the public is entitled to "expect the highest standards of conduct" from Council Members. Section 5 expands on this by obliging Council Members among other things, to "perform their functions with integrity, avoiding the improper use of the influence of their office and conflicts of interest", perform those duties in a way that ensures "public confidence in their work" and encourage "transparency and accountability".

44. He notes that the prohibition of influencing a decision to a Council Member's private advantage is subject to various exceptions, none of which apply in this case.

45. Mr. Foster also uses the broader factual context to inform the interpretation of "private advantage" under the Code. He notes that Councillor Marimpietri – whom he claims was similarly implicated by the resolutions because of the fact that he served on Oshawa City Council in 2013 – declared a conflict of interest and did not vote on the matter. Accordingly, Councillor Chapman "was put on notice" that discussing, debating, or voting on the matter might have been inconsistent with the highest standards of conduct and the spirit of the City's laws and policies, as the Code's principles require.

46. Mr. Foster characterizes the issue in this Code of Conduct proceeding as a "narrow" one:

[whether] Councillor Chapman improperly used his influence in 2019 to defend municipal decisions that were the subject of judicial review – decisions that were the product of a plan that he helped create as well as motions that he drafted, privately advocated for, moved, and publicly supported in comments to the media.

47. He alleges that Councillor Chapman "helped orchestrate" the City's response to Report AG-13-09 through Resolution 308, prior to the May 21, 2013 Council meeting, further describing the response as a "premeditated strategy." As evidence of this, Mr. Foster notes that, in addition to moving, debating, and voting on Resolution 308, Councillor Chapman met with two other Councillors on two separate occasions (May 18 and May 20, 2013) to develop the wording of the resolution.

48. He also points to a May 22, 2013 article by Reka Szekely on DurhamRegion.com that “further cemented” Councillor Chapman’s association with the resolution. In the article, the Councillor was identified with the Resolution and, in respect of the competing findings in Mr. Foster’s Report and the Rust-D’Eye Report, was quoted as saying that his experience is that, “there’s two sides to every story and somewhere in the middle is the truth.”

49. Mr. Foster also alleges that, prior to the September 3, 2013 Council meeting, Councillor Chapman orchestrated the City’s response to the Rust D’Eye Report through Resolution 404. As evidence of this, Mr. Foster offers, for example, that Councillor Chapman asked another Councillor to second his motion.

50. In supplementary submissions, Mr. Foster stresses the importance of not conflating the judicial review application with the Code of Conduct complaint. He notes that the former alleges administrative law breaches against the City, while the Code of Conduct complaint is premised on his belief that the judicial review application would adversely affect the Councillor’s reputation among his constituents and political peers. He emphasizes that finding that Councillor Chapman engaged in fundamental administrative law breaches of fairness is not necessary to establish that he was in breach of the Code.

51. Mr. Foster describes the Rust-D’Eye Report and the Rebuttal Report together as the “fruits of Resolution 308” and states that the Councillor’s response had the effect of further silencing Mr. Foster and preventing discussions of his reports. Mr. Foster contends that Councillor Chapman’s actions “cemented his public association with the City’s response to Resolution 404.” In this sense, he argues that Councillor Chapman’s moving, and Council’s subsequent passage, of Resolution 404 constitute an irreversible imprimatur of the plan to silence Mr. Foster.

RESPONDENT’S POSITION

52. Councillor Chapman does not dispute that he undertook a series of actions at Council related to the Foster and Rust-D’Eye Reports. He does, however, disagree that he has a private interest in the matter and that his actions were intended to confer on him a private advantage within the meaning of the Code. Further, he asserts that his actions were taken in the “course of normal business” before Council.

53. He explained that, like many Councillors, he makes motions that sometimes pass and sometimes do not pass. In either case, he notes that constituents may question his decision to move or vote on a particular matter, concluding that they “have the option to not vote for me in any election where I choose to seek office.”

54. Councillor Chapman notes that the matters in question took place in 2013 and had no bearing on his re-election in 2014 and 2018. He disagrees with the

Complainant's position that the outcome of the judicial review application will affect his position or standing with respect to his peers or the constituents he serves.

55. Councillor Chapman points out that was never in a position to control the outcome of Resolutions 308 and 404. He emphasizes that the "decisions made and directions given were those of the Council as a whole by a majority vote of the members present." In essence, it was a Council decision, and not his decision.

56. In support of this, he points out that Mr. Foster acknowledges as much in his initial Complaint, where he states, "The grounds for the application invoke decisions of a handful of individuals, including Councillor Chapman, to support the passage of motions."

57. Councillor Chapman emphasizes that the "handful of individuals" to which Mr. Foster refers constituted, at the time, a majority of the duly elected members of Oshawa City Council.

58. Councillor Chapman also observes that he did not have authority over the procedure of the meetings where Resolutions 308 and 404 were discussed, debated, and voted on. He notes that it was the Mayor who served as Chair, and therefore controlled the procedure of the meeting in accordance with the Rules of Procedure. Councillor Chapman explains that he makes this point, not to suggest that the Mayor had control of the outcome by virtue of being Chair, but instead to emphasize that Councillor Chapman did not even have the ability to influence procedure as effectively as another member of Council.

59. Councillor Chapman takes the position that the mover of a motion is not precluded from debating or voting on subsequent discussions of that motion merely because they were the initial mover.

60. In response to Mr. Foster's claim that Councillor Chapman ought to have been "on notice" as a result of Councillor Marimpietri's declaration of a conflict of interest because of his involvement in the 2013 decision-making, Councillor Chapman notes that Councillor Marimpietri's decision might have related to an actual pecuniary interest and, therefore, have no bearing on what Councillor Chapman should have done.

PROCESS FOLLOWED

61. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint and the Council Member responding to the Complaint.

62. The Complaint was filed November 26, 2019.

63. During a telephone conversation around the time of filing of the Complaint, legal counsel for Mr. Foster asked me if the inquiry would be completed prior to the hearing of the application for judicial review, scheduled for January 30, 2020. I replied that because of the short time remaining, this would not likely be the case.

64. I issued a notice of inquiry on December 4. The notice explained that the inquiry would only consider the allegation under section 30 [now section 33] of the Code. It stated that I would not inquire into the alleged breaches of sections 4, 5(b), 5(c), 5(d), and 5(e), but that it remained open to the parties to make submissions on how sections 4, 5(b), 5(c), 5(d), and 5(e) might affect the interpretation and application of section 30 [now section 33].

65. Councillor Chapman responded on December 16.

66. Mr. Foster's Reply was sent on January 10, 2010.

67. On January 17, legal counsel for Mr. Foster emailed to ask me whether the general expectation that parties would maintain the confidentiality of the Code of Conduct inquiry process would prevent counsel from discussing the Complaint with the Divisional Court on January 30. On January 22, I replied explaining why confidentiality is important to the inquiry process, but noting that I cannot govern what might occur or be required in a parallel proceeding.

68. The judicial review application was dismissed by the Divisional Court, January 30. A copy of the decision was provided to Council on February 11 through INFO-20-34.

69. The first regular City Council meeting following the Court decision was February 18. There was no discussion of the application.

70. On March 2, I attended the Corporate Services Committee meeting where amendments to the Council Code of Conduct were on the agenda.

71. On March 17, the Province of Ontario declared a state of emergency resulting from the COVID-19 pandemic. During the lockdown that followed, non-urgent Code of Conduct inquiries were paused.

72. On May 25, Council in Committee of the Whole considered Report CNCL-20-64, which dealt with legal costs related to Mr. Foster's application for judicial review. Total legal fee expenses were \$193,320.92 (including \$22,240.48 in sales tax).

73. The next step of the inquiry involved a detailed review of documentation relevant to the Complaint, and a review of recordings of relevant Council meetings, following which I sent both parties a request for their submissions in response to 23 questions. This request, titled “Invitation to provide additional information and submissions,” was issued July 7.

74. Councillor Chapman responded to the invitation to provide additional information and submissions, August 28. Mr. Foster did the same, September 16.

75. I concluded that the extensive submissions of the parties and large volume of materials were sufficient for me to complete the inquiry.

76. I have taken into account and carefully considered all the information and documentation provided by the parties, as well as all their submissions and other communications.

FINDINGS OF FACT

77. Most of the relevant facts are set out under the heading “Background” at the beginning of his report.

78. I find there is no evidence that Councillor Chapman had the ability to control personally the outcomes of voting on Resolution 308, Resolution 404, and related matters. He contribute to decision making and to passage of motions, but his vote was just one among the majority of Council Members.

ISSUES AND ANALYSIS

A. Can sections 4, 5(b), 5(c), 5(d), and 5(e) of the Code be breached?

B. Did Councillor Chapman contravene section 30 [now section 33] of the Code of Conduct by discussing, debating, voting on, or otherwise influencing a matter before Oshawa City Council in order to obtain a private advantage?

A. CAN SECTIONS 4, 5(B), 5(C), 5(D), AND 5(E) OF THE CODE BE BREACHED?

79. No.

80. As explained above, in the notice, I informed both parties that I would not inquire into the alleged breaches of sections 4, 5(b), 5(c), 5(d), and 5(e) of the Code, but that it was open to the parties to make submissions on how sections 4, 5(b), 5(c), 5(d), and

5(e) might affect the interpretation and application of section 30 [now section 33] (the other provision cited in the Complaint).

81. Sections 4 and 5 of the Code read as follows:

Principles upon which This Code of Conduct is Based

4. Improving the quality of municipal administration and governance can best be achieved by encouraging high standards of conduct on the part of all municipal officials. In particular, the public is entitled to expect the highest standards of conduct from the Members whom they elect to local government and who are appointed as Directors of the DOBOM. In turn, adherence to these standards will protect and maintain the City's reputation and integrity.
5. Key statements of principle that underlie this Code of Conduct are as follows:
 - (a) Members must serve and be seen to serve their constituents in a conscientious and diligent manner;
 - (b) Members must be committed to performing their functions with integrity, avoiding the improper use of the influence of their office, and conflicts of interest;
 - (c) Members are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and that will bear close public scrutiny;
 - (d) Members must recognize and act upon the principle that democracy is best achieved when the operation of government is made as transparent and accountable to members of the public as possible; and
 - (e) Members shall seek to serve the public interest by upholding both the letter and spirit of the laws of Parliament and the Ontario Legislature, as well as the laws and policies adopted by the Council.

82. Sections 4 and 5 of the Code appear beneath the heading, "Principles upon which This Code of Conduct is Based." Section 5 begins with the words, "Key statements of principle that underlie this Code of Conduct are as follows ..."

83. In my view, sections 4, 5(b), 5(c), 5(d) and 5(e) are statements of principle, and they are not provisions that are capable of being breached or of giving rise to a complaint. These provisions can, however, inform how the substantive provisions of the Code, including section 30 [now section 33], are to be interpreted: *Re Durham Region (Council Member)*, 2018 ONMIC 3; *Re Partner*, 2018 ONMIC 16; *Re Beyak*, 2018 ONMIC 8.

84. Mr. Foster's arguments rely on sections 4 and 5, the "Principles" sections of the Code, to inform the interpretation of section 30 [now section 33]. In interpreting section 30, I have taken sections 4 and 5, and Mr. Foster's submissions, into account.

B. DID COUNCILLOR CHAPMAN CONTRAVENE SECTION 30 [NOW SECTION 33] OF THE CODE OF CONDUCT?

85. No, he did not.

86. I accept Mr. Foster's "narrow" characterization of the issue in this proceeding with slight modification, as follows: Whether Councillor Chapman contravened the Code by discussing, debating, voting on, or otherwise influencing a matter before Oshawa City Council in order to obtain a private advantage.

87. Section 30 [now section 33] of the Code prohibits a Member from using the influence of office for any purpose other than the lawful exercise of the Member's official duties. Paragraph (a) specifically prevents a Member of Council from attempting to influence a decision to obtain a private advantage:

No Improper Use of Influence

30.[now 33.] No Member shall use the influence of her or his office for any purpose other than for the lawful exercise of her or his official duties and for City purposes. Without limitation, no Member shall:

- (a) use her or his office or position to influence or attempt to influence the decision of any other person, for the Member's private advantage or that of the Member's parent, child, spouse, staff member, friend or associate, business or otherwise

88. Mr. Foster presents a clear theory of why Councillor Chapman attempted to use his position to influence decisions of Council based on his own personal interest. The theory is that Councillor Chapman had an interest in defending previous Council decisions in which he voted in the majority.

89. According to Mr. Foster, in 2013, Councillor Chapman helped to create and to implement the City's response to Mr. Foster's report. Councillor Chapman did so by working to craft, to pass and then to implement Resolutions 308 and 404. In doing so, Councillor Chapman held himself out to the public as a proponent of the resolutions while employing a variety of political machinations behind the scenes to ensure their passage. This is Mr. Foster's theory.

90. Mr. Foster argues that a successful application for judicial review would have been a major indictment of Councillor Chapman, and negatively affected his standing among his peers and his electors.

91. The weakness of this argument is that the decisions made in 2013 were not those of Councillor Chapman. They were decisions of Oshawa City Council, of which Councillor Chapman was only one Member.

92. Councillor Chapman takes the position that, in discussing, debating, and voting on the matters before Council in 2013, he did so as one Member of Council. He was not

the sole architect of the City's response, nor was able to control the outcome of any particular vote.

93. In my July 7 invitation to provide further information and submissions, I offered a specific opportunity to provide authority or precedent on this point:

I invite the parties to direct my attention to any legal authority or case precedent relevant to the question of whether the mover of a successful motion bears responsibility different than the responsibility of other members of the governing body of an entity and/or different than responsibility of the entity itself.

94. Mr. Foster addresses this portion of the invitation as follows:

We do not have authority for the proposition that the mover of a successful motion bears responsibility different than other members or the entity itself. However, no such allegation was made in the Code of Conduct Complaint, and no court proceeding was commenced against Councillor Chapman personally.

The question is whether Councillor Chapman improperly used his influence in 2019 to defend municipal decisions that he planned, drafted, privately advocated for, moved, and publicly endorsed to protect his reputation within the Oshawa community and among fellow Councillors. Given the overriding principles that are set out within ss. 4-5 of the Code, it cannot be said that Councillor Chapman's participation, in 2019, in discussions about the City's response to Mr. Foster's judicial review application adhere to "the highest standards of conduct" that would promote public confidence in Council's work.

95. In my view, on this legal issue there is no reason to distinguish between the mere moving of a motion and the actions listed by Mr. Foster: planning, drafting, privately advocating, moving, and publicly endorsing. Government decisions do not come out of nowhere. Before a decision is taken, one or more officials, including elected officials, may be involved in conception, development, preparation, negotiation, promotion, persuasion, and numerous other activities that lead to the final result.

96. That context makes Mr. Foster proposition's untenable. Consider the very common example of a provincial or federal minister who works with officials on drafting a bill, introduces it in the House, defends it in the news media and in meetings with stakeholders, shepherds it through committee, and votes in favour at all stages. The Minister's reputation may well be tied to the legislation. Indeed, the law might even have become an election issue. The suggestion that the Minister thereby possesses a disqualifying private interest, that she must recuse herself from decisions on responding to legal challenges to the law once enacted, finds support in no authority I could locate.

97. One reason is that a government decision, once made, and a law, once enacted, are not the property of any particular politician. They belong to the polity. They become, in this case, decisions and laws of the municipal corporation. The interest in upholding them and defending them from legal challenge is an interest of the corporation. (It is

helpful to note that municipal powers are exercised by by-law, and the oppugned 2013 Council decisions were duly confirmed by by-law.¹² This inquiry relates, therefore, to Councillor Chapman's votes on the City's response to a legal challenge to by-laws enacted by the City in 2013.)

98. The provincial Integrity Commissioner has previously held that no one politician is solely responsible for a collective government decision. Indeed, Acting Integrity Commissioner (as he was in 2001) the Honourable Gregory T. Evans held that not even a Premier, despite the first minister's role and influence, can be held solely responsible for a duly enacted law:

The legislation enacted by the Legislature, after due debate, became the law of the Province of Ontario upon proclamation. The fact that Harris supported the legislation does not mean that sole responsibility for the content of the legislation should be attributed to him. As a member he has one vote. As the leader of the majority party there can be little question of his influence upon the legislation. In our democracy, the voters expect the leader of the government, which they have elected, to bring forward and support legislation which will implement the political platform upon which the party sought their support. In other words, we elect governments to govern. It is the public, through the members whom they elect to office, who influence the legislation and it is the public which in a subsequent election determines whether their present government retains their confidence and will be returned to office.¹³

99. Acting Integrity Commissioner Evans applied the same principle to all decisions of the Government. In fact, he indicated that collective decisions are not challengeable under the *Members' Integrity Act*:

Harris is not the government, but only one member of the government.

A government cannot be in violation of the *Members' Integrity Act*. If it should exceed its legislative powers, it is a constitutional issue for judicial consideration. Otherwise, its actions are to be assessed by public opinion through our election process.

A political benefit which may result from legislation favourable to a program or project which a member personally espouses, may be open to political analysis, media comment, public approval or concern, but it is not a conflict of interest.¹⁴

100. I accept the rationale of Integrity Commissioner (and former Chief Justice) Evans, and apply it here. Once each resolution was adopted, it became a decision of Council. Once the confirming by-law was passed, that decision was made by by-law. These were not Councillor Chapman's decisions and Councillor Chapman's laws, but

¹² *Municipal Act*, subs. 5(3); By-law 62-2013, *A By-law to confirm the City Council meeting of May 21, 2013*; By-law 85-2013, *A By-law to confirm the City Council meeting of September 3, 2013*.

¹³ Ontario, Integrity Commissioner, *Re The Honourable Michael D. Harris* (May 16, 2001), at 6, online: <http://www.oico.on.ca/docs/default-source/commissioner's-reports/re-harris-rail-cycle-may-16-2001.pdf?sfvrsn=6>

¹⁴ *Ibid.*, at 16.

decisions of Council as a whole and by-laws of the Corporation of the City of Oshawa, no matter what role Councillor Chapman might have played in achieving these outcomes.

101. Mr. Foster argues that “Councillor Chapman’s judgment and reputation were implicated by Mr. Foster’s judicial review application.” I disagree. Decisions of Oshawa City of Council and by-laws of the corporation were implicated by Mr. Foster’s judicial review application. Councillor Chapman is but one member of that Council. He shares the same public interest as every Council Member in decisions made in response to a legal challenge to a by-law of the corporation. Councillor Chapman does not have a personal or private interest in the matter.

102. If I am wrong about Councillor Chapman’s judgment and reputation being implicated, I find that public perceptions of a politician’s judgment and reputation do not give rise to private advantage under section 30 [now section 33] of the Code. In this respect, I agree with the following observations of former federal Conflict of Interest and Ethics Commissioner Mary Dawson:

Nowhere in the Code is there a suggestion that the expression “private interests” would cover political gain or advantage. To come to such an expansive interpretation would require some indication in the Code that this was intended. I find no such indication ...

One could make the argument that a Member would have a private pecuniary interest in re-election because securing a seat in the House of Commons comes with a comfortable salary and benefits. Following this argument to its logical conclusion, however, would imply that any actions undertaken by a Member aimed at enhancing his or her image with constituents could be construed as furthering a private interest, and therefore contravene the Code. This cannot be the intent of the Code.¹⁵

103. Finally, I note that section 31 [now section 34] of the Code of Conduct provides several exceptions to the application of section 30 [now 33]. Among them: “‘private advantage’ does not include: (a) a matter that is of general application.”

104. A duly enacted by-law of the corporation is a matter of general application. The collective decision of City Council is a matter of general application. This is an additional reason to find that Councillor Chapman was not voting on a matter of private advantage when he voted on the City’s response to the judicial review application.

¹⁵ Canada, Conflict of Interest and Ethics Commissioner, *The Cheques Report: The use of partisan or personal identifiers on ceremonial cheques or other props for federal funding announcements* (April 29, 2010), at 16.

CONCLUSION

105. I find that Councillor Chapman was not participating in decision making on a matter of personal interest or private advantage, and did not contravene the Code of Conduct.

CONTENT

106. 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
City of Oshawa

December 14, 2020