

The Municipal Integrity Commissioner in Ontario: Role and Responsibilities

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The *Municipal Statute Law Amendment Act, 2006* (formerly Bill 130) amended the *Municipal Act, 2001* and the *City of Toronto, 2006*, effective January 1, 2007, to add a new part, entitled "Accountability and Transparency".

In each case, the provisions of that Part authorize the municipal council to establish a code of conduct for members of both the council and local boards. In each case contravention of the code cannot constitute an offence.

Municipal councils also have the power to pass by-laws respecting accountability and transparency of the municipality and its operations,¹ which could also produce requirements affecting the ethical behaviour of members.

Each municipal council is also empowered (in the case of Toronto, required) to appoint an integrity commissioner who reports to council and is responsible for performing in an independent manner the functions assigned by the municipality with respect to the application of the code of conduct and of any procedures, rules and policies of the municipality governing the ethical behaviour of members of council and local boards.

In carrying out his or her responsibilities, the integrity commissioner may exercise such powers and perform such duties as are lawfully assigned by the municipality.

The integrity commissioner may delegate in writing to any person, other than a member of council, any of his or her powers and duties.

Precursors to the Creation of the Position

The role of the municipal integrity commissioner was anticipated and recommended by Madam Justice Bellamy in her report as Commissioner of the Toronto Computer Leasing Inquiry, published in 2005.

Commissioner Bellamy's recommendations, under the heading of "Ethics", included many suggestions for the improvement of the City's code of conduct for councillors and staff, to include broader ethical considerations, setting out the highest ideals and values for which all public servants should be working.

Among Commissioner Bellamy's recommendations to the City were the following:

- a full-time integrity or ethics commissioner should be hired;

- to ensure independence, he or she should serve for a fixed term, be removable only by a two-thirds vote of council, and report directly to council, not the mayor;
- the City should encourage staff and councillors to consult with the integrity commissioner when necessary;
- the integrity commissioner should offer his or her opinion to all members of council who request it, in strictest confidence;
- members of the public should be allowed to make complaints, which may be anonymous, to the integrity commissioner;
- councillors should not be allowed to withhold co-operation with investigations by the integrity commissioner;
- the integrity commissioner should be free to dismiss frivolous complaints at the outset;
- the integrity commissioner should have summons powers;
- the integrity commissioner should be able to recommend to council an appropriate range of sanctions for ethical misdeeds, including public reprimands, public apologies, expulsion from one or more committee meetings, removal from committee posts or committee chair positions, expulsion from one or more council meetings, or a declaration of vacancy in the councillor's seat;
- the integrity commissioner should not have the power to impose sanctions directly;
- the integrity commissioner should be given the resources to participate actively in the development of ongoing ethical education programmes and materials for councillors.

Comprehensive recommendations were also made relating to the receiving by councillors of gifts, entertainment and other benefits, including requiring a registry of gifts received.

The resultant provisions enacted by Bill 130 followed some, but not all, of the Commissioner's recommendations.

Principal among them was the emphasis on the independence of the integrity commissioner, but also maintaining the authority of the council to establish the code of conduct and to assign to the commissioner responsibilities as to its application, as well as other procedures, rules and policies governing members' ethical behaviour.

The municipality and its local boards are required to give the integrity commissioner such information as he or she believes to be necessary for an inquiry.

The statute also gives the integrity commissioner free access to all books, accounts, financial records, electronic data processing records, reports, files, and all other papers, things or property belonging to or used by the municipality that the integrity commissioner believes to be necessary for an inquiry.

This would appear to include the requirement that members of council give the integrity commissioner access to records held by the member in that capacity.

The only penalties specifically authorized by the legislation are a reprimand, and/or suspension of remuneration of the member for up to 90 days, which may be imposed only if the integrity commissioner reports his or her opinion that the member has contravened the code of conduct. However, the penalties are not stated to be exclusive, and, while it would not appear that a council could suspend remuneration for more than 90 days, other administrative steps might be taken, such as to request an apology, or other consequences within the council's existing powers.

It would not appear, however, that the integrity commissioner could remove or suspend a member from his or her duties as a councillor, or preclude a member from attending a meeting, debating or voting with respect to any matter.

While Commissioner Bellamy recommended that rules concerning conflict of interest should form part of the City's code of conduct, and many municipal councils have included such provisions in their codes, it is unclear the extent to which a code of conduct or integrity commissioner's inquiry can specifically address issues which are the subject-matter of specific regulations and enforcement procedures under the *Municipal Conflict of Interest Act*, which provides for court proceedings against the councillor to be commenced

by an elector.

The legislation is specific, in referring to possible duties of an integrity commissioner in conducting an “inquiry”, not an “investigation”, which, together with the integrity commissioner’s duty to report his or her opinion to the council, are directed to characterizing the integrity commissioner’s role in that regard as more of an administrative nature, rather than prosecutorial proceedings against the councillor whose conduct is subject to the inquiry.

The integrity commissioner is not required to make recommendations to the council for penalties or other action which the council might take, but the imposition of a reprimand or a three-month suspension of remuneration may be imposed only if the integrity commissioner reports that in his or her opinion the member has contravened the code.

The integrity commissioner is required to preserve secrecy in all matters that come to his or her knowledge in the course of his or her duties.

At the same time, the municipality is required to ensure that reports received from the integrity commissioner are made available to the public.

The requirement to preserve secrecy, where it applies, prevails over the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*.

The integrity commissioner is given statutory authority to elect to exercise the powers of a commission under Parts I and II of the *Public Inquiries Act*, which apply to the inquiry as if it were an inquiry under that Act.²

An integrity commissioner may be authorized to conduct an inquiry arising from a request made by council, a member of council, or a member of the public, about whether a member of council has contravened the code of conduct applicable to the member.

It is unclear, where the original requester seeks to withdraw the request and terminate the inquiry, whether or not the integrity commissioner may be required or authorized to continue the inquiry. It might depend on the reason for the withdrawal.

The integrity commissioner is one of four “accountability officer” positions recommended by the Bellamy Inquiry; the others being the Lobbyist Registrar, the Ombudsman and the Auditor General. Once again, as with the position of the integrity commissioner, the establishment of the positions of Ombudsman and Auditor General is mandatory in the case of the City of Toronto, and permissive for others.³

If the integrity commissioner is authorized to provide a periodic report to the council on his or her activities, he or she may summarize the advice given, but is prohibited from disclosing confidential information that could identify the person concerned. However, where the integrity commissioner reports his or her opinion concerning possible contravention of the code of conduct by a member, “the Commissioner may disclose in the report such matters as in the Commissioner’s opinion are necessary for the purposes of the report”.

Where the integrity commissioner in the course of an inquiry determines that there are reasonable grounds to believe that there has been a contravention of any other Act or the *Criminal Code*, he or she is required to immediately refer the matter to the appropriate authorities and suspend the inquiry until the resulting police investigation and charges have been finally disposed of. It is unclear, however, how requirements in a code of conduct relating to alleged conflict of interest by a member may relate to the specific, possibly duplicative, requirements of the *Municipal Conflict of Interest Act*.

While an integrity commissioner’s inquiry into possible contravention may lead to serious consequences for a council member, the more significant ongoing responsibilities of the integrity commissioner relate to his or her educational and advisory role, on a

continuing basis, to members of council and his or her availability and duty to take appropriate steps to implement the will of council in the application of its code and any other requirements or policies of the council governing the ethical conduct of its members.

Issues to be Considered

While the legislation is probably as clear as the subject-matter allows, difficult issues face municipal councils in the establishment of their codes of conduct and individual integrity commissioners exercising their duties pursuant to council instruction. Some of these are as follows:

- Is it to be the role of the integrity commissioner to be proactive in providing ongoing information and advice to members of council with respect to issues identified as arising under the code of conduct?
- Can an integrity commissioner be authorized to decide to conduct his or her own inquiry, in the absence of a request, and even against the wishes of a majority of councillors?
- Is it possible to remove entirely any potential for conflict of interest in the appointment or instruction of an integrity commissioner?
- Should an integrity commissioner accept an anonymous request for an inquiry?
- How detailed should an integrity commissioner's report be, and should he or she name names?
- Once having embarked on an inquiry, should an integrity commissioner accept directions or instructions from the council?
- In the event that either the requester or the council decides that the request should be withdrawn, what should the integrity commissioner do?
- In what circumstances is it appropriate for an integrity commissioner to delegate any of his or her powers or duties?
- Can a council require its integrity commissioner to accept and conduct an inquiry into any particular matter?
- Can an integrity commissioner conduct an inquiry into conduct of a councillor preceding the adoption of the code of conduct or the appointment of the integrity commissioner?
- In the conduct of an inquiry, should an integrity commissioner be in a position to request the council to interpret its code of conduct or to provide information previously considered confidential or in camera, to assist the commissioner?
- Is it open to an integrity commissioner, in his or her report to the council arising out of an inquiry, to recommend one or both of the sanctions designated under the Act and/or additional sanctions or consequences to be meted out to the member?
- How extensive should be the findings of fact set out in such a report by an integrity commissioner, and should it include information which would otherwise be considered confidential?
- What position should an integrity commissioner take in dealing with a relevant witness who is uncooperative or refuses to be interviewed? What specific issues may arise in attempts to interview: (1) other members of council, or (2) members of staff?
- In dealing with allegations of "conflict of interest", to what extent and in what ways may the integrity commissioner look into issues of pecuniary versus non-pecuniary interest and/or improper use of influence?
- What techniques are available to an integrity commissioner to provide required reports to council (and therefore the public) in the context of issues of confidentiality, MFIPPA and other restrictions on communication of information?

A municipal integrity commissioner may find it of value to network with his or her counterparts in other municipalities, such as through the Municipal Integrity Commissioners Association of Ontario (recently formed). Hopefully this will lead to suggestions for improvement of local codes of conduct, and possibly substantial standardization of wording in various codes of conduct so that a system of jurisprudence may develop under them.

Integrity at the Provincial Level

The Integrity Commissioner for Ontario is appointed by Lieutenant Governor-in-Council pursuant to the provisions of the *Members' Integrity Act, 1994*.

In the balancing of interest between the need for transparent and accountable government and the rights of individual members, the Provincial statute is somewhat more specific in some areas:

- the Provincial Integrity Commissioner “shall hold office for a term of five years”, subject to being removed for cause before the expiry of the term of office by the Lieutenant Governor-in-Council on the address of the Assembly;
- under section 28 of the Act, a member of the Assembly may request that the Commissioner give an opinion and recommendations on any matter respecting the member’s obligations under the Act, and under Ontario parliamentary convention, and the Commissioner is required to make inquiries and provide the member with an opinion and recommendations, which are confidential, subject to release by the member or with the member’s consent;
- under section 29 of the Act, information disclosed to the Commissioner under the Act is confidential and shall not be disclosed to any person except with the member’s consent, in a criminal proceeding or otherwise in accordance with the Act;
- section 30 of the Act provides specific authority to a member of the Assembly who has reasonable and probable grounds to believe that another member has contravened the Act or Ontario parliamentary convention, to request the Commissioner to give an opinion as to the matter. Such request must be in writing and set out the grounds for the belief and the contravention alleged. The Commissioner then may decide to conduct an inquiry, after giving the member whose conduct is concerned reasonable notice;
- under section 31 of the Act, the Commissioner is required to provide his or her opinion to the Speaker, who is required to provide it to the member whose conduct is concerned and to the leader of each political party represented in the Assembly, and to cause it to be laid before the Assembly itself;
- section 31(5) provides authority to the Commissioner not to conduct an inquiry where, in his or her opinion, the referral of the matter is frivolous, vexatious or not made in good faith, or there are no grounds or insufficient grounds for an inquiry. The Commissioner is required to state the reasons for not conducting the inquiry in the report;
- under section 34 of the Act, where the Commissioner conducts an inquiry and finds that the member has contravened any of certain designated provisions, the Commissioner is required to recommend in his or her report,

(a) that no penalty be imposed;

(b) that the member be reprimanded;

(c) that the member’s right to sit and vote in the Assembly be suspended for a specified period or until a condition is fulfilled; or

(d) that the member’s seat be declared vacant.

In such circumstances, the Assembly may approve an order that a recommended penalty be imposed, or may reject the recommendation and impose no penalty.

Conclusion

Over one dozen Ontario municipalities have appointed integrity commissioners to assist in implementing their codes of conduct. Even in the case of the City of Toronto, the position does not appear to be considered full-time, at least so far.

It is most important that the integrity commissioner maintain as much independence, actual and perceived, as possible from the council whose code of conduct he or she administers. While the legislation appears to anticipate that an integrity commissioner may be an employee of the municipality, that relationship alone could raise awkward issues, and possibly be alleged as a conflict. At the same time, the role of the integrity commissioner is to assist the council in implementing its will as expressed in the code of conduct, and the integrity commissioner fulfills primarily an administrative function, not having the responsibility to either decide that the code has been contravened by a member nor to impose sanctions.

The most important functions of the integrity commissioner are to educate members of council with respect to the application and interpretation of the code, and to be available to respond directly to requests for assistance from individual members, where the council has delegated that responsibility to the integrity commissioner.

For those municipalities which have adopted a code of conduct, or are considering doing so, the role of the integrity commissioner is central to implementing the council's decision and generally assisting members of council and the public, where authorized to do so, in terms of best practices and ethical considerations, which form a vital part of the role of every councillor.

1. *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 8(2)2; *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 10(2)2, 11(2)2.
2. *City of Toronto Act, 2006*, s. 160(2); *Municipal Act, 2001*, s. 223.4(2).
3. *City of Toronto Act, 2006*, ss. 158(1), 170(1), 177(1); *Municipal Act, 2001*, ss. 223.13(1), 223.19(1).

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