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April 6, 2021

Our File No.: 155819

Mayor Jordan and Members of Council  
The Corporation of the Town of Grimsby  
160 Livingston Avenue,  
Grimsby, Ontario  
L3M 4G3

Your Worship and Members of Council:

**Re: Information Requests re Integrity Commissioner Report IC-11767-1020  
Clarification re Council Decision on February 16, 2021**

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## Introduction

We have been requested to consider and respond to two information requests from meetings of Council held on February 16, 2021 and March 22, 2021. The information requests relate to a decision of Council pertaining to the Integrity Commissioner's Code of Conduct Report IC-11767-1020 (Vaine complaint against Jordan) dated January 22, 2021.<sup>1</sup>

## Background

On October 2, 2020, the Town's Integrity Commissioner received a complaint pursuant to the Town of Grimsby Code of Conduct against Mayor Jeff Jordan (the "Mayor") regarding the disclosure of confidential information from a closed meeting of Council.

The Integrity Commissioner conducted an investigation and determined that the Mayor had contravened the Code of Conduct by having disclosed confidential information, contrary to the provision entitled "Release of Confidential Information Prohibited."<sup>2</sup>

Although the Report concluded that the Mayor had contravened the Code of Conduct, the Integrity Commissioner determined the breach to be "trivial and without consequence".<sup>3</sup>

The Integrity Commissioner accordingly did not recommend the imposition of a penalty against the Mayor nor the requirement for any corrective actions.

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<sup>1</sup> *Integrity Commissioner's Code of Conduct Report IC-11767-1020*, January 22, 2021 ("Report"), online at: [https://grimsby.civicweb.net/FileStorage/D96C3E6F45D64B589ABA11C28069DA63-IC-11767-1020%20Report%20\(Vaine%20and%20Jordan\).pdf](https://grimsby.civicweb.net/FileStorage/D96C3E6F45D64B589ABA11C28069DA63-IC-11767-1020%20Report%20(Vaine%20and%20Jordan).pdf) .

<sup>2</sup> *Ibid*, at para. 22.

<sup>3</sup> *Ibid*, at para. 23.

The Committee of the Whole received the Report on February 1, 2021, and passed the following resolution:

### **7.1 Reports**

- a) Integrity Commissioner Report IC-11767-1020 (Vaine and Jordan)

#### **CW-21-25**

Moved by Councillor Ritchie; Seconded by Councillor Vaine;

Resolved that the Town Clerk through the office of the CAO be directed to report any cost that is affiliated with this matter and report back to the Committee of the Whole; and

That the Town Clerk through the office of the CAO look into related cases in the Province of Ontario where closed session information has been disclosed and prepare a report to Committee of the Whole at the earliest opportunity for further discussion.

The Clerk brought forward Report CAO 21-07: Reporting on Costs and Related Cases for Integrity Commissioner Complaint (Vaine-Jordan) to the meeting of the Committee of the Whole on February 16, 2021. The following resolution was passed at this meeting:

### **9.1 Reports**

- a) \*Report CAO 21-06: Reporting on Costs and Related Cases for Integrity Commission Complaint (Vaine-Jordan)

#### **CW-21-45**

Moved by Councillor Sharpe; Seconded by Councillor Ritchie;

Resolved that Report CAO 21-06 dated February 16, 2021 be received; and

That since Mayor's correspondence with this individual was deemed to be a breach of the Code of Conduct; and

That Mayor Jordan be required to pay the \$1,302.62 that this individual charged the Town for this correspondence; and

That report IC-11767-1020 be forwarded to those individuals pertaining to the directions given by Council via various resolutions from the closed session of July 13, 2020.

Councillor Bothwell submitted an information request at the same meeting of Committee of the Whole as follows:

#### **INFORMATION REQUESTED** by Councillor Bothwell:

- The Integrity Commissioner has made a ruling and a decision that the Mayor's action was inconsequential, and therefore there should be no penalty. However, the motion imposes a financial penalty to the Mayor, and therefore request that the Clerk or Legal Counsel clarify the following:

- Whether this financial penalty is setting a precedent where Council is taking the Integrity Commissioner's recommendation and doing something that is outside the Municipal Act by imposing a penalty on the Mayor by asking him to reimburse a cost as a result of the Integrity Commissioner investigation.
- Whether this practice is acceptable, and if this is setting a precedent or even permitted in the Municipal Act.<sup>4</sup>

A second information request was subsequently made and passed unanimously at the meeting of Council on March 22, 2021 with respect to the adoption of Item 5 b) of the agenda respecting Council Minutes – March 1, 2021 as follows:

**Information Request:**

Councillor Sharpe requests clarification of the intent of a March 1, 2021 motion about how it was read as opposed to how it is written.

**C-21-47**

Moved by Councillor Vardy; Seconded by Councillor Ritchie

Resolved that Resolution CW-21-70 be lifted from the Committee of the Whole meeting minutes of March 1, 2021 for separate consideration.

We believe that the information request from Councillor Sharpe refers to the Motion that was considered and passed by Committee of the Whole on **February 16, 2021** (not March 1, 2021) (the "Motion").

**Materials Reviewed**

In order to provide our opinion, we have reviewed the recordings of the relevant portions of the aforementioned meetings of Council (on March 1, 2021 and March 22, 2021) and Committee of the Whole (on February 16, 2021 and March 1, 2021) where the matters respecting the Report, Council's decision respecting the Report and the information requests were made. We also reviewed the agendas and minutes of these and other meetings as well as the Report.

We also reviewed the Town's Procedural By-law<sup>5</sup> and Part V.1 of the *Municipal Act, 2001* and such other materials that we considered applicable to respond to the information requests.

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<sup>4</sup> This Information Request is set out as an Administrative Correction to the minutes of the Committee of the Whole meeting on February 16, 2021 to correct the Item CW-21-45. This was done at the meeting of Council on March 1, 2021 and it contained in Item 5 c) of the minutes of that meeting.

At the meeting of the Committee of the Whole on March 1, 2021, a similar but longer information request directing that the Clerk consult with the Town's legal counsel for a determination of whether the requirement that the Mayor pay the Town \$1,302.62 as directed in the foregoing resolution violated ss. 223.4(5) and/or 448(1) of the *Municipal Act, 2001* was moved. The motion was held to be a reconsideration of the information request from February 16, 2021 and was voted down.

<sup>5</sup> Town of Grimsby Procedural By-law 20-65 Consolidated – online: <https://www.grimsby.ca/en/town-hall/resources/Documents/Procedural-Bylaw-20-65.pdf>

## Issues

The information requests raised the following questions:

1. Who is the decision-maker when the Integrity Commissioner reports that a member has contravened the Code of Conduct?
2. Does the Motion impose a financial penalty that is not authorized by the *Municipal Act, 2001*?
3. Was the Motion that was passed correctly written?

## Analysis

### 1. Who is the Decision-Maker?

As noted above, Council received the Report from the Integrity Commissioner on February 1, 2021. The Report contained a clear finding that the Mayor had contravened a provision of the Code of Conduct by disclosing confidential information from a closed meeting.

The Report was provided to Council in accordance with subsection 223.4(5) of the *Municipal Act, 2001*. The authority and discretion to impose a penalty belongs exclusively to Council but only if the Integrity Commissioner has reported that there has been a contravention of the Code of Conduct:

### Penalties

**223.4 (5)** The municipality may impose either of the following penalties on a member of council or of a local board if the Commissioner reports to the municipality that, in his or her opinion, the member has contravened the code of conduct:

1. A reprimand.
2. Suspension of the remuneration paid to the member in respect of his or her services as a member of council or of the local board, as the case may be, for a period of up to 90 days.

The Integrity Commissioner only makes recommendations and there is no formal “decision” until Council renders one.

A municipal council is not bound to accept the recommendations of its Integrity Commissioner. There are many decisions emanating from integrity commissioner reports where a council decides to proceed differently than what its integrity commissioner has recommended. In some cases, councils have not agreed to impose either penalties or remedial measures / corrective actions as recommended. In other cases, councils have imposed penalties (or more severe penalties) and/or remedial measures / corrective actions even when not recommended by their integrity commissioner.

## **2. Does the Motion Impose a Financial Penalty?**

### **(i) Penalties**

It is clear that a council can only impose the two statutory penalties that are authorized under subsection 223.4(5) of the *Municipal Act, 2001*:

- (a) a reprimand; or
- (b) a suspension of pay.

This was unequivocally confirmed by the Ontario Divisional Court in *Magder v. Ford*<sup>6</sup> in a matter that concerned the penalty provision in the *City of Toronto Act, 2006*<sup>7</sup> (which is almost identical to the provision in the *Municipal Act, 2001*):

Subsection 160(5) of the COTA states that City council may impose "either of the following penalties" if the Integrity Commission reports that a member has contravened the Code. The French version of the COTA provides that council "peut infliger . . . l'une ou l'autre des sanctions suivantes". The literal reading of both versions of the provision is that there are only two sanctions or penalties that council can impose for a breach of the Code. (emphasis added)

### **(ii) Corrective Actions**

The Divisional Court held that while there are only two statutory penalties, a municipality is not precluded from imposing remedial measures or corrective actions to carry out the objectives of its code of conduct:

That is not to say that the COTA precludes other remedial measures to carry out the objectives of a Code. For example, the Toronto Code permits the Integrity Commissioner to recommend "Other Actions". Those "Other Actions" include a request for an apology. Such a request is not in and of itself a penalty or sanction. In some cases, an apology would be a reasonable and efficacious way to deal with an infraction of the Code, rather than to [page258] penalize with a reprimand or suspension. Similarly, a request to return City property if someone used it improperly may be a remedial measure. We agree with the application judge that a generous reading of the City's power to pass a code of conduct, in accordance with s. 6(1) of the COTA, would support the validity of including remedial measures in such a code. We need not determine the precise ambit of permissible remedial measures in this appeal.<sup>8</sup>

Many codes of conduct list either "Other Actions" that may be taken, or provide that remedial measures or corrective actions may be imposed. For example, the City of Toronto's Code of Conduct lists the two following actions:

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<sup>6</sup> *Magder v. Ford* (2013), 7 M.P.L.R. (5th) 1 at para. 66 (Ont. Div. Ct.).

<sup>7</sup> *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A.

<sup>8</sup> *Magder v. Ford*, *supra* note 6, at para. 67.

1. Repayment or reimbursement of moneys received.
2. Return of property or reimbursement of its value.

Grimsby's Code of Conduct does not list remedial measures or corrective actions but notes in Section 5 d) of Part B of the Complaint Protocol:

- d) Any recommended corrective action or penalty must be permitted by the Municipal Act, 2001, and shall be designed to ensure that the inappropriate behaviour or activity does not continue and is not repeated.

The Divisional Court's decision in *Magder v. Ford* was clear that the corrective actions are permissible pursuant to a municipality's broad authority to enact by-laws relating to its governance structure and the accountability and transparency of the municipality and its operations under paras. 11(2) 1 and 2 of the *Municipal Act, 2001*.

Also, as noted above, the Divisional Court indicated that it "need not determine the precise ambit of permissible remedial measures"<sup>9</sup> on the basis that the specific remedial measure or corrective action to be imposed would need to be determined on a case-by-case basis.

The Divisional Court in *Magder v. Ford*, as well as the Superior Court in *Altmann v. Whitchurch-Stouffville (Town)*,<sup>10</sup> have indicated that the imposition of remedial measures or corrective actions cannot be for punitive purposes (i.e., in other words, they cannot be penalties or sanctions under the guise of "corrective actions").

### **(iii) Requirement to Pay - A Penalty or a Corrective Action?**

The Motion expressly noted that the Mayor's disclosure of confidential information to a particular individual led to that individual to charge the municipality \$1,302.62. The Motion also provided:

That Mayor Jordan be required to pay the \$1,302.62 that this individual charged the Town for this correspondence.

The Motion itself does not describe the repayment obligation as either a "penalty" or as a "corrective action." Councillor Sharpe [at 2:19:30] stated at the meeting:

It is appropriate that Mayor Jordan should pay the bill for contacting this individual and not the Town of Grimsby.<sup>11</sup>

Councillor Bothwell stated [at 2:29:00] that the "integrity commissioner made a ruling and a decision that it was inconsequential and that there be no penalty" and "as a result this [motion] is creating a financial penalty to the Mayor."

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Altmann v. The Corporation of the Town of Whitchurch-Stouffville* (2018), 81 M.P.L.R. (5th) 1 at paras. 39 and 49 (Ont. S.C.J.).

<sup>11</sup> Councillor Sharpe at states [at 2:22:40]: "I do not think the Town should be responsible for the costs incurred from this conversation...".

Later on, Councillor Sharpe [at 2:34:05] notes that “‘repayment’ has been ordered before”<sup>12</sup> but does not provide the specific context as to how “repayment” was imposed nor does he clarify whether the requirement “to pay” in the Motion is a penalty or a corrective action.

Some guidance can be found from the Divisional Court’s ruling in *Magder v. Ford* which considered whether Toronto’s Integrity Commissioner could order a member of council to repay funds he had never received:

What is objectionable in the present case is the fact that a so-called remedial measure is being used for a punitive purpose. In Decision CC 52.1, City council ordered Mr. Ford to pay moneys to certain donors when he had never received such moneys personally. While the application judge called the reimbursement obligation a remedial measure, in our view, this was a penalty imposed on Mr. Ford. Indeed, the Integrity Commissioner described the payment as a sanction in her report. Her language in support of that sanction is the language of deterrence and denunciation, as seen in the quotation at para. 18 of our reasons, above. Her report was adopted by council, and the language of sanction is found in Decision CC 52.1. Certainly, from the perspective of an individual who is required to pay moneys he never received personally, this is a financial sanction or penalty.<sup>13</sup>

We closely reviewed the video-recording of the applicable portions of the Committee of the Whole meeting held on February 16, 2021 in order to determine whether the reimbursement or repayment obligation is a penalty or a remedial measure / corrective action.

There is no express reference to remedial measures or corrective action. In this case, Mayor Jordan did not receive any monies. While he may have caused the Town to incur charges of \$1,302.62 from the individual that he disclosed confidential information to, he did not personally receive the funds. Based on the Divisional Court’s ruling on *Magder v. Ford*, the requirement “to pay” in the Motion bears the characteristics of a financial sanction or penalty.

It is our opinion that requirement for the Mayor to pay \$1,306.62 is not a suspension of pay and it is not ever referred to as a remedial or corrective action – the requirement to pay is a financial penalty that is not authorized by the *Municipal Act, 2001*.

**(e) Was the Motion that was Passed Correctly Written?**

It is clear from the video-recording of the applicable portions of the Committee of the Whole meeting on February 16, 2021 that the final wording of the Motion is almost identical to the version of the Motion that Councillor Sharpe introduced when he first moved the Motion, subject to the friendly amendment that was moved by Councillor Ritchie and agreed to by Councillor Sharpe.

Council had a full debate on the Motion at the meeting.

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<sup>12</sup> This is in reference to Report CAO 21-06: Reporting on Costs and Related Cases for Integrity Commissioner Complaint (Vaine-Jordan) at page 2.

<sup>13</sup> *Magder v. Ford*, *supra* note 6, at para. 68.

At the conclusion of debate, the Mayor made one final statement [at 2:45:30] and called the question. Mayor Jordan then read aloud the Motion.

It is only *after* the Motion is read that Councillor Ritchie stated as follows [at 2:46:46]:

Just a point of clarity, Mr. Mayor, if I could: I don't know if we can actually force you to pay if this is passed tonight if we have to do a suspension of pay. I don't know but if we can have both of those words in there because I don't know if we have the ability to force anyone to pay a particular bill.

Councillor Sharpe then stated [at 2:47:14]:

There's probably a tax savings if we deduct it from the pay too. Accounting aside, I'm sure that the Treasurer or the Admin Department can do that as long as it is included in the motion, I am OK with it.

It is apparent from the video-recording of the meeting that both the mover and seconder of the Motion were of the view that the imposition of the requirement for the Mayor to reimburse the Town for \$1,302.62 for the costs of the communication might not be enforceable and that some wording to refer to a "suspension of pay" should be inserted into the wording of the Motion.

The point of clarification from Councillor Sharpe is not referred to as a friendly amendment nor as a formal motion to amend the Motion.

There is no further discussion and no member of Council made any additional comment. The Mayor did not canvas Council as to whether there was any consent for the suggested modification and he did not re-read the Motion with the wording suggested by Councillor Ritchie and agreed to by Councillor Sharpe.

Since a recorded vote was requested, the Clerk proceeded to poll each of the members in turn.

It is our opinion that the matter proceeded correctly on a procedural basis. The Mayor had already called the question and read the Motion when Councillors Ritchie and Sharpe spoke to clarify the wording of the Motion.

Section 9.2(1)(b) of the Procedural By-law provides that a motion to amend shall be introduced during debate on the main motion.<sup>14</sup>

Moreover, Section 9.2(1)(e) provides that an amendment "[s]hall be decided or withdrawn before the main motion is put to vote."

Accordingly, to the extent that the clarification by Councillors Ritchie and Sharpe constituted a motion to amend, the debate on the Motion had already ended and the modified wording could not be accommodated at this point and in this manner.

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<sup>14</sup> In fact, this occurred during debate on the Motion when Councillor Ritchie proposed a "friendly amendment" (pursuant to Section 9.2(1)(d) of the Procedural By-law) to the Motion (which was accepted by Councillor Sharpe).

Furthermore, pursuant to the Procedural By-law, the voting had commenced upon the Mayor having called the question and having read the Motion:

#### 11.7 Voting Commenced

- (1) After the Chair commences to take a vote on a question, no Member shall speak to such question or present any other motion until a vote has been taken on such question.

It is our view that the vote on the question was properly conducted in accordance with the Procedural By-law. The “clarification” to the wording of the Motion was not properly introduced following the calling of the question, which commenced the process of voting.

While the intent of the mover and seconder of the Motion may have been clear, the proposed modified wording was not correctly raised because it occurred *following* the debate on the Motion.

In any event, there was no concurrence or acceptance of the modified wording. As a general rule of proper board governance, some form of active assent is required for an action – in this circumstance, silence does not equate to acquiescence. This is demonstrated by the fact that the Mayor did not re-state the Motion.

Based on the foregoing, it is our opinion that the Motion as originally moved, as read by the Mayor and as set out in the minutes of the meeting of February 16, 2021 is correct.

#### Conclusions

Based on the foregoing, it is our opinion that:

1. the Integrity Commissioner does not make decisions or rulings – his reports express his opinion and set out his findings and recommendations;
2. Council is the decision-maker and has the power to impose penalties and/or corrective actions when there is a finding of a contravention of the Code of Conduct even if it is not recommended by the Integrity Commissioner;
3. there are only two penalties that may be imposed by Council pursuant to subsection 223.4(5) of the *Municipal Act, 2001*, including a “suspension of pay”;
4. the requirement that Mayor Jordan pay the amount of \$1,302.62 that was charged to the Town is not expressly identified or referred in the debate on the Motion as a “corrective action”;
5. the “requirement to pay” appears to be a form of financial penalty that is not authorized at law; and
6. the Motion was fully debated by the Committee of the Whole and the wording of the Motion that was put to a vote was correct given that the Motion had not been properly amended in accordance with the Procedural By-law.

For the above-noted reasons, the Motion was read, written and voted upon as moved (subject to a friendly amendment that was concurred by the mover) during the debate. The Motion was not and could not have been amended in accordance with the Procedural By-law as intended by the mover and seconder.

Yours truly,

AIRD & BERLIS LLP

A handwritten signature in blue ink, appearing to read "John Mascarin". The signature is stylized with a large, looping initial "J" and a cursive "Mascarin".

John Mascarin

JM/km

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