

**Integrity Commissioner for Durham Region
and Brock, Clarington, Oshawa, Pickering, Scugog, Uxbridge and Whitby**

Annual Reports

1. Introduction

I have been appointed as Integrity Commissioner for the Regional Municipality of Durham and seven of its local municipalities. As is the custom, this is a joint report. (It does not cover the Town of Ajax, where am not the Integrity Commissioner.)

2. Fiscal Overview

The financial impact of Integrity Commissioner services falls entirely on the municipal tax base. Integrity Commissioners and codes of conduct have been mandated by the Province without any corresponding provincial funding.

A few Ontario municipalities pay Integrity Commissioners salaries or annual retainers, but most municipalities, including Durham Region and its local municipalities, primarily compensate Integrity Commissioners by the hour for services rendered.¹ Municipalities are unable, however, to determine the extent of the demand for Integrity Commissioners' time. Under the legislation, any member of the public may request an inquiry into an alleged code of conduct contravention,² and any elector "or a person demonstrably acting in the public interest" may request an inquiry into whether the *Municipal Conflict of Interest Act* was contravened.³ The Act provides that Integrity Commissioners perform their functions an independent manner,⁴ so municipalities cannot intervene in the conduct of inquiries.

Here, as in most Ontario municipalities, any individual can seek to initiate an Integrity Commissioner inquiry for which the municipality becomes liable to pay.⁵

I believe that this legislative regime places on Integrity Commissioners an implied obligation to act reasonably in generating costs to municipalities through the provision of services, in particular through the conduct of inquiries. Integrity Commissioners must act

¹ Durham Region pays an additional annual retainer of \$900, which covers the Region and the local municipalities.

² *Municipal Act*, subsection 223.4(1).

³ *Municipal Act*, subsection 223.4.1(2).

⁴ *Municipal Act*, subsection 223.3(1).

⁵ Some municipalities have attempted to address the uncertainty by asking Integrity Commissioners to agree to "upset limits" in their contracts. The problem with this approach is that individual complainants, not municipalities, determine the demand for Integrity Commissioner inquiries. Integrity Commissioners are Accountability Officers who exercise statutory functions under Part V.1 of the *Municipal Act*, and their statutory obligations do not disappear once an upset limit is reached. Their position is not the same as, for example, that of a contractor that has agreed to regrade a section of municipal highway of known dimensions.

in a manner that is responsive and fair to the individuals who are parties to their inquiries, while at the same time following a process that is efficient, cost-sensitive, and prudent, taking into account the circumstances of each case.

The following table displays costs for Integrity Commissioner services, exclusive of tax, and the number of inquiry reports (including MCIA decisions) issued:

Municipality	2019	2020	Inq. Reports ⁶	Ann. Retainer
Regional Municipality of Durham	\$6,019	\$12,267	1	\$900
Township of Brock	\$4,302	\$17,112	3	\$0
Municipality of Clarington	\$2,844	\$4,828	0	\$0
City of Oshawa	\$5,999	\$37,236	5	\$0
City of Pickering	\$813	\$598	0	\$0
Township of Scugog	\$1,267	\$1,960	0	\$0
Township of Uxbridge	\$7,266	\$741	1	\$0
Town of Whitby	\$8,939	\$7,481	0	\$0

By comparison, recent annual costs of Integrity Commissioner commissioners in other GTA municipalities of varying sizes have included: Markham 2018-2019 (\$32,105),⁷ Richmond Hill 2019 (\$64,500), Richmond Hill 2020 (\$55,000),⁸ Georgina 2019 (\$9,559.80),⁹ Georgina 2020 (\$31,204.95),¹⁰ and Aurora 2020 (\$3,495).¹¹

3. Legislative Reform

The Province is currently consulting on reform of the Code of Conduct / Integrity Commissioner regime. I will likely participate in the consultations as an individual, on my own behalf. Because Integrity Commissioners must operate independently of the

⁶ Two reports from a single inquiry are counted as one report.

⁷ <https://tinyurl.com/5a4aw2fv>. One inquiry report was issued that year.

⁸ <https://tinyurl.com/w7rr249w>

⁹ <http://www3.georgina.ca/archive/georgina/council-2020/2020-01-22-ADD.pdf>

¹⁰ <https://pub-georgina.escribemeetings.com/filestream.ashx?DocumentId=1705>

¹¹ <https://tinyurl.com/aw626ads>

municipalities, it would not be appropriate for me to convey a position on behalf of any municipality; I will make clear that my comments are offered in a personal capacity.

While I have not yet made submissions, I am sharing with the Region and its local municipalities some of the considerations that I am likely to raise:

- **Addressing the cost to municipalities, especially smaller ones.** The volume of activity is primarily complaint driven, which places the costs of this provincial mandate outside a municipality's control. Consideration could be given to replacing municipal Integrity Commissioners with the provincial Integrity Commissioner, or a new provincial agency under Tribunals Ontario, or full-time, provincial appointees responsible for geographic areas of the Province – or at least giving municipalities such an option.
- **Legislated qualifications for Integrity Commissioners,** who are appointed as accountability officers under the *Municipal Act*.¹² Currently there are no standards to prevent the appointment of an individual who has been convicted of a crime, or who has been subject to professional discipline for misappropriating client funds.
- **A selection process suitable for the appointment of a statutory accountability officer.** It is not obvious why appointment of an accountability officer would be decided on a commercial basis via Request for Proposals, or how a corporation or partnership is able exercise the legal authority of an Integrity Commissioner. An alternative view is that appointments of individuals to fill statutory offices should proceed according to an application and/or recruitment process. Various municipalities have started to abandon RFPs for Integrity Commissioners in favour of an application/ recruitment process better suited to appointments of individuals to hold statutory office. Examples include Ottawa and Richmond Hill.
- Some stakeholders are advocating for a power to remove councillors from office – which essentially means overturning the results of a democratic election. I do not believe that under any circumstance Integrity Commissioners should be given the power to unseat duly elected municipal councillors. I certainly do not believe that this significant power should be awarded by RFP, or that the power to penalize elected officials should be handed to a corporation.

¹² For example, under federal legislation, the federal Conflict of Interest and Ethics Commissioner must be a former judge, or “former member of a federal or provincial board, commission or tribunal who .. has demonstrated expertise in one or more of the following: (i) conflicts of interest, (ii) financial arrangements, (iii) professional regulation and discipline, or (iv) ethics ...”

4. Code of Conduct Inquiries

Whether to conduct an inquiry into an allegation under the Code of Conduct lies in the Integrity Commissioner's discretion. The Integrity Commissioner does not make the final decision on a Code of Conduct inquiry. Instead, the Integrity Commissioner reports findings and recommendations to Council, and it is Council that makes any decision.

The Complaint Protocols set targets for the completion of the inquiry process, but they give the Integrity Commissioner the discretion to extend deadlines as necessary. Generally, inquiries are pursued as expeditiously as possible.

However, the following six factors bear on the timing of inquiries:

1. As explained above, an Integrity Commissioner has an implicit responsibility to manage the volume of inquiry activity in as manner that is reasonable and prudent. When multiple complaints are received around the same time, they cannot all be handled at once. Staggering the inquiries is essential as a matter of fiscal responsibility and time management.
2. In deciding the sequence of inquiries, the Integrity Commissioner may also take into account whether multiple inquiries have been initiated by the same persons. In theory, everyone in the municipality has the right to request an inquiry.
3. If an inquiry is particularly complex, then an Integrity Commissioner has full discretion to extend the time for as long as the process takes.
4. If the Integrity Commissioner attempts to help the parties achieve an informal resolution (*i.e.*, settlement), then the inquiry is paused and the complaint is held in abeyance. Sometimes a particular case will appear to be an ideal candidate for settlement. This means that the process will be paused, sometimes for a long while, to give the parties time to settle their differences.
5. COVID-19.
6. The parties themselves: Often a party will request more time to make a submission. As a matter of fairness (and consistent the court jurisprudence on requests for adjournments) a reasonable request for extension is not denied. Occasionally a party will not respond to communications for several weeks. This also affects timing.

Settlement

It is a responsible use of the discretion conferred on an Integrity Commissioner to pause the proceeding to give the parties an ample opportunity for resolution and also to allow the parties to consider the matter with the benefit of distance from the actual events. Often the passage of time makes a seemingly intractable difference possible to resolve.

It is important to note that a pause carries no additional cost to the municipality. My practice is always to pause when circumstances warrant.

COVID-19

In addition to the first four factors listed above, in 2020 everyone was also forced to cope with the realities of the global pandemic.

As Ontario was gripped by the COVID-19 public health crisis and in a state of emergency, I decided to suspend further action on various files until the Province and Durham Region reached an appropriate state of recovery. This was not strictly permitted by Ontario Regulation 73/20, which gave power to extend deadlines and suspend proceedings to certain statutory officials, but not Integrity Commissioners conducting code of conduct investigations.¹³ (In fact, the Province was specifically asked to include Integrity Commissioner code of conduct proceedings in an amendment to the Regulation, but declined to do so.) Nonetheless, given all that the residents of the Region and Ontario were experiencing, it was the right thing to do. Further, the general discretion possessed by Integrity Commissioners encompasses delays associated with the COVID pandemic.

Transparency

I attach to each inquiry (investigation) report a statement of the time spent on the process and the total cost to the municipality. Across Canada, very few municipal Integrity Commissioners do this.

Under the *Municipal Act*, an inquiry report is a public document. Many municipalities in Durham Region make the reports easily accessible by posting, for example, on the Accountability and Transparency page. I encourage all municipalities to do this.

In addition, the reports of many municipal Integrity Commissioners, including me, appear on the public, online, Canadian Legal Information Institute (CanLII) database, and are accessible for free at <https://www.canlii.org/en/on/onmic/>. Outside Durham Region, some municipalities and some Integrity Commissioners do not participate in CanLII, or post their reports. In my opinion, this is unfortunate; to make the results of an accountability exercise difficult to find is to defeat the purpose.

Reports (Code of Conduct)

The following are the code of conduct inquiry reports issued during 2019 and 2020. Decisions on MCIA inquiries are listed in the next section.

Region

Re McLean (March 26, 2019), 2019 ONMIC 2 (CanLII), <https://canlii.ca/t/j0358>

Re McLean (Supplementary) (April 17, 2019), 2019 ONMIC 8 (CanLII), <https://canlii.ca/t/j035b>

¹³ On the other hand, the wording of the Regulation was sufficiently broad to cover *Municipal Conflict of Interest Act* inquiries.

Brock

Bath-Hadden v. Pettingill (No. 1) (February 20, 2020), 2020 ONMIC 3 (CanLII), <https://canlii.ca/t/j6gm6>

Campbell v. Schummer (August 3, 2020), 2020 ONMIC 8 (CanLII), <https://canlii.ca/t/jbnx5>

Miller v. Bath-Hadden (October 13, 2020), 2020 ONMIC 12 (CanLII), <https://canlii.ca/t/jc3zx>

Oshawa

Gobin v. Nicholson (November 30, 2020), 2020 ONMIC 13 (CanLII), <https://canlii.ca/t/jcx26>

Foster v. Chapman (Dec. 14, 2020), 2020 ONMIC 17 (CanLII), <https://canlii.ca/t/jcx27>

This table presents the number of inquiries completed, per year. It includes both code of conduct inquiries and MCIA inquiries.

Municipality	Code of Conduct Inquiries		MCIA Inquiries	
	2019	2020	2019	2020
Regional Municipality of Durham	1 ¹⁴	0	0	0
Township of Brock	0	3	0	0 ¹⁵
Municipality of Clarington	0	0	0	0
City of Oshawa	0	2	0	3
City of Pickering	0	0	0	0
Township of Scugog	0	0	0	0
Township of Uxbridge	0	0	1	0
Town of Whitby	0	0	0	0

The above table that does not include inquiries still active at the end of the reporting period. It also does not include inquiries into code of conduct complaints and MCIA

¹⁴ The *Re McLean* inquiry resulted in two reports. It is counted as one inquiry.

¹⁵ The *Bath-Hadden v. Pettingill* inquiry involved both a code of conduct complaint and an MCIA application, and there were two reports. It is counted in this table as a code inquiry.

applications where there were insufficient grounds for investigation, or where the matters were settled or complaints/applications were withdrawn.

The confidentiality provisions of the *Municipal Act* prohibit any discussion of outstanding inquiries, other than to say that the factors discussed above apply to those proceedings.

5. Municipal Conflict of Interest Act Inquiries

The legislation treats inquiries into allegations of MCIA breaches somewhat differently than inquiries under a Code of Conduct. Council is not the decision maker in an MCIA matter. Instead, it is the Integrity Commissioner, at the conclusion of an MCIA inquiry, who decides whether or not to apply to a Superior Court judge for a declaration that the Member has contravened the MCIA. The Integrity Commissioner must publish written reasons for the decision. I do this providing the reasons to the Canada Legal Information Institute (CanLII), for posting in its online database.

An Integrity Commissioner's MCIA decisions are not subject to Council approval. They are provided to Council for information.

The *Municipal Act* requires the Integrity Commissioner to complete the inquiry within 180 days after receiving the completed application. However, Ontario Regulation 73/20 had the effect of suspending the deadline in MCIA applications between March 16 and September 14, 2020.

Reasons for Decision (Municipal Conflict of Interest Act)

The following are the reasons for decisions in MCIA applications issued during 2019 and 2020:

Brock

Bath-Hadden v. Pettingill (No. 2) (February 20, 2020), 2020 ONMIC 4 (CanLII), <https://canlii.ca/t/j5ckj>

Oshawa

Durham Flight Centre Inc. v. Marimpietri (November 15, 2019), 2019 ONMIC 18 (CanLII), <https://canlii.ca/t/j3dhq>

Davis v. Carter (February 23, 2020), 2020 ONMIC 5 (CanLII), <https://canlii.ca/t/j5d14>

Gobin v. Giberson (December 7, 2020), 2020 ONMIC 14 (CanLII), <https://canlii.ca/t/jc19d>

Uxbridge

Petrou v. Beach (September 13, 2019), 2019 ONMIC 11 (CanLII), <https://canlii.ca/t/j2dsg>

6. Special Reports

I also issued several Special Reports. Usually a Special Report addresses an issue that has been raised with me by a Council.

- Regional Municipality of Durham, June 30, 2019, Special Report: Follow-up on Committee of the Whole Presentation
- Municipality of Clarington, June 8, 2020, Council Members and Alleged By-law Infractions
- Municipality of Clarington, October 15, 2020, Council Members and Follow-Up Communication with Bylaw Enforcement
- Town of Whitby, August 2, 2019, Whitby Yacht Club membership offered to Town Councillors (educational information memorandum, not a special report)

7. Requests for Advice

The role of the Integrity Commissioner also includes providing advice to Council Members and local board members about the following:

4. Requests from members of council and of local boards for advice respecting their obligations under the code of conduct applicable to the member.
5. Requests from members of council and of local boards for advice respecting their obligations under a procedure, rule or policy of the municipality or of the local board, as the case may be, governing the ethical behaviour of members.
6. Requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*.

The *Municipal Act* requires that a Council Member's or local board member's request for advice from the Integrity Commissioner shall be made in writing, and that the advice shall be in writing.

A Council Member or local board member is free to disclose, or to choose not to disclose, the advice received. The Integrity Commissioner, on the other hand, is subject to the strict confidentiality requirements of section 223.5 of the Act.

- (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

...

- (2.1) Advice provided by the Commissioner to a member under paragraph 4, 5 or 6 of subsection 223.3 (1) may be released with the member's written consent.
- (2.2) If a member releases only part of the advice provided to the member by the Commissioner under paragraph 4, 5 or 6 of subsection 223.3 (1), the Commissioner may release part or all of the advice without obtaining the member's consent.
- (2.3) The Commissioner may disclose such information as in the Commissioner's opinion is necessary,
 - (a) for the purposes of a public meeting under subsection 223.4.1 (8);
 - (b) in an application to a judge referred to in subsection 223.4.1 (15); or

- (c) in the written reasons given by the Commissioner under subsection 223.4.1 (17).
- (3) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

For accountability and tracking purposes, each request for advice is assigned a file number, and (except in Whitby which uses a different process) the Clerk is informed of the name of the Member associated with each file number. The topic and content of the request for advice are disclosed to nobody.

Some requests for advice were answered briefly. Other responses were lengthy. In several instances, a single request for advice involved multiplied follow-up requests for clarification or added information. For statistical purposes, the follow-ups are included with the original request. Consequently, the figures below understate the full amount of advisory activity.

The following table records the number of requests for advice that were answered:

Municipality	Requests for Advice 2019	Requests for Advice 2020
Regional Municipality of Durham	0	3
Township of Brock	3	4
Municipality of Clarington	2	2
City of Oshawa	5	6
City of Pickering	0	0
Township of Scugog	5	4
Township of Uxbridge	3	1
Town of Whitby	7	3

8. Internal Outreach, Education and Training

During the reporting period, I delivered the following internal outreach, education and training:

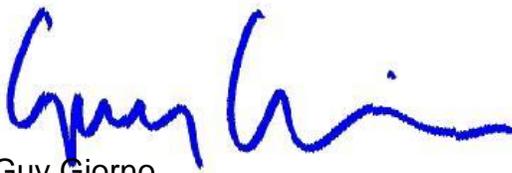
- January 22, 2019, Town of Whitby, presentation (pre-recorded) to members of the Town's local boards and advisory committees

- January 31, 2019, Joint meeting of Councils of Township of Brock, Township of Scugog, and Township of Uxbridge, Training Presentation
- May 15, 2019, Regional Municipality of Durham, Committee of the Whole, Education and Training Session
- September 19, 2019, Township of Brock, Council Education Session
- March 2, 2020, City of Oshawa, attended at Corporate Services Committee to answer questions if necessary; was not called to address the Committee
- March 2, 2020, Town of Whitby, Special Council Meeting, Follow-up to Report CLK 13-19, Codes of Conduct and Governance Policy Updates

In several cases, I followed up on writing on questions that arose during the sessions.

In 2019, at the request of the Region and several local municipalities, I proposed amendments that would harmonize the gift/benefit provisions of the codes of conduct across Durham Region.

Respectfully submitted,



Guy Giorno

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April 30, 2021