



**Cunningham Swan**

LAWYERS

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Mayor and Members of Council  
c/o Jeanne Harfield, Clerk  
Municipality of Mississippi Mills  
3131 Old Perth Road  
Box 400  
Almonte, Ontario  
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Dear Mayor and Members of Council:

**RE: Code of Conduct Complaint**  
**Our File No.: 32987-56**

This public report of our investigation is being provided to Council in accordance with Section 223.6(1) of the *Municipal Act*. We note that Section 223.6(3) of the *Municipal Act* requires that Council make the report public. The Clerk should identify on the agenda for the next open session Council meeting that this report will be discussed. Staff should consider whether it is appropriate to place the full report on the agenda in advance of Council deciding how the report should otherwise be made public.

Should Council desire, the Integrity Commissioner is prepared to attend at the open session meeting to present the report and answer any questions from Council.

At the meeting, Council must first receive the report for information. The only decision Council is afforded under the *Municipal Act* is to decide how the report will be made public, and whether to adopt any recommendations made by the Integrity Commissioner. Council does not have the authority to alter the findings of the report, only consider the recommendations.

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The Integrity Commissioner has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Integrity Commissioner is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Integrity Commissioner the duty to conduct investigations in response to complaints under the Code of Conduct, and that the Integrity Commissioner is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Integrity Commissioner's final decision in this matter.

## **PRELIMINARY REVIEW**

On May 12, 2022, a complaint was received by our office with respect to the conduct of Councillor Cynthia Guerard (the "Member"). The Complaint alleges that Councillor Guerard attended two council meetings in person while not in compliance with the Township's Policy HR-36, Mandatory Vaccination Policy (the "Policy"). According to the Complaint, the Policy requires members of Council to be fully vaccinated against Covid-19, and to provide proof thereof to the CAO, failing which they are considered to be unvaccinated. The Complaint alleges that the Member did not provide proof of vaccination and was therefore presumed unvaccinated. Nevertheless, she attended the May 3 and 17 Council meetings in person and, when asked to leave chambers on the 17<sup>th</sup> because she was unvaccinated, simply sat outside of the chambers and joined in remotely.

The Code of Conduct and the *Municipal Act* provide the Integrity Commissioner with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the complaint;
- Reviewing the relevant provisions of the *Municipal Act*;
- Providing a copy of the request for inquiry and supporting materials to the Member, with a request for any written response to be provided within 10 days;
- Reviewing the Member's Responses; and
- Reviewing all submissions and analyzing the merit of the request for an investigation.

During the preliminary review we assume that the facts as set out in the complaint are true. We do this not for purposes of finding a breach, but to test the merit of the complaint. In other words, if the alleged behaviour in fact occurred, would that amount to a breach of the Code of Conduct? If the behaviour would constitute a breach, we undertake a full investigation to determine whether the allegations are true. If the behaviour, even if true, would not constitute a breach there is no reason to undertake a full investigation. It is important to understand that we make no finding of fact during the preliminary review - we simply assume the facts are true as a method to assess the merit of the complaint at this stage.

After conducting the preliminary review, the Integrity Commissioner found that some or all of the behaviour complained of would, if the allegations were true, constitute a breach or breaches of the Code of Conduct. As a result, the Integrity Commissioner undertook an investigation of the allegations.

## **FACTS**

Cynthia Guerard is a Councillor with the Township of Mississippi Mills. The Township has a Policy, HR-36, which requires that all members of Council be vaccinated. The Policy also sets out requirements for showing proof of vaccination. As will be discussed below, the application of the proof of vaccination requirements to members of Council is disputed by the Member.

The complaint pertains specifically to the Member's conduct at the meetings of May 3 and 17, 2022. As of those dates, the Member had not provided proof of vaccination to the Township's CAO. She attended Council in person on both occasions. On the 3<sup>rd</sup>, the Minutes reflect that she was advised that she was not in compliance with the Policy. On the 17<sup>th</sup>, a point of privilege was raised with respect to the Member's non-compliance with the Policy. The Chair ordered the Member to apologize, and when she failed to do so, expelled her from Council chambers. The Member then proceeded to join the meeting via Zoom, while sitting in the hallway outside Council Chambers.

### **Mississippi Mills Code of Conduct for Members of Council and Local Boards**

The Code of Conduct provides:

11. Every Member shall abide by the following principles:

[...]

c) Members shall comply with all applicable legislation, by-laws and Municipal policies, including this Code of Conduct;

30. The role of the Chief Administrative Officer and Department Heads is to direct the day to day management of the Municipality and assign duties to the Staff placed under their supervision. To encourage the efficient management of the Municipality, individual Members must be cognizant of that fact and are advised of the following:

a) Members will respect and adhere to the Policies set by Council, and will under no circumstances take it upon themselves, individually, to circumvent established Policies.

## **Vaccination Policy – Coronavirus (COVID-19)**

### **Policy Statement**

[...]

The Municipality requires all Councillors, employees, volunteers, contractors and students completing placements to be fully vaccinated against the hazard of COVID-19 to support the health and safety of our workplaces and our community.

All Council and Municipal employees are required to be fully vaccinated with a Health Canada or World Health Organization recognized COVID-19 vaccine by November 30, 2021. Employees not yet fully vaccinated must receive one dose of COVID-19 vaccine by October 31, 2021 and the second dose of COVID-19 vaccine by November 30, 2021 to ensure compliance with this policy.

### **Application**

This policy applies to all existing and future Municipal employees, volunteers, contractors and students completing placements. Employees commencing employment following the effective date of this policy shall, as a condition of employment, provide proof of vaccination.

Employees in various Municipal operations may have additional requirements under government directives, regulations, orders and/or legislation, based on their specific roles and responsibilities.

Unionized employees will be subject to the terms of the collective agreement.

Providing proof of full vaccination against COVID-19, as per this policy, is a condition of employment with the Municipality of Mississippi Mills for existing employees and for all future hires.

### **Policy Requirements**

Vaccination is one of the critical protective measures against the hazards of COVID-19.

As part of the Municipality's commitment to the continued development and implementation of workplace controls to reduce the hazards and mitigate the risks of COVID-19, all existing and future Municipal employees, volunteers, contractors and students completing placements must provide proof of full vaccination against COVID-19. Acceptable proof includes documentation verifying receipt of a

vaccination series approved by Health Canada (i.e. Pfizer-BioNTech, Moderna AstraZeneca/COVISHIELD or Janssen/Johnson & Johnson). The list of accepted vaccines may expand in the future.

...

### **Responsibilities**

CAO is responsible for:

[...]

Ensuring Council and employee vaccination status information is collected, maintained and disclosed in accordance with this policy and privacy legislation

### **PROCEDURAL OBJECTIONS**

The Member, through her counsel, raised a number of procedural objections to our investigation. Responses to these objections were provided in the form of letters; for the sake of providing full and thorough reasons for our report, those objections, and our rulings on them, are summarized here.

#### Allegations of Conflict of Interest

Through counsel, the Member alleged that the Integrity Commissioner was in conflict of interest primarily because the Integrity Commissioner was also legal counsel for the Municipality.

Prior to engaging as Integrity Commissioner in this specific complaint, the Integrity Commissioner considered the issue of potential conflict and satisfied himself that no conflict existed.

Through an exchange of correspondence on this issue, counsel for the Member provided two cases which, he alleged, stood for the proposition that the Integrity Commissioner was in a conflict of interest with respect to this matter: *Ghirardosi v. British Columbia (Minister of Highways)*, and *Sweetgrass First Nation v. Gollan*. Both cases involved situations where members of arbitral panels had recent or ongoing retainers to provide legal advice and representation to one or more of the parties before them.

In response, we referred the Member and her counsel to the recent Divisional Court decision in *Chiarelli v. Ottawa (City of)*, 2021 ONSC 8256. That case considered a number of aspects of an Integrity Commissioner's role, including allegations of bias. In it, the Divisional Court explained that the Integrity Commissioner's role is investigative, rather than adjudicative. In other words, we investigate a complaint, and report our findings to Council, whose role is

adjudicative. The Divisional Court cited considerable jurisprudence in finding that the threshold for demonstrating bias is higher for investigators than for adjudicators. The standard, essentially, is whether the decision maker has a closed mind; that is, whether we have predetermined the issue.

With respect, we do not consider the cases raised by counsel to be relevant, as they pertain specifically to the adjudicative context, and relate to facts that are considerably different than those in this matter. We can confirm that the Integrity Commissioner has not acted for or against the Member or provided advice to the Municipality on the issues raised in this complaint. In our opinion, there was nothing put forward to indicate that the Integrity Commissioner had a closed mind with respect to the investigation. Accordingly, we ruled against the allegations, and proceeded with the investigation.

#### Allegations that the Policy is Ultra Vires

The Member has also alleged that the Policy is ultra vires the authority of the Township. She alleges that there was no authority for the Township to maintain vaccination requirements, particularly after the Province had lifted its requirements.

We would again point to the recent decision in *Chiarelli*. In that matter, a member under investigation had made allegations to the Integrity Commissioner that City Council was biased against him; the Integrity Commissioner found that he did not have the authority to consider allegations of bias against City Council. The Court agreed, noting that the Integrity Commissioner reports back to City Council, but that City Council is not answerable to him.

In our opinion, the same is true in this case. The Integrity Commissioner has power to consider legal arguments; however, the jurisdiction of Council to enact policies is simply not one of them. Accordingly, we dismissed this objection and proceeded.

#### Objections under the PHIPPA

At a certain point in our investigation, we inquired into the Councillor's vaccination status. As will be seen below, this was entirely pertinent, and had the potential to serve as a complete answer to our investigation. The Member, again through counsel, refused to respond, citing in part the *Personal Health Information Protection Act*. In particular, she pointed to the fact that the Integrity Commissioner is not a health care practitioner, and therefore cannot ask for personal health information under the Act.

Section 7 of the Act reads as follows:

### **Application of Act**

- 7 (1) Except if this Act or its regulations specifically provide otherwise, this Act applies to,
- (a) the collection of personal health information by a health information custodian on or after the day this section comes into force;
  - (b) the use or disclosure of personal health information, on or after the day this section comes into force, by,
    - (i) a health information custodian, even if the custodian collected the information before that day, or
    - (ii) a person who is not a health information custodian and to whom a health information custodian disclosed the information, even if the person received the information before that day; and
  - (c) the collection, use or disclosure of a health number by any person on or after the day this section comes into force. 2004, c. 3, Sched. A, s. 7 (1)

As neither our office, nor the Member, are Health Information Custodians, and as we were not seeking any information from a Health Information Custodian, the *Act* does not apply.

### Objections Under Sections 7 and 8 of the Charter

Finally, the Member's counsel raised the objection that the *Charter* protects personal privacy, alleging that, "It is clear that an individual does not have to release any medical information save and except in limited circumstances, none of which existed after the provincial mandate was removed". In support of this assertion, counsel cites *R v. O'Connor*.

As will be discussed below, for the purposes of this investigation we accept the Member's contention that the Policy is not well drafted where it requires proof of vaccination of members. There was no dispute that the Policy does require that a member actually be vaccinated. As the Member's objection specifically pertains to providing health information, and was raised following our question regarding her vaccination status, we understand this to be an objection to the question itself.

The only submission made in support of this objection was a reference to the *O'Connor* case, which pertained to sections 7 and 8 of the *Charter*. These sections of the *Charter* were explicitly considered in the context of COVID-19 masking and vaccination rules in *Banas v. HMTQ*, 2022 ONSC 999. In that case, charges had been brought after a restaurant failed to impose COVID-19 restrictions as required by law. A *Charter* challenge was raised, particularly focusing on masking and proof of vaccination requirements.

In *Banas*, the Court did not find that masking and proof of vaccination requirements violated S. 7 or 8 of the *Charter*. With respect to S.7, the Court found that there was no evidence tendered to support claims that the regulations in question caused the harms complained of. Similarly, the Member in this matter has not provided any support for her argument under S.7 and, accordingly, this argument must fail.

Section 8 of the *Charter* protects against unreasonable search and seizure. Per *R v Finley*, 2013 SKCA 47, we agree that our question of the Member's vaccination status may constitute a "search" within the meaning of S.8. However, as the Supreme Court of Canada stated in *British Columbia Securities Commission v. Branch*, 1995 CanLII 142 (SCC), S. 8 protects reasonable expectations of privacy from an unreasonable search and seizure. The Court found that administrative and regulatory investigations will not have the same standards of reasonableness as criminal investigations, and that a "less strenuous approach" will apply.

In the circumstances, we do not consider asking the Member her vaccination status to be an unreasonable search. The Member was not asked to provide medical information or proof of vaccinations, simply to confirm or deny that she had received a vaccination. This regulatory investigation is not captured by any cases referenced by the Member's counsel.

## **ANALYSIS**

On the merits, the Member alleges that the Policy, as worded, does not unambiguously establish that members of Council must provide proof of their vaccination status. It is clear that Councillors must be vaccinated – a point which the Member seemed to concede – and it is clear that employees must provide proof of vaccination status.

However, the policy does clearly state that the CAO is responsible for collecting proof of vaccination, including, explicitly, from Councillors. The Policy also prescribes a particular form for non-employees to use in providing proof of vaccination. On balance, it is our interpretation that the Member was required by the policy to disclose to the CAO her vaccination status. Applying the policy would be rendered impossible if this were not the case; a circumstance that the Municipality could not have intended.



It was on this basis that we asked the Member to confirm, without providing any proof, whether she is vaccinated against COVID-19. The Member refused to answer.

The outcome of this investigation turned on information known to the Member, which she was in the best position to provide, and which may well have demonstrated that she had not breached the Policy. Nonetheless, she refused to disclose this information.

These are appropriate circumstances, in our opinion, in which to draw an adverse inference. This approach finds support in various cases. For example, in *Attallah v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 3722, the Divisional Court, on judicial review, upheld the decision maker's decision to draw an adverse inference where a party called no evidence, in the face of significant evidence against their position. In *Assaf v Shannon*, 2021 CanLII 139275, the Landlord Tenant Board drew an adverse inference where the applicant failed to adduce evidence that would have supported his case, and was in the best position to do so. If the Member was vaccinated, simply confirming this may have been sufficient to conclude that she did not breach the Policy. As she declined to do so, we must assume it is because she was not vaccinated, and her answer would have harmed her position.

Accordingly, we find that the Member breached section 11(C) of the Code by failing to comply with a Council policy that requires all members to be vaccinated.

The final question is whether the Member also breached section 30(a) of the Code by attempting to circumvent established policies?

We consider the refusal of the Member to provide proof of her vaccination status to be a circumvention of the policy. As we interpret the policy, it requires that the CAO collect vaccination status information. The Member's refusal to confirm her vaccination status is a breach of this policy. Her refusal rendered it impossible for the CAO to fulfil his role under the policy and for Council to ensure that all of its Members were in compliance with the policy.

## **CONCLUSION AND RECOMMENDATIONS**

Based on the findings set out above, the Integrity Commissioner finds that Councillor Guerard breached the Municipality's COVID policy and thereby breached the Code of Conduct.

The Integrity Commissioner recommends that Council suspend the Member's remuneration for a period of 90 days. The Councillor has shown no respect for the policy and direction of Council and has failed to cooperate with the Integrity Commissioner in this investigation. While the Member's actions during the investigation were conducted through counsel, the reasons for refusing to cooperate were found to have no basis in law and therefore do not justify the Member's refusal to answer the question as to her vaccination status.

In the absence of remorse or any indication that the Member acknowledges her actions were improper, the Integrity Commissioner is left with no alternative but to recommend the maximum penalty available in the circumstances.

This concludes the investigation and report in this matter.

Sincerely,

**Cunningham, Swan, Carty, Little & Bonham LLP**



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