

Principles
Integrity

Recommendation Report
Code of Conduct Complaint against
City of Thunder Bay
Councillor Aldo Ruberto

January 21, 2022

Introductory Comments

- [1] Principles *Integrity* is privileged to serve as Integrity Commissioner for the City of Thunder Bay and for a number of other Ontario municipalities and locally elected bodies. The operating philosophy which guides us in our work and which appears in every formal communication with our clients to reinforce its importance to us, is this:

The perception that a community's elected representatives are operating with integrity is the glue which sustains local democracy. We live in a time when citizens are skeptical of their elected representatives at all levels. The overarching objective in appointing an integrity commissioner is to ensure the existence of robust and effective policies, procedures, and mechanisms that enhance the citizen's perception that their Council (and local boards) meet established ethical standards and where they do not, there exists a review mechanism that serves the public interest.

- [2] Our efforts in concert with our clients are therefore to help establish an ethical framework through which the public perception of Council is deservedly enhanced.
- [3] The City of Thunder Bay has as part of its ethical framework a Code of Conduct which is the policy touchstone underlying the assessments conducted in this report. It represents the standard of conduct against which all members of Council are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one which is required in all Ontario municipalities, is an inquiry/complaints process administered by an integrity commissioner.
- [4] Integrity commissioners carry out a range of functions for municipalities (and their local boards). They assist in the development of the ethical framework, for example by suggesting content or commentary for codes of conduct. They conduct education and training for members of council and outreach for members of the community. One of the most important functions is the provision of advice and guidance to members to help sort out ethical grey areas or to confirm activities that support compliance. And finally, but not principally, they investigate allegations that

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a person has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report.

- [5] It is important that this broad range of functions be mentioned at the outset of this investigation report. Our goal, as stated in our operating philosophy, is to help members of the community, indeed the broader municipal sector and the public, to appreciate that elected and appointed representatives generally carry out their functions with integrity. In cases where they do not, there is a proper process in place to fairly assess the facts and, if necessary, recommend appropriate sanctions. In every case, including this one, the highest objective is to make recommendations that serve the public interest, if there are recommendations to be made.
- [6] Our role differs from other 'adjudicators' whose responsibilities generally focus, to state it colloquially, on making findings of fact and fault. While that is a necessary component when allegations are made, it is not the only component.
- [7] Our operating philosophy dictates the format of this report. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations, and we have done that. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint.
- [8] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have provided an opportunity to the Respondent to respond to the allegations, and to review and provide comment on the preliminary Findings Report.

The Complaint

- [9] On October 27, 2021 we received a complaint against Councillor Aldo Ruberto alleging that he had engaged in conduct contrary to the Council Code of Conduct.
- [10] The particulars of the complaint are that immediately following an incident when a truck drove through an area inhabited as a homeless encampment, running over a tent, Councillor Ruberto posted comments about the incident on social media. In that social media post, the Councillor posited an innocent explanation – the wind – as the cause of the incident. In response to social media posts disputing the wind explanation, he removed that post, replacing it with another post positing another innocent explanation – heart attack or stroke – as the cause of the incident.

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[11] The complaint alleges that the Councillor's comments, speculating on innocent explanations at a time the matter was under active criminal investigation by the police, constitute a breach of the Code of Conduct.

Process Followed for this Investigation

[12] In conducting this investigation, Principles *Integrity* applied the principles of procedural fairness and was guided by the complaint process set out under the Code of Conduct.

[13] This fair and balanced process includes the following elements:

- Reviewing the complaint to determine whether it is within scope and jurisdiction and in the public interest to pursue, including giving consideration to whether the complaint should be restated or narrowed, where this better reflects the public interest
- Notifying the Respondent of the complaint against him, and providing adequate disclosure of the information we possessed so that he could prepare his response
- Reviewing the Code of Conduct and documentation including on-line social media posts
- Conducting interviews as necessary of persons with relevant information
- Providing the Respondent with the additional opportunity to review and provide responses to the Integrity Commissioner's draft Findings Report, and taking any additional response into consideration prior to finalizing and submitting our Recommendation Report

Background and Context

[14] The COVID-19 Pandemic has seen a rise in homelessness and the proliferation, in cities across Canada, of tent encampments appearing in urban areas.

[15] In the early fall of 2021, such an encampment came to exist at an abandoned gas bar (known as Suny's) on Dawson Road in Thunder Bay.

[16] The homeless encampment became the subject of political protests, pitting advocates for the vulnerable homeless population against residents of the neighbourhood.

[17] While the City grappled with a solution, tensions mounted.

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- [18] In the late afternoon of Tuesday October 5, 2021, an individual drove his truck through the encampment, knocking down and dragging a tent under his vehicle as he drove off. Witnesses subsequently interviewed by local media stated that the truck drove back and forth repeatedly over the tent, before speeding away.
- [19] Almost immediately, the police were on the scene, and the driver arrested within hours.
- [20] On Wednesday October 6, 2021 the Respondent posted the following link about the incident on his Facebook page:



- [21] Following a flurry of exchanges on social media, many denouncing the Respondent for suggesting the incident was caused by the wind, the Respondent removed his post.
- [22] In response to criticism of the first post, he posted:

“I believe in humans. I think we are all inherently good. I am disappointed by people and their actions. And in this case I was hoping I was right about what could have happened. Remember at the time of my post, it

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was early in the morning. No one knew if the guy had a stroke, heart attack, passed out etc. ...”

[23] One member of the public, a freelance journalist, reached out to the Respondent, challenging him for publicly spreading uninformed and unsubstantiated speculation on his social media, as an elected official.

[24] The Respondent responded by criticizing the reporter.

[25] In the course of the investigation the Respondent advised us that he from time to time blocks individuals on Facebook, but that he did not block the reporter.

The Council Code of Conduct and the Applicable Law:

[26] The provisions of the Thunder Bay Council Code of Conduct which are most applicable to the complaint are outlined below:

A. General Introduction

Members of Thunder Bay Council recognize their obligation to serve their constituents and the public in a conscientious and diligent manner understanding that as leaders of the community, they are held to a higher standard of behaviour and conduct.

Members recognize that ethics and integrity are at the core of public confidence in government and in the political process; that elected officials are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence, avoids the improper use of influence of their office and conflicts of interests, both apparent and real. They recognize the need to uphold both the letter and the spirit of the law including policies adopted by Council.

This Code of Conduct ensures that Members of Council share a common basis and understanding for acceptable conduct of Members of Council, in concert with and beyond the minimum standards of behaviour set out in the existing legislative framework.

This Code of Conduct is consistent with the principles of transparent and accountable government, and reflective of the City’s core values.

B. Framework and Interpretation

1. This Code of Conduct applies to all Members of Council (“Members”). It is to be given broad, liberal interpretation in accordance with applicable legislation and the definitions set out herein. As a living document the Code of Conduct will be brought forward for review at the end of each term of Council, when relevant legislation is

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amended, and at other times when appropriate to ensure that it remains current and continues to be a useful guide to Members of Council.

C. Guiding Principles:

1. Members of Council shall serve the public and their constituents in a conscientious and diligent manner.
2. Members of Council should be committed to performing their functions with integrity, impartiality and transparency.
3. Members of Council shall perform their duties in office and arrange their private affairs in a manner that promoted public confidence and will bear close public scrutiny.

...

Rule 10, Media Communications:

...

3. In all media communications, including social media, members will treat each other, staff and members of the public with decorum, dignity and respect, and shall avoid messaging that amounts to abuse, bullying or intimidation.

Commentary

While Members are encouraged to actively participate in vigorous debate, Members should understand that they are part of a democratically-elected representative body and should not engage in social media as if they are outsiders. In this regard, caution should be exercised when blogging, posting, tweeting, re-posting and linking to posts using social media, whether the member is using a personal account or a City account.

...

While social media can be an excellent tool for communicating quickly with constituents and sharing ideas and obtaining input, social media can breed incivility that generally is avoided in face-to-face interactions. In a world where a transitory comment can become part of the permanent record, Members should exercise restraint in reacting too quickly, or promoting the social media posts of others whose views may be disparaging of Council's decisions or another Member's perspectives.

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Analysis:

- [27] This complaint arises at a time when communication via social media – Facebook and Twitter particularly – is commonplace.
- [28] It is not unusual to see comments on social media almost instantly reflecting events as they occur.
- [29] Elected officials, often motivated by the desire to keep their constituents informed, may post about issues and events in real time as they are unfolding.
- [30] Elected officials, however, occupy a privileged position within our democratic system which imposes accountability for their words publicly pronounced or published.
- [31] For these reasons, elected officials bear an increased responsibility to ensure the matters they are posting about do not inadvertently spread false rumours or misinformation.
- [32] Elected officials also have a responsibility to avoid commenting on matters under investigation or which are before the courts.
- [33] As an aside, elected officials who choose to engage in social media as if they are participating in a discussion in the ‘Town Square’ should not arbitrarily block other participants simply because those individuals disagree or express an opposing or different perspective.
- [34] For the reasons set out in detail below, we find that the Respondent’s activity on social media – posting unsubstantiated speculation relating to a matter under police investigation constitutes inappropriate conduct contrary to the standards expected of members of Council as reflected under the Code of Conduct.

Commenting on matters before the Court

- [35] It is recognized that elected officials have a certain status by virtue of the office they hold. Elected office is a privileged position which wields some influence.
- [36] Commenting on a court proceeding is recognized as inappropriate. While elected officials may hold their own views regarding legal proceedings, they are constrained from publicly commenting on proceedings before the courts, and this extends to matters under criminal investigation by the police.

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- [37] Even the speculation as to the underlying cause of an incident which is under active police investigation is inappropriate for elected officials and members of Council to engage in. This is particularly the case where an arrest has been made and charges are proceeding, and the speculation posits reasons which would seem to provide exculpatory explanations in aid of the accused.
- [38] Under a democratic system of government, where the courts are independent of a legislative branch of the government, elected officials are constrained from opining on matters before the courts in a manner which may be perceived as attempting to influence the outcome.
- [39] The principle recognized in the jurisprudence and parliamentary convention is that elected officials should not comment, in matters before the court, where to do so may be seen as an attempt to interfere with the due course of justice or lawful process of the courts.
- [40] The rule against elected officials commenting publicly on matters before the court is referred to as the *sub judice* rule.
- [41] At the Provincial level, it has been found to contravene the Ontario Provincial Members' Integrity Act.
- [42] In a Report dated October 25, 2006, the Provincial Integrity Commissioner stated the following regarding an MPP's comments about a court proceeding:
- [23] ... all members know, or should know, that they should not comment on a matter that is the subject matter, or part of the subject matter, of a proceeding pending before a court. Indeed, there is a standing order of the Legislature which addressed that very issue as related to comments in the Legislative Assembly.
- [43] The proper practice, observed regularly when elected officials are asked to take a position on legal proceedings, is to state that they have no comment because the matter is before the courts.
- [44] This is more than a mere device to avoid answering difficult questions. It is the appropriate response for elected officials to avoid improper influence in legal proceedings.
- [45] The concept is readily recognized by elected officials at the Provincial and Federal levels. It ought to be better understood at the municipal level, as well.
- [46] It is important for Members of Council to refrain from commenting inappropriately. In essence, our system of democracy and respect for the rule of law demands the cooperation of all those who function within it.

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- [47] We find that Respondent's comments posing innocent explanations (the wind, a stroke or heart attack) were inappropriate.
- [48] The social media post containing the comments coincided with the active criminal investigation being undertaken by the police.
- [49] The risk of such public comments by an elected official is that they may influence the legal proceedings – in this case, potentially influencing the police investigation.
- [50] Moreover, such comments publicly made may become a source of misinformation in the public realm, where it turns out (as here) that they were in error and without any factual foundation.
- [51] In this regard, the Respondent's comments posted on social media must be regarded as inappropriate in publicly disseminating unsubstantiated speculation and misinformation, and in offending the *sub judice* rule by commenting on a matter under investigation.
- [52] The Respondent has acknowledged the posts; in his defence, he advises that the first post (*'hoping it is a case of the wind blowing a tent and hitting a truck'*) was published early in the morning, before he left the house for 7 hours and not looking at his phone. But upon his return home, he saw the slew of comments and posted updated information.
- [53] The fact that available information was rapidly changing underscores the reason a member of Council ought **not** to be publicly suggesting possible explanations for an event pending police investigation.
- [54] The Respondent, while acknowledging the facts, disputes our determination that this constitutes an ethical breach.

Blocking on social media

- [55] The Councillor admitted during our investigation that he has occasionally blocked other participants on his social media in the past, although he has subsequently unblocked some of them.
- [56] He states that in the circumstances of this post, he was utilizing the journalist's Facebook timeline to make his comments and so denies that this constitutes 'blocking' on social media. We agree with that assessment.
- [57] We think it is important, in light of the complaint, to provide some general guidance on engaging in social media by members of Council.

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- [58] Social media can be perceived in many respects as an electronic version of the 'Town Square', particularly where access to a user's account is 'open' to anyone on the platform, without need for permission or approvals. This we refer to in this report as 'open social media.'
- [59] Open social media is a place where opinions and ideas are freely shared, contentious matters are addressed, and where people come together just to come together. In its best light, social media represents a democratization of communications between citizens and their elected officials.
- [60] Regrettably social media is not always a platform for healthy discussion. At times it attracts unconstructive negativism, and even hate.
- [61] The potential for unconstructive and even offensive communication over social media has resulted in the development of certain tools through which participants can control their accounts. One of the tools available on social media is the ability to 'block' another registered platform user from interacting with the user.
- [62] There is no obligation on elected officials to utilize social media, however, there is a growing number of politicians who are active on social media as a means of keeping their constituents and the public informed. Social media also enables elected officials to 'take the temperature' of the communities they serve.
- [63] Social media provides an almost instantaneous and unfiltered means of communicating with constituents and the public. Many members of councils use open social media accounts to inform their constituents of their position on issues before government and under consideration.
- [64] Blocking can prevent a participant from adding or providing input to the post.
- [65] Our investigation examined whether the freelance journalist was arbitrarily blocked from a public interest discussion hosted through the Respondent's Facebook account, and if so, whether this contravened the Code of Conduct.
- [66] The Respondent has advised that in the past, he has blocked individuals on his social media sites when he felt they were being unfairly critical, tenacious or disagreeable. He characterized the blocking of the journalist as a step he took for his own mental health.
- [67] A Member of Council may be justified in blocking participants whose comments are offensive or abusive. In our view, it is always advisable to tell the individuals why they are being blocked. It may be that the offending participant chooses to adjust their behaviour to remain in the conversation.

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- [68] It is not acceptable for Members of Council to arbitrarily block a dissenting voice in a discussion of public interest simply because views do not align with their own.
- [69] Blocking has the effect of unilaterally silencing dissenting voices, and presents the curated and potentially inaccurate or altered view of universal support for one point of view - the view expressed by the Councillor - on what may be portrayed by the Councillor as a transparent, open discussion.
- [70] It is acknowledged that members have an onus to exercise diligence to remove any abusive, hateful, racist or otherwise offensive posts from the social media they control. However, members who invite the public to comment and participate should be prepared to accept, without artificially silencing, whatever input and feedback is provided that is not offensive or abusive.
- [71] The fact that a member is using a 'personal account' may be a factor, but where the member is using open account to broadcast information to constituents, in effect as a public official, the 'Town Square' analogy applies.
- [72] In our view, Council should provide a policy framework which provides guidance to members of council, including that those who engage on open social media platforms for communicating publicly should not *arbitrarily* block participants, simply because they express criticism or an opposing perspective. Arbitrary blocking reflects a type of censoring that fails to align with the standards expected of members of Council as articulated in their Code of Conduct.
- [73] Having reviewed the social media posts brought to our attention during the course of this investigation, we find that the comments of the freelance journalist, while reflecting persistence in questioning the Respondent, would not be considered by a reasonable person to be offensive or abusive.
- [74] That said, some of the posts by the complainant in this matter, brought to our attention during the investigation, contain offensive and derogatory names and expletives which would certainly justify blocking.
- [75] The Code of Conduct provides guidance on his responsibilities in this regard in the commentary under Rule 10: Media Communications:

While Members are encouraged to actively participate in vigorous debate, Members should understand that they are part of a democratically-elected representative body and should not engage in social media as if they are outsiders. In this regard, caution should be exercised when blogging, posting, tweeting, re-posting and linking to posts using social media, whether the member is using a personal account or a City account.

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- [76] Notwithstanding this guidance, the responsibilities of a Member when participating in open social media are acknowledged to be evolving and we recognize that the Code of Conduct provides insufficient guidance in respect of such issues.
- [77] Though we make no finding that the Respondent inappropriately blocked the journalist on the occasion identified, his acknowledgment that he occasionally blocks persons from his own account guides us to recommend below that Council should develop a policy framework for how Members of Council engage on open social media accounts for the purpose of communicating on City business, including Twitter and Facebook.

Findings:

- [78] Municipal codes of conduct are policy documents adopted by municipal councils to guide the conduct and behaviour of their members.
- [79] Codes of conduct are not statutes like the *Criminal Code* or *Highway Traffic Act*, which require the application of strict and narrow legal interpretation before the commission of an offence can be found. Rather, a code of conduct is a policy document, and is to be given broad, liberal interpretation in much the same manner as an official plan or other municipal policy.
- [80] The Thunder Bay Code of Conduct does not contain a specific provision regarding commenting on law enforcement matters on Facebook or other social media. Nor, we note, does it contain specific provisions regarding communicating with constituents at 'Town Halls', via telephone or virtual electronic means.
- [81] It is worthy of note that neither do codes of conduct typically list specific prohibitions against lying, swearing, shouting, or other abusive behaviour toward constituents, or proscriptions against attending virtual meetings shirtless, drunk and disheveled. Yet, it would be unreasonable to argue that these behaviours would not be open to examination as breaches of the behavioural standards found in a code of conduct.
- [82] A code of conduct provides general and specific guidance to aid members in understanding and achieving the high standard of behaviour expected by the public.
- [83] Codes should be perceived as guides to proper ethical behaviour, and not simply as traps for elected officials. While a toenail over an ethical line would not draw the attention of an integrity commissioner, neither should significant non-compliant behaviour be excused merely because of the absence of codified text in the nature of a statutory offence provision such as those found in the *Criminal Code* or the *Highway Traffic Act*.

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- [84] Guidance exists in the provisions of the Code which speak to communication generally, conveying information on matters in an open and transparent manner, allowing the public to view the rationale for decisions, and to treating members of the public with respect and without abuse.
- [85] The lack of specificity in the Code may influence the nature of any sanctions that might be recommended. That is a separate matter from whether the context of a situation can result in a finding that a Member of Council has fallen short of the ethical standards applicable to them.
- [86] We find that the Respondent's conduct, speculating on innocent explanations for the event being investigated by the police was contrary to the Guiding Principles of the Code.
- [87] In making our findings we recognize that given the recent and rapid evolution of social media as a means of communicating with constituents, codes of conduct have not kept pace in providing appropriate guidance for elected officials.
- [88] The Respondent's conduct was contrary to the Code of Conduct provisions emphasized below:

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Other Guidance and Observations:

- [89] Councillor Ruberto is very active on social media and it is difficult at times to discern whether he is posting in a personal capacity or as a councillor. He has a tendency to repost the flotsam of the internet which, when juxtaposed with public service messaging, can be perplexing. This leads to confusion and invites legitimate criticism. The fact that he posts from a 'personal' page does not diminish the problem.
- [90] It is not the role of a councillor to be the clearing house for internet postings regardless of their nature particularly when City business is also communicated on the site. The intermingling of a running string of memes, photographs, and other typical Facebook postings with legitimate City communications diminishes the ability of important public messaging from being seen. We think he should exercise restraint in this regard.

Concluding Remarks and Recommendations:

- [91] While an Integrity Commissioner may recommend sanctions, the overarching goal is to achieve course correction and better ethical behaviour among members of Council. This, we believe, assists in preserving, or improving, the overall good will of the community toward Council, as noted in the first paragraph of this report.
- [92] A monetary sanction, even a nominal one, serves to underscore that the stated behaviour has fallen below applicable standards. A sanction is intended to act as a deterrent.
- [93] This is not the first complaint brought to our attention regarding statements inappropriately made by the Respondent, nor is it the first complaint brought to our attention regarding his social media posts.

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[94] Previous complaints were able to be resolved without public report through the Respondent's commitment to course correction; our guidance to him is and was to exercise better judgment before blurting things out.

[95] Unfortunately, it does not appear that our advice has been heeded.

[96] To that we would add be cautious about engaging in a free-for-all on social media. Under the circumstances, we would hope that the Respondent would demonstrate greater restraint and exercise improved judgment in his engagement on social media in future.

[97] In the circumstances we think the time has come for Council to consider a short suspension of pay for a period of 5 days in an effort to encourage better compliance with the Code's guidance.

[98] It is therefore recommended:

1. That Council pass the following resolution:

That having been found to have breached the Code of Conduct for the City of Thunder Bay, the remuneration paid to Councillor Aldo Ruberto be suspended for a period of 5 days commencing with the next pay period.

[99] It is also recommended:

2. That the City consider developing general social media guidance and cautions for Members of Council, including with regard to their responsibilities regarding blocking on open social media sites.

[100] Such guidance should include when notice including a statement for the reasons for blocking (or for the use of other restrictive tools specific to the platform) should be given, and on where it would be appropriate for the restriction to be permanent, or temporary in order to create an opportunity for remediation and more appropriate discourse.

[101] We also recommend to Councillor Roberto that he immediately separate his social media communications so that his personal and City-related postings are clearly distinguished. Given his practice of co-mingling the two, we suggest he establish two separate accounts and rigidly adhere to the distinct purpose for each account.

[102] We conclude by expressing our thanks to everyone who cooperated with our investigation. We will be pleased to be in attendance when this report is considered to answer any questions Council may have relating to its contents.