



# *2017 ROMA Annual Conference*

## **Sign-Posts for Responsible Councillors: Tools to Help You Get it Right**

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**AIRD & BERLIS** LLP

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Barristers and Solicitors

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# Overview

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- *Buck v. Morris et al.* – Ont. S.C.J.
- *Ferri v. Ontario (Attorney General)* – Ont. C.A.
- *Bracken v. Niagara (Regional Municipality)* – Ont. S.C.J.
- *Bracken v. Fort Erie (Town)* – Ont. S.C.J.
- Order MO-3281 (City of Oshawa; January 22, 2016) – IPC
- *Di Biase v. City of Vaughan; Vaughan Integrity Commissioner* – Ont. S.C.J.

# Defamation (and more)

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## *Buck v. Morris et al.*

### Facts

- Defamation action by one member of council against other members of council and a local media outlet (settled with the media) following the publication of “Statement from the Town of Aurora Council”
- Councillor posted highly disparaging comments about senior staff on her blog
- Council retained lawyer to write legal opinion about whether the councillor’s blog posts had violated the Town’s Code of Conduct; the councillor had not signed the Code of Conduct

# Defamation (and more)

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## *Buck v. Morris et al.*

### Facts

- Council issued the Statement to provide public with “the complete story” and also published letter from its lawyer
- Councillor alleged that the Statement and letter contained false statements and were defamatory

# Defamation (and more)

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## Issues

- Are the words complained of defamatory to the plaintiff?
- Are they substantially true?
- Are they expressions of an opinion? If yes, could any person honestly express that opinion on the established facts?
- Did the councillors exceed limits of their duty by reading the statement out loud at a meeting of Council and having it posted on the website and in the local media?

# Defamation (and more)

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## Rulings

The Statement and letter from legal counsel were not defamatory

- The Court held that there was nothing in the Statement that would lead a reasonably informed person to conclude that the councillor was unfit or incompetent to hold office or had abused or interfered with the ability of staff to serve the residents or had acted unlawfully

# Defamation (and more)

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## Rulings

- The Court also held that the statements in the legal opinion were not defamatory because they were accurate – the legal opinion stated that the councillor had violated the Code of Conduct and recommended that Council ask the councillor to apologize for her blog posts and abide by the Code of Conduct

# Defamation (and more)

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## Rulings

The Statement and letter from legal counsel were substantially true

- The councillor's publications were highly critical and disparaging of staff, independent legal counsel was retained to review the blog postings and advise Council and found, in a detailed and comprehensive opinion, contravention of numerous provisions of the Code of Conduct
- Council adopted the Code of Conduct but the councillor did not sign it, legal counsel recommended that Council request the apology and retraction of statements & publications

# Defamation (and more)

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## Rulings

The Statement and letter were a form of qualified privilege

- Publication in the paper and on the website were appropriate in the context (i.e. blog posts had also been published on the internet) and appropriately achieved Council's purpose to publicly show support for its staff

# Conflict of Interest

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## *Ferri v. Ontario (Attorney General)*

### Facts

- The appellant was a local and regional councillor for the City of Vaughan. His son was a planning and development law lawyer
- The son's law firm was retained to appeal a part of the official plan to the Ontario Municipal Board. The son worked directly on the appeal file
- The councillor applied for prospective relief from the court to determine whether he could participate in council meetings dealing with the appeal without being in contravention of the *Municipal Conflict of Interest Act*
- Section 3 of the statute expressly provides that the pecuniary interest of a parent, spouse or child of a council member is deemed to be the pecuniary interest of the member.

# Conflict of Interest

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- The application judge found that the son had a pecuniary interest in the appeal
- The son's interest was neither remote nor insignificant under s. 4(k)
- A reasonable elector would likely conclude that the councillor's deemed interest was not "so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member"
- The councillor appealed

# Conflict of Interest

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## Issues

- Did the application judge apply an overly broad definition of pecuniary interest; conflate the analyses required under ss. 3 and 4(k) of the statute and disregard factors relevant to the analysis required under s. 4(k) of the *Municipal Conflict of Interest Act*?

# Conflict of Interest

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## Ruling

- The Court of Appeal found that the applications judge erred in concluding that if the pecuniary interest of a child is proximate and significant, so then is the deemed interest of the member
- The analysis under s. 4(k) must commence afresh and focus on the proximity and significance of the councillor's financial interest in the context of the circumstances
- A reasonable elector apprised of all of the circumstances would not conclude that the councillor's deemed interest in the official plan appeal would be likely to influence his participation in the debate or vote on the matter of the official plan before council

# No Trespass Notice

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## *Bracken v. Niagara (Regional Municipality)*

### Facts

- The CAO issued a no trespass notice to the applicant under the Trespass to Property Act which prohibited him from entering the regional headquarters for a period of one year
- Regional Council did not pass a by-law or resolution authorizing the issuance of the no trespass notice
- The applicant commenced an application that the no trespass notice violated his right of freedom of expression and assembly under s. 2(b) of the Charter and his right to life liberty and security of the person under s. 7

# No Trespass Notice

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## Issue

- Did the no trespass notice contravene the applicant's s. 2(b) rights (i.e. freedom of expression) under the Charter?

# No Trespass Notice

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## Ruling

- The Court found the no trespass notice effectively prohibited the applicant from attending meetings of regional council and infringed his right to freedom of expression and assembly
- There was no evidence of actual physical violence or threats of physical violence by the applicant against any member of regional council, staff or the public
- The Applicant's rights under s. 2(b) extended to his ability to actually be able to physically attend and participate in public council meetings.
- A less intrusive and equally effective method could have been implemented rather than a total prohibition

# No Trespass Notice (2)

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## *Bracken v Fort Erie (Town)*

### Facts

- The CAO issued a no trespass notice to the applicant under the *Trespass to Property Act* prohibiting him from entering Town Hall
- The applicant alleged that he was protesting peacefully outside of the Town Hall and in council chambers, but staff members claimed that the applicant was acting “erratically” and shouting into a megaphone and staff members “were afraid for their safety and that of the public”

# No Trespass Notice (2)

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## *Bracken v Fort Erie (Town)*

### Facts

- The applicant commenced an application that the no trespass notice was unconstitutional for violating his right of freedom of expression and assembly under s. 2(b) of the *Charter* and his right to life, liberty and security of the person under s. 7

# No Trespass Notice (2)

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## Issue

- Did the no trespass notice contravene the applicant's s. 2(b) rights (i.e. freedom of expression) under the Charter?

# No Trespass Notice (2)

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## Ruling

- The Court found that the applicant was engaged in behaviour that was “erratic and intimidating” and noted in particular that:  
  
...the Town Hall is a location where employees work. They are entitled to work in a safe, nonthreatening, non-intimidating environment free from all kinds of harassment. It is also a public place where members of the public attend to deal with issues regarding their municipality.
- The content of the applicant’s speech was protected under the *Charter*, but his erratic, confrontational behavior, particularly to the detriment of members of staff and the public, was not

# Councillor Records

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## Order MO-3281, City of Oshawa; January 22, 2016

### Facts

- Council passed a motion to appoint a named lawyer to investigate allegations of wrongdoing on the part of the city and its staff in relation to the city's acquisition of a property
- Hours prior to the meeting, a city councillor sent an email from her private account to the lawyer asking for feedback on a draft motion to appoint the lawyer as an investigator
- The City received a request for access to all communications between the councillor and the lawyer

# Councillor Records

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- The City requested copies of all records potentially responsive to the request from the councillor
- The councillor voluntarily provided a hard copy of the email to City Clerk Services
- The City reviewed the email and determined that it was not subject to disclosure because it was not a record “in the custody” or “under the control” of the City
- The requester appealed the City’s decision to the IPC

# Councillor Records

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## Issue

- Was the record in the custody or under the control of the municipality?

# Councillor Records

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## Ruling

- s. 4(1) of MFIPPA states: *“Every person has a right of access to a record or a part of a record **in the custody or under the control of an institution...**”*
- The IPC applied past decisions which found that councillors are not part of the “institution” because they are not officers or employees
- The IPC determined that the Councillor was not acting as an officer or employee of the institution nor was she discharging a special duty assigned by council when she created the email record in question
- Past IPC decisions have found that a councillors records may nonetheless be subject to access requests where the councillor’s records are in the custody or under the control of the municipality on the basis of established principles

# Councillor Records

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- The IPC applied the Supreme Court of Canada's two-part test on the question of whether an institution has control of records that are not in its physical possession and found:
  1. The contents of the record related to a city matter
    - the record related to the hiring of an investigator to review allegations about individual city employees and city departments - an activity within the city's authority
    - the record played an integral part in council's decision to retain an investigator

# Councillor Records

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2. The City could reasonably expect to obtain a copy of the record upon request
  - the record relates directly to city's mandate and functions – it contains negotiations between the councillor and investigator relating to city's potential of hiring him
  - City relied on the record to secure the engagement of the investigator

# Councillor Records

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## Ruling

- The IPC found the record at issue was a record under the control of the city within the meaning of subsection 4(1) of MFIPPA
- The IPC ordered the City to issue a decision letter to the appellant regarding access to the record in accordance with the provisions of MFIPPA
- The City has subsequently released to the record requester

# Challenge to Integrity Commissioner Report

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## *Di Biase v. Vaughan (City) Integrity Commissioner*

### Facts

- The Integrity Commissioner received a complaint alleging that the deputy mayor had improperly used his influence to assist a contractor secure city business, and so conducted an investigation and produced a report that found that the deputy mayor had:
  - violated the city's code of conduct by swearing at and bullying city staff who would not hand over confidential details about city bids to him
  - emailed confidential city information to an outside source, whose reply was partially copied and pasted into emails to his fellow councillors and municipal staff
  - undertaken acts "with a view to exercising influence or assisting" the constructor to secure city business

# Challenge to Integrity Commissioner Report

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- City Council accepted the Integrity Commissioner's final report and recommendation and voted to suspend the deputy mayor's pay for the maximum of 90 days
- The deputy mayor unsuccessfully applied for a court order to quash the Integrity Commissioner's final report and Council's decision accepting it

# Challenge to Integrity Commissioner Report

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## Issues

- Was the applicant denied procedural fairness with respect to the Integrity Commissioner's report?
- Did City Council err in accepting the Integrity Commissioner's report?

# Challenge to Integrity Commissioner Report

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## Ruling

- The Court rejected the applicant's argument that the Integrity Commissioner's report "lacked procedural fairness" and that City Council "erred" in accepting her decision
- The Court held that there was no breach of procedural fairness, and that the Integrity Commissioner properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City Staff who had participated in her investigation
- The Integrity Commissioner was not required to provide the applicant with every detail of the case against him, it was sufficient if the broad grounds were given

# Challenge to Integrity Commissioner Report

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- The Divisional Court determined that the Integrity Commissioner:
  - could decide when to investigate or not investigate a complaint
  - was entitled to re-formulate a complaint
  - had provided sufficient procedural fairness to the deputy mayor
  - correctly did not suspend investigation re: one criminal aspect
  - undertook a proper targeted search of emails on the city system
  - properly did not disclose the names of 32 city witnesses

# Challenge to Integrity Commissioner Report

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- The City did not err in accepting the Integrity Commissioner's report

A vertical photograph of the Toronto skyline, featuring the CN Tower and various skyscrapers, reflected in the water. The image is positioned on the left side of the slide.

# Contact Information

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Thank You

