
CITY OF PETERBOROUGH INTEGRITY COMMISSIONER,
GUY GIORNO

Citation: Chan v. Therrien, 2021 ONMIC 6

Date: June 3, 2021

REPORT ON COMPLAINT

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INTRODUCTION

1. The inquiry and this report are not about whether government-imposed pandemic restrictions are good or bad. This report does not take sides in that debate; it does not comment on those supporting the restrictions, on those opposed to the restrictions, or on those opposed to those opposed to the restrictions. The only issues in the proceeding are how the Code of Conduct is to be interpreted and applied. This report should not be interpreted as expressing a position on anything else.

COMPLAINT AND INQUIRY

2. Mr. Calvin Chan (Complainant) alleges that Mayor Diane Therrien (Respondent) contravened By-Law Number 19-028, a By-law to establish a Code of Conduct for Members of the Council of The Corporation of the City of Peterborough and certain Local Boards, in social media posts of April 22 and April 24.

3. At the date of this report, the posts, three of which directly refer to Mr. Randy Hillier, MPP (Lanark-Frontenac-Kingston), and the Hon. Maxime Bernier, Leader of the People's Party of Canada, can be found at the following links:

<https://twitter.com/DianeNTherrien/status/1385294963592908806>

<https://twitter.com/DianeNTherrien/status/1385352243763982339>

<https://twitter.com/DianeNTherrien/status/1385385242765271047>

<https://twitter.com/DianeNTherrien/status/1385951181357322241>

4. The Complainant submits that the posts contained indecent, abusive or insulting words or expressions, contrary to paragraph 10 a) of the Code of Conduct, constituted harassment, contrary to paragraph 10 c) of the Code of Conduct, and infringed rights protected by the *Canadian Charter of Rights and Freedoms*.

SUMMARY

5. The Tweets of Mayor Therrien do not constitute government action, and consequently cannot infringe *Charter* rights.

6. I decline to consider whether Mr. Hillier and the Hon. Mr. Bernier have experienced harassment, when neither complained of it. In any event, the Tweets do not constitute harassment.

7. I find that the Mayor's social media posts did not contravene section 10, including paragraphs 10 a) and c), of the Code.

BACKGROUND

8. Mr. Hillier and the Hon. Mr. Bernier are members of a group calling itself the End the Lockdowns National Caucus. The group's public position is that, "After careful examination and scrutiny of mitigation measures undertaken by all levels of government, it is now evident that the lockdowns cause more harm than the virus and must be brought to an end."¹

9. In Ontario, while many municipalities have adopted by-laws related to the pandemic, and medical officers of health have issued orders under the *Health Protection and Promotion Act*, the most prominent and far-reaching restrictions are those made by the provincial Cabinet under the *Emergency Management and Civil Protection Act* and the *Reopening Ontario (A Flexible Response to COVID-19) Act*.

10. The Province has not adopted a single, consistent set of pandemic restrictions. Instead, the rules have continued to change. For example, Ontario Regulation 82/20, which contains most of the rules governing the opening and closing of businesses and facilities, was amended 67 times between March 24, 2020, and May 22, 2021 – meaning, on average, that the rules were amended every six days.

11. The rules themselves never imposed universal restrictions or prohibitions – the restrictions have always been subject to exceptions. For example, for a long period of time, stores selling groceries could also sell books and CDs, while large and small book retailers could not. At the time of writing, many construction projects are closed, but any construction project even partly funded by government is not.² A business that washes and cuts humans' hair must be shut, but a salon that shampoos and grooms pets may be open.³ Decisions about what to lock down and what to exempt from the lockdown have always been policy choices of government.

12. At various times, the Ontario restrictions have included so-called stay-at-home orders.⁴ As did other restrictions, the stay-at-home orders contained a variety of exemptions. One exemption permitted an individual to travel to a second residence provided the stay was less than 24 hours or more than 14 days.⁵

13. Not only does the design of lockdowns and lockdown exemptions reflect government policy choices, but the prioritization of lockdowns over other strategies (e.g., paid sick days, speedier vaccine procurement, widespread asymptomatic testing,

¹ End the Lockdowns National Caucus, statement (February 2, 2021), online: <https://www.libertycoalitioncanada.com/end-the-lockdown-caucus>

² O. Reg. 82/20, Schedule 2, s. 43.

³ O. Reg. 82/20, Schedule 2, s. 23.

⁴ O. Reg. 11/21, O. Reg. 265/21.

⁵ O. Reg. 11/21, Schedule 1, subs. 1(1), para. 19.

prohibiting flights from global hotspots) also reflects provincial and federal government policy choices since the pandemic began.

14. In choosing policies, governments in Canada have prioritized partial vaccination over full vaccination. As of June 3, measured by proportion of population fully vaccinated, Canada (6%) is 67th in the world, behind the United States (41%), United Kingdom (39%), Italy and Spain (21% each), Germany (20%), Brazil (11%), and Mexico (10%).⁶

15. I mention the making of policy choices because in the background of the incident giving rise to this inquiry are differing opinions among different Ontarians about the choices that governments have made. Some Ontarians agree and some Ontarians disagree with the prioritization of certain policy options over other policy options. Some Ontarians believe there are too many exemptions. Some Ontarians believe there are too few. Some Ontarians believe the exemptions are random or unfair. Some Ontarians believe the exemptions are influenced too much by lobbying and not enough by science.⁷

16. Labelling people as either “for” or “against” “lockdowns” is overly simplistic. In Ontario, a lockdown is a bundle of shifting government policy choices, including restrictions and exemptions, based on input from lobbyists as well as public health experts.⁸ Public opinion on the subject is not binary.

17. On April 16, Premier Doug Ford and several Cabinet Ministers announced another iteration of provincial policy choices. They stated that, effective April 17:

Police officers and other provincial offences officers will have the authority to require any individual to provide their home address and purpose for not being at their residence. In addition, police officers, special constables and First Nation Constables will have the authority to stop vehicles to inquire about an individual's reasons for leaving their home.⁹

18. The Premier and Ministers also announced the closure of, “all outdoor recreational amenities, such as golf courses, basketball courts, soccer fields, and playgrounds with limited exceptions.”¹⁰

⁶ See percentage of population fully vaccinated, *New York Times*, “Tracking Coronavirus Vaccinations Around the World,” online: <https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html>

⁷ Ontario, Legislative Assembly, Official Report of Debates (Hansard), 1st Session, 42nd Parliament, No. 212A (November 24, 2020), p. 10677, quoting Catherine Fife, MPP, online: https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2020/2020-11/24-NOV-2020_L212A.pdf

⁸ The Province’s lobbyist registry reveals the extent of lobbying on the Government’s COVID decision-making: <https://lobbyist.oico.on.ca/Pages/Public/PublicSearch/>

⁹ Office of the Premier, “Ontario Strengthens Enforcement of Stay-at-Home Order” (April 16, 2021), online: <https://news.ontario.ca/en/release/61192/ontario-strengthens-enforcement-of-stay-at-home-order>

¹⁰ *Ibid.*

19. Reflecting the fact that a lockdown is not a single standard but instead a bundle of policy choices, Mayor Therrien immediately responded by noting the continued absence of paid sick days from the provincial policy solution. (The argument in favour of paid sick days is that such a program would make it economically possible for workers to stay home when they exhibit symptoms.) “You haven’t put PAID SICK DAYS on the table @fordnation,” she Tweeted.¹¹

20. Peterborough Police Service, along with many of its counterparts across the Province, responded with a public statement that it would not use the new power: “Peterborough Police will continue to be complaints-driven in our response to the increased measures, that means we will not be randomly stopping people.”¹²

21. At the same time, Peterborough Police continued to enforce provincial restrictions under the *Reopening Ontario (A Flexible Response to COVID-19) Act*, and to lay charges for alleged violations.¹³

22. Since at least January, groups of individuals have held peaceful protests, usually at noon, Saturday, and usually at or near Confederation Square, 501 George Street North, or City Hall, 500 George Street North. Participants have carried signs such as “no more lockdowns” and “lockdown is not working.” As I have noted, however, “lockdown” is not an absolute concept. In Ontario, a lockdown has been a bundle of evolving government policy choices, combining restrictions and exemptions from restrictions.

23. On Saturday April 10, approximately 250 protestors gathered, and five charges were laid.¹⁴ On Saturday, April 17, approximately 150 to 200 people participated, and four charges were laid.¹⁵

24. Mr. Hillier and the Hon. Mr. Bernier had been travelling to different communities, participating in gatherings, and expressing their views on pandemic restrictions. At some point they both decided to attend the April 24 protest in Peterborough. Word of their plans

¹¹ Diane Therrien (@dianetherrien), Tweet (April 16, 2021, 4:44 p.m.), online: <https://twitter.com/DianeNTherrien/status/1383159277741805570?s=20>

¹² Peterborough Police Service, “Peterborough Police Response to New Provincial COVID-19 Regulations” (April 16, 2021), online: <https://www.peterboroughpolice.com/en/news/peterborough-police-response-to-new-provincial-covid-19-regulations.aspx>

¹³ Peterborough Police Service, “Media Release for Friday, April 30, 2021” (April 30, 2021), online: <https://www.peterboroughpolice.com/en/news/media-release-for-friday-april-30-2021.aspx>

¹⁴ Global News, “Peterborough police issue 14 Reopening Ontario Act tickets over weekend, city closes basketball court” (April 12, 2021), online: <https://globalnews.ca/news/7752536/peterborough-police-reopening-ontario-act-tickets-weekend-basketball-court-closed/>

¹⁵ Global News, “COVID-19: Peterborough police issue 6 tickets at anti-shutdown protest; Cobourg police charge 4” (April 19, 2021), online: <https://globalnews.ca/news/7768918/peterborough-police-covid-charges-cobourg/>

appears first to have been posted to social media late on April 20, but did not immediately receive widespread attention.¹⁶

25. At 7:48 p.m., Wednesday, April 21, the Hon. Mr. Bernier tweeted a notice promoting a “Peterborough Freedom Rally,” Saturday, noon, at Confederation Square.¹⁷ The Hon. Mr. Bernier Tweeted: “Join me and @randyhillier in Peterborough on Saturday as we urge @fordnation and other governments across Canada to #EndTheLockdowns!”¹⁸ He Tweeted an almost identical message at 8:28 a.m. the next morning.¹⁹ At the time of writing, the two Tweets have been retweeted 739 times, and liked 1.9 K times.

26. On April 22, Mayor Therrien, Peterborough County Warden J. Murray Jones, Dave Smith, MPP (Peterborough-Kawartha), and the Hon. Maryam Monsef, MP (Peterborough-Kawartha) issued the following joint statement:

Peterborough – Peterborough-Kawartha Member of Parliament Maryam Monsef, Member of Provincial Parliament Dave Smith, Peterborough County Warden J. Murray Jones and City of Peterborough Mayor Diane Therrien have issued the following joint statement:

Living with COVID-19 continues to be an incredible challenge. We would like to thank the vast majority of residents who have been following provincial emergency measures along with public health guidelines and making the personal sacrifices needed to protect each other. Staying home, practising physical distancing, wearing masks and getting vaccinated are actions we must take to stay safe. We all want to see this pandemic end as soon as possible, and we must all work together to make that happen.

There have been demonstrations in our community opposing the provincially mandated public health measures that have been put in place to help stop the spread of COVID-19. At these protests people have been gathering in large numbers, not wearing masks and standing close together in defiance of public health advice.

These gatherings have the potential to become super-spreader events.

Thirteen people in Peterborough have already lost their lives to COVID-19. No one wants to see more families devastated by this pandemic. We all have a role to play in preventing further illness and death.

There are many safe ways for people to express opposition to the provincial regulations or ask questions about public health measures without putting themselves and others at risk.

Together, we are asking our community to please stay home, avoid in-person gatherings and follow public health advice. We all want to see our businesses open as soon as

¹⁶ See <https://twitter.com/DenJenKen/status/1384644677622710273?s=20>

¹⁷ Hon. Maxime Bernier (@MaximeBernier), Tweet (April 21, 2021, 7:48 p.m.), <https://twitter.com/MaximeBernier/status/1385017683482222592?s=20>

¹⁸ *Ibid.*

¹⁹ Hon. Maxime Bernier (@MaximeBernier), Tweet (April 22, 2021, 8:28 a.m.), <https://twitter.com/MaximeBernier/status/1385208826035679234?s=20>

possible. We all want to spend time with our friends and family. We must work together to stop the spread so our community can start to heal from COVID-19.

Our actions have consequences, and we challenge you to consider how your actions will impact the wellbeing of our community. Please do not put your life and the life of others at risk. Please choose to stay home and stay safe.²⁰

27. The *Peterborough Examiner* (@ptboexaminer) carried a story on the joint statement and Tweeted about it. That afternoon, Mayor Therrien (@dianetherrien) retweeted @ptboexaminer, and added this message: “**TL;DR: The travelling clown convention isn’t welcome here. @randyhillier @Maxime Bernier**”²¹ (TL;DR is an acronym of “too long; didn’t read.”) To date, her Tweet has been retweeted 103 times and liked 469 times.

28. Roughly four hours later, Mayor Therrien Tweeted a message to Mr. Hillier and the Hon. Mr. Bernier. It read: “**Hey @randyhillier @MaximeBernier I know you guys are bored but Stay TF home.**”²² TF is commonly understood to stand for “the f##k.”

29. This Tweet includes a photo of the Mayor holding two fingers in a V shape, with her palm facing toward her. Those accustomed to the hand gestures of prior generations might describe the gesture as a backwards “peace” sign or backwards “victory” sign. With the hand thus positioned, the two-finger V is understood by many to be offensive, though sources do not always agree on the precise offensive meaning.²³ (The Tweet, including the photo, is reproduced in the Appendix. The Tweets appear in chronological order; this one is the second.)

30. At the time of writing, the Mayor’s V-sign, “Stay TF home” Tweet has received more than 2K likes and has been retweeted 530 times.

²⁰ “MP Monsef, MPP Smith, Warden J. Murray Jones and Mayor Therrien release joint statement on Anti-Lockdown Protests” (April 22, 2021), online:

<https://pbs.twimg.com/media/Ezmul14X0AIEorZ?format=jpg&name=900x900>

²¹ Diane Therrien (@dianetherrien), Tweet (April 22, 2021, 2:10 p.m.), online:

<https://twitter.com/DianeNTherrien/status/1385294963592908806>

²² Diane Therrien (@dianetherrien), Tweet (April 22, 2021, 5:58 p.m.), online:

<https://twitter.com/DianeNTherrien/status/1385352243763982339>

²³ BBC America, “10 Things That Americans Don’t Realize are Offensive to Brits” (January 10, 2013), online, <https://www.bbcamerica.com/anglophenia/2013/01/10-things-americans-dont-realize-are-offensive-to-brits>; Lauren Gawne, Slate, “How to Flip Someone Off Like a Brit” (October 15, 2015), online, <https://slate.com/human-interest/2015/10/the-up-yours-gesture-looks-like-a-peace-sign.html>; Cambridge Dictionary, “V-sign,” online, <https://dictionary.cambridge.org/dictionary/english/v-sign>; Oxford Reference, “V-sign,” online, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803120300620>;

31. This Tweet received much attention on social media – both favourable and critical. The reaction promoted the Mayor to Tweet, about two hours later: **“Whoops I triggered the selfish dullards.”**²⁴

32. The Mayor addressed the reaction again on April 24:

As a decent person, if I think my actions might harm others, I reconsider those actions. These clowns don't GAF about your well-being. And if you're upset about my “unprofessional” language but not upset about ENDANGERING others, well... GFY.²⁵

33. GFY and GAF are widely understood to mean, respectively, “go f##k yourself” and “give a f##k

34. The Hon. Mr. Bernier responded to the Mayor, both online and at the April 24 protest, stating, in part, “Canada is my home.”²⁶ In his speech he elaborated: “Canada is my home and I have the constitutional right to travel across this country.”²⁷ (He was referring to the mobility rights guaranteed by section 6 of the *Canadian Charter of Rights and Freedoms*.)

35. Mr. Hillier also responded to Mayor Therrien. He Tweeted:

Come one 'n' all Canadians to Peterborough this Saturday April 24th. I'm proud to defend our freedoms with @MaximeBernier When the French & the English stand together, Canadian Freedoms are unassailable. Lets show @dianeNtherrien what being Canadian means #onpoli #nomorelockdowns.²⁸

36. Approximately 600 people attended the April 24 peaceful protest. Both Mr. Hillier and the Hon. Mr. Bernier spoke.²⁹

²⁴ Diane Therrien (@dianetherrien), Tweet (April 22, 2021, 8:09 p.m.), online: <https://twitter.com/DianeNTherrien/status/1385385242765271047>

²⁵ Diane Therrien (@dianetherrien), Tweet (April 24, 2021, 9:38 a.m.), online: <https://twitter.com/DianeNTherrien/status/1385951181357322241>

²⁶ Hon. Maxime Bernier (@MaximeBernier), Tweet (April 22, 2021, 6:55 p.m.), <https://twitter.com/MaximeBernier/status/1385366739664445444?s=20>

²⁷ Hon. Maxime Bernier, speech (April 24, 2021), online: https://m.facebook.com/watch/?v=299812401743023&_rdr

²⁸ Randy Hillier (@randyhillier), Tweet (April 22, 2021, 7:12 p.m.), online: <https://twitter.com/randyhillier/status/1385370966612717569?s=20>

²⁹ Paul Rellinger, Kawartha Now, “Saturday’s anti-lockdown rally in Peterborough went ahead without required permit” (April 27, 2021), online: <https://kawarthanow.com/2021/04/27/saturdays-anti-lockdown-rally-in-peterborough-went-ahead-without-required-permit/>

37. The police laid 15 charges arising from the April 24 gathering, ten under the *Reopening Ontario (A Flexible Response to COVID-19) Act*, and five under other provincial statutes.³⁰ Those ticketed included Mr. Hillier and the Hon. Mr. Bernier.³¹

38. The Complaint was filed May 3.

POSITIONS OF THE PARTIES

Complainant

39. The Complainant alleges that the Mayor's Tweets disparaged Mr. Hillier, the Hon. Mr. Bernier, and the event organizers and attendees, using abusive, indecent, and inflammatory language.

40. Specifically, the Complainant states that:

- The Mayor, in a denigrating or insulting fashion, referred to Mr. Hillier and the Hon. Mr. Bernier as a couple of travelling clowns.
- Her fourth Tweet essentially said Mr. Hillier and the Hon. Mr. Bernier, as well as organizers and potential attendees, were clowns who don't give a f##k about people's well-being.
- She said people who criticized her Tweets were selfish dullards.

41. According to the Complainant, by posting the Tweets, Mayor Therrien acted in a pre-meditated manner to harass, demean, and insult the Hon. Mr. Bernier and Mr. Hillier and their supporters, using plainly abusive and indecent language.

42. When asked, the Complainant pointed to the specific terms "clowns," "travelling clown convention," and "selfish dullards," as instances of harassment. He submits further that harassment included "seeking to impugn the reputation and character of Bernier, Hillier and the [organizers and attendees] ... engaging in peaceful political dissent." Finally, the Complaint argues that the Mayor should be found to have engaged in harassment because she breached every public official's duty to act with impartiality, neutrality, fairness and integrity.

³⁰ Peterborough Police Service, "COVID-19 Update for April 24 Protest" (April 24, 2021), online, <https://www.peterboroughpolice.com/en/news/covid-19-update-for-april-24-protest.aspx>; "Media Release for Friday, April 30, 2021" (April 30, 2021), online, <https://www.peterboroughpolice.com/en/news/media-release-for-friday-april-30-2021.aspx>

³¹ Greg Davis, Global News, "COVID-19: More charges coming for Peterborough anti-lockdown protest with Hillier, Bernier" (April 27, 2021), online: <https://globalnews.ca/news/7813340/covid-19-peterborough-anti-lockdown-protest-charges/>

43. The Complainant submits that Mr. Hillier, the Hon. Mr. Bernier, and the event organizers and attendees were exercising their rights under the *Canadian Charter of Rights and Freedoms*. He argues that the Mayor's Tweets did not recognize these individuals' *Charter* rights of mobility and freedom of assembly. He argues Mayor Therrien knew, or ought to have known, that her Tweets would have a chilling effect on members of the public deciding whether to attend the event, "effectively, discouraging attendees from exercising their *Charter* right[s] to peaceful assembly and to freely traverse Canada."

44. He alleges that the Mayor Tweeted with the intent of discouraging and intimidating members of the public from attending the event in accordance with their *Charter* rights. Alternatively, he alleges she Tweeted with willful neglect of or disregard for their *Charter* rights.

45. The Complainant asks that the Respondent apologize or be removed from office as Mayor.

Respondent

46. The Respondent recognizes that the Hon. Mr. Bernier, Mr. Hillier, and the event organizers and attendees have *Charter* rights, but notes that she, too, has *Charter* rights, including the right of freedom of thought, belief, opinion and expression.

47. She observes that the right to freedom of assembly is subject to reasonable limits, such as, in this case, the provincial pandemic restrictions designed to protect public health. She states that her freedom of expression certainly includes the right to Tweet about events that she believes to be unlawful and dangerous.

48. The Mayor argues that her Tweeted opposition to the protests did not violate the assembly rights of those who ultimately choose to attend.

49. Mayor Therrien says she was Tweeting in a personal capacity, using her personal phone and personal Twitter account to express her personal opinion. She did not speak for Council or for the City, nor claim to do so.

50. She feels that both the Hon. Mr. Bernier and Mr. Hillier continued to flout provincial and public health rules, which she says has frustrated municipal and provincial representatives.

51. "Not only are their actions reckless to the lives and health of others, they also mock and belittle the work of front-line health care staff and other essential workers who have to deal with the fallout of the pandemic every day," she states.

52. She argues that both the Hon. Mr. Bernier and Mr. Hillier use inflammatory language and images. She asserts that Mr. Hillier, in particular, has compared the

pandemic restrictions to Naziism. “The propriety of their actions as elected officials are appropriately subject to democratic discourse and debate,” the Mayor states.

53. The Mayor states that “I share in the frustration with the lockdowns and have expressed to my MPP that I believe in many ways it is doing more harm than good ...” She notes, however, that the restrictions are law, and flouting the law by consistently holding mass gatherings causes harm to communities and may prolong the lockdown.

54. According to the Mayor, she was exercising her right as a citizen to participate in the public debate of the propriety of the Hon. Mr. Bernier’s and Mr. Hillier’s actions.

55. Mayor Therrien explains her language and tone as follows:

It was important to send a strong message, and strong language is an effective means to do that. It should be used only in the most grave situations, and this was one, since what was at stake was literally a matter of sickness and death in the community. My language choice was intended to reflect my outrage at the foolishness of Mr. Bernier and Mr. Hillier’s behaviour and was aimed at participating in the democratic discourse about whether these actions should be tolerated by the Canadian public. My language choice and ways of expressing myself are reflective of a non-elitist, accessible form of political speech, which I believe speaks to younger generations – my generation – and those who do not always engage in political discourse.

56. The Mayor questions whether the Complainant should be able to bring a complaint on behalf of Mr. Hillier and the Hon. Mr. Bernier, each of whom can speak for himself and can initiate any legal process he chooses.

57. Finally, the Mayor wishes to retract the comparison of the Hon. Mr. Bernier and Mr. Hillier to clowns, on the basis that it was unfair to clowns. She explains:

I regret using the word “clowns” when referring to these groups. I had a nice email exchange with a man who has worked as a clown for 25 years and he reminded me that clowns provide a service and try to bring joy to people through their performances. The same cannot be said of Mr. Bernier or Mr. Hillier.

Complainant’s Reply

58. The Complainant challenges most of the statements contained in the Mayor’s Response. I have read and considered them all, even though I do not repeat them all below.

59. The Complainant disagrees with the Mayor’s explanation of her language and tone, and makes the following points:

- Indecent, abusive, or insulting language, is neither a productive nor a legitimate means of engaging in political discourse or resolving political disagreements.

- The Mayor used indecent, abusive, or insulting language as a bad faith means of discrediting individuals with whom she disagreed.
- Whether or not Mr. Hillier and the Hon. Mr. Bernier have used similar language or engaged in similar conduct in the past is irrelevant. It would negate the purpose of the Code of consider this as a defence.
- Use of accessible language, including language meant to reach politically disconnected individuals, is not required to involve indecent, abusive or insulting language.

60. In my response to my question about whether the Complainant has standing to complain of harassment of the Hon. Mr. Bernier and Mr. Hillier, the Complainant took no position.

61. In my response to my question about whether a group of 600 people could be subject to harassment, the Complainant argues that “a manner of conduct or discourse which espouses a sentiment which may reasonably lead to harassment of [them]” would constitute harassment.

62. In response to my request for particulars that would provide a basis for me to inquire into the allegations that the Tweets discouraged the exercise of *Charter* rights, were intended to discourage the exercise of *Charter* rights, or were posted with wilful neglect of and disregard for *Charter* rights, the Complainant relies on the plain meaning of the words in the Tweets.

PROCESS FOLLOWED

63. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint and the Council Member responding to the Complaint.

64. The Complaint was received May 3.

65. Based on a review of the Complaint, I decided to commence an inquiry under the opening words of section 10 of the Code, as well as paragraph 10 a). I decided not to inquire into the allegations related to paragraph 10 c) of the Code or the *Charter of Rights and Freedoms* until hearing from the Complainant on these points.

66. I set out the scope in a May 3 Notice of Inquiry sent to both parties. The Notice stated that the issues being considered were:

- Whether the Respondent’s social media posts contravened the opening passage of section 10, by failing to treat to treat members of the public appropriately and without abuse, bullying or intimidation.

- Whether the Respondent's social media posts contravened paragraph 10 a), by using indecent, abusive, or insulting words or expressions toward any member of the public.

67. The Notice invited the Complainant to address the following issues, so that on the basis of his input I could decide whether the inquiry would also consider the *Charter* allegations and the paragraph 10 c) allegations:

- Whether the Mayor's Tweets are subject to the *Charter*.
- What particulars provide a basis for me to inquire into the allegations that the Tweets discouraged the exercise of *Charter* rights, were intended to discourage the exercise of *Charter* rights, or were posted with wilful neglect of and disregard for *Charter* rights.
- Whether an individual other than the Hon. Mr. Bernier or Mr. Hillier has standing to allege harassment of either.
- Whether a group of 600 or more can be subjected to harassment.
- Whether the facts alleged in the Complaint, if established, amount to harassment.

68. The Complainant addressed my questions, May 14. The Mayor submitted a Response to the Complaint on the same day.

69. The Complainant replied, May 27.

70. I carefully reviewed all the submissions of the parties. I have examined the relevant social media posts. I also reviewed news coverage of the April 24 event, including recordings posted online.

71. I have all the information I need to report to Council.

FINDINGS OF FACT

72. Findings of fact are based on the civil standard of the balance of probabilities.

73. Most of the relevant findings of fact are set out in the Background section, above. The remainder appear below.

74. I agree with the Complainant's submissions about the plain meaning of the Mayor's words. Specifically:

75. The Mayor referred to Mr. Hillier and the Hon. Mr. Bernier as a couple of travelling clowns.

76. The Mayor essentially stated that Mr. Hillier and the Hon. Mr. Bernier, as well as organizers and potential attendees, were clowns who don't give a f###k about people's well-being.

77. The Mayor said people who criticized her Tweets were selfish dullards.

78. The Mayor told Mr. Hillier, the Hon. Mr. Bernier, and event organizers and potential attendees, to stay the f###k home.

79. The Mayor's April 24 Tweet told an unidentified online audience, apparently consisting of social media critics and/or some supporters of Randy Hillier and the Hon. Maxime Bernier, to go f###k themselves.

80. The Mayor posted a photo that shows her making an offensive hand gesture. The gesture was directed to Mr. Hillier and the Hon. Mr. Bernier.

ISSUES AND ANALYSIS

81. I have considered the following issues:

- A. Are the Mayor's Tweets subject to the *Charter*?
- B. Does the Complainant have standing to complain that Mr. Hillier and the Hon. Mr. Bernier were harassed?
- C. If proved, would the facts alleged in the Complaint amount to harassment of a group of 600 people?
- D. Did the Mayor contravene paragraph 10 a), by using indecent, abusive or insulting words or expressions toward any member of the public?
- E. Did the Mayor fail to treat to treat members of the public appropriately and without abuse, bullying or intimidation?

A. Are the Mayor's Tweets subject to the Charter?

82. No. The Mayor's Tweets were personal and not governmental.

83. As a general rule, the *Charter* applies only to government action, and not to the actions of private individuals. "Private parties owe each other no constitutional duties ... *Charter* rights do not exist in the absence of state action": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), at para. 95.

84. Her Tweeting was action in the Mayor's personal capacity outside her and Council's capacity and authority under the *Municipal Act: Freitag v. Penetanguishene (Town)*, 1999 CanLII 3786 (ON CA), at para 12.

85. Actions of a government official are subject to the *Charter* only when the official acts on behalf of the government, and not in a personal capacity: *DM v. Reeves*, 2017 ABQB 139 (CanLII), at para. 18. Nothing indicates the Mayor was Tweeting on behalf of the City of Peterborough.

86. The City has a Social Media Policy that purports to govern, “Personal Use of Social Media where that use relates to the business or operations of the City.”³² First, the Tweets in question do not relate to City business or operations. Second, despite the Policy’s purported reach, it is simply incapable of converting someone’s personal activity into municipal government activity. Third, the use of a personal phone to post personal Tweets involves contractual relationships between the individual and Twitter and between the individual and a phone/wireless company, none of which emanate from provincial statute or municipal by-law.

87. I am aware of the Ottawa Mayor’s concession, in 2018, that his Twitter account is official, not personal, but there is no indication that his circumstances were similar to Mayor Therrien’s, and no Court has ever ruled on that matter.³³

88. Because Mayor Therrien’s Tweets are not subject to the *Charter* I will not inquire into whether they contravened *Charter* rights.

89. Alternatively, if I am wrong about that conclusion, I decline to inquire into the *Charter* issue because the Complaint provides insufficient basis to do so. In response to my invitation to the Complainant to provide particulars of how the Tweets discouraged the exercise of *Charter* rights, were intended to discourage the exercise of *Charter* rights, or were posted with wilful neglect of and disregard for *Charter* rights, the Complainant merely relies on the plain meaning of the words in the Tweets.

90. In my view there is nothing in the plain meaning of the words of the Tweets that would justify an inquiry into whether the four Tweets breached anyone’s mobility rights and freedom of assembly rights under the *Charter*.

B. Does the Complainant have standing to complain that Mr. Hillier and the Hon. Mr. Bernier were harassed?

91. Under paragraph 10 c) of the Code, a Council Member must not, “engage in any Harassment of any other Member, any member of staff or any member of the public.”

³² City of Peterborough, Social Media Policy, para. 3.2, online: <https://www.peterborough.ca/en/city-hall/resources/Documents/Social-Media-Policy.pdf>

³³ Beatrice Britneff, Global News, “Watson concedes Twitter account is public, not personal; agrees to unblock critics” (November 2, 2018), online: <https://globalnews.ca/news/4624699/watson-concedes-twitter-account-is-public-not-personal-agrees-to-unblock-critics/>

92. Having considered the issue, I think that the precise question is not whether the Complainant has *standing* to allege harassment. The question should properly be framed as a question of the Integrity Commissioner's discretion. Under section 223.4 of the *Municipal Act*, the decision to launch an inquiry rests with the Integrity Commissioner. In that context, the question is: Should I inquire into a harassment allegation made by someone other than the alleged victim?

93. As a general matter, I believe an Integrity Commissioner should be reluctant to inquire into an allegation of harassment unless it is brought by the person alleged to have been harassed. That was the determination reached in *Miller v. Bath-Hadden*, 2020 ONMIC 12 (CanLII), at paras. 65-70. In that case – in which the alleged harassment involved physical contact – I noted that the alleged victim was an experienced politician quite capable of bringing his own Code of Conduct complaint, had he chosen to do so. I also remarked that Part V.1 of the *Municipal Act* makes clear that the role of an Integrity Commissioner is request driven. This means, in the case of an alleged Code of Conduct contravention, that the inquiry must start with a proper complaint.

94. Unlike *Miller v. Bath-Hadden*, this case involves alleged harassment consisting not of physical contact but of words. In my view, here there is even less reason to inquire into whether Mr. Hillier and the Hon. Mr. Bernier were harassed by the Mayor's Tweets, when neither chose to complain. Each is an experienced politician, fully capable of engaging the Code of Conduct process if he wishes.

95. It is significant that Mr. Hillier and the Hon. Mr. Bernier chose to address the Mayor's remarks by using the same tools that the Mayor herself used: namely, public debate and public communication, including communication via social media. "When an issue arises in the context of political debate, political debate offers its own remedies," and using the tools to political debate to respond is preferable to having an Integrity Commissioner police the debate: *Re Maika*, 2018 ONMIC 11 (CanLII), at paras. 138-139.

96. For these reasons, I decline to inquire into the Complainant's allegation that the Mayor's Tweets constituted harassment of Randy Hillier and the Hon. Maxime Bernier.

C. If proved, would the facts alleged in the Complaint amount to harassment of a group of 600 people?

97. No. Even if capable of proof, the facts alleged would not constitute harassment.

98. The Code defines harassment to include, "any comment, conduct, action or gesture that is unwelcome or that ought reasonably known to be unwelcome that could affect a person's dignity or a person's psychological or physical health."

99. Under this definition, it is not enough that a comment be unwelcome. The comment must also be such that it could affect someone's dignity or psychological or physical health.

100. I find that the words cited in the Complaint do not rise to this standard. In addition, the language was not directed to any specific individual (other than Mr. Hillier and the Hon. Mr. Bernier, discussed previously), and the impact on any recipient was attenuated by its non-targeted delivery through a social medium.

101. I realize that some other Integrity Commissioners are more inclined to make findings of harassment, for example, concluding that harassment means saying "old boys club."³⁴ Their wide interpretations are not binding here. Under the *Municipal Act*, Integrity Commissioners must operate independently, which requires both independence from municipalities and independence from one another. In any event, I believe that setting too low a bar for harassment (as amounting to anything that somebody dislikes) serves only to devalue the concept of harassment and to diminish the entire Code of Conduct / Integrity Commissioner regime.

D. Did the Mayor's Tweet's contravene paragraph 10 a), by using indecent, abusive or insulting words or expressions toward any member of the public?

102. No.

103. The Mayor told people to stay the f##k home and to go f##k themselves, called them clowns and selfish dullards, and made an offensive hand gesture. I find, however, that she did not contravene paragraph 10 a) of the Code by using indecent, abusive or insulting words or expressions. In fact, it would trivialize the Code of Conduct to find that her words and gesture are covered.

104. Codes of Conduct and Integrity Commissioner inquiries are significant matters. The Legislature has seen fit to require that each municipal council adopt a Code of Conduct,³⁵ and either appoint an Integrity Commissioner or obtain the services of one.³⁶ Integrity Commissioners have a role in giving advice to Council Members, but the Legislature perceives the function to be so weighty, it has mandated that both the request for advice and the response be in writing.³⁷ Upon the request of a Council, a Council Member or a member of the public, an Integrity Commissioner may conduct an inquiry

³⁴ Township of North Stormont Integrity Commissioner, *Re Roxanne Villeneuve* (January 6, 2020), at 18, online: <https://northstormont.ca/wp-content/uploads/2020/01/Code-of-Conduct-Complaint-Report-of-Integrity-Commissioner-Received-Jan-14th-2020.pdf>

³⁵ *Municipal Act*, subs. 232.2(1).

³⁶ *Municipal Act*, subss. 232.3(1.1),(1.2).

³⁷ *Municipal Act*, subss. 232.3(2.1),(2.2).

into whether a Council Member has contravened a Code of Conduct.³⁸ In an inquiry, the Integrity Commissioner may use *Public Inquires Act* powers to issue summonses, take evidence under oath, and compel document production.³⁹ The Integrity Commissioner is entitled to free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property of the municipality that the Integrity Commissioner believes to be necessary to the inquiry.⁴⁰ In the event of a contravention, the Integrity Commissioner may recommend and Council may impose a suspension of up to 90 days' pay.⁴¹

105. These are serious provisions, and their implementation comes with a material cost to each municipality. In my view, it is inconceivable that, when it enacted this regime, the Legislature had in mind the dropping of F-bombs or the use of words such as “clown.”

106. In a case such as this, profanity requires no investigation and no interpretation. No investigation, because Council and the public know what occurred. No interpretation, because Council and the public know what the words mean. Residents offended by a Council Member's use of the F-word will take offence. Residents who want to applaud the language will applaud. Residents who don't care will remain indifferent. Nothing in an Integrity Commissioner report on the F-word is likely to add new information or to change anyone's mind. **In my view, this is precisely why the Legislature could never have intended that Integrity Commissioners would be appointed to police the saying (and Tweeting) of the F-word.**

107. The same analysis applies to City Council, which passed By-Law Number 19-028, the Code of Conduct. In adopting the Code, did City Council intend to establish third-party oversight of the use of f##k and its various derivatives such as GFY, GAF, and TF? Surely it did not.

108. In any event, I have considered the language used, and find that it did not contravene the Code.

109. The relevant portion of the Code reads as follows:

Each Member has the duty and responsibility to treat members of the public, each other Member and staff appropriately and without abuse, bullying or intimidation, and to ensure that the City's work environment is free from discrimination and Harassment. Without limitation, a Member must not:

- a) use indecent, abusive or insulting words or expressions toward any other Member, any member of staff or any member of the public

³⁸ *Municipal Act*, subs. 232.4(1).

³⁹ *Municipal Act*, subs. 232.4(2).

⁴⁰ *Municipal Act*, subs. 232.4(4).

⁴¹ *Municipal Act*, subs. 232.4(5).

110. Courts in both Canada and the United States have held that the use of profanity, in particular, f###k, to express oneself, is protected expression, in particular where the profanity is used to convey emotion, emphasis, or tone.

111. In the leading American F-word case, *Cohen v. California*, the majority of the U.S. Supreme Court observed:

How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.⁴² [emphasis added]

112. In *R v. Wells*, 2016 ABPC 171 (CanLII), at paras. 59-60, the court held that a “F###k Harper” sign displayed through the back window of motor vehicle was protected speech:

I am satisfied that Wells chose to exhibit his sign because of his antagonism towards then Prime Minister Stephen Harper for his conduct as a politician. It was Wells' belief, for instance, that Mr. Harper had shown contempt for the constitution. On its face, Wells' sign bearing the phrase “F... Harper” had expressive content. Indeed, it constituted a form of political expression. And political expression is one of, if not the most important form of expression protected by the *Charter*, s.2(b). ...

The fact that the form of political expression chosen by Wells was vulgar or offensive does not, ipso facto, remove it from the sphere of conduct protected by the *Charter*, s.2(b). [expletive deleted] [case citation deleted]

113. *R v. Lawrence*, 1992 CanLII 6136 (AB QB), involved an individual who repeatedly said “f###k you” and raised his middle finger to the Premier and several provincial Ministers participating in a public meeting. The court stated, at para. 13:

This latter conduct and articulation of the four letter obscenity combines both content and form and is clearly an expression of his feelings toward the members of the panel and the government's position with respect to the pulp mill development and

⁴² 403 U.S. 15, 25-26 (1971), online: <https://supreme.justia.com/cases/federal/us/403/15/>

his perception of its impact on the environment. It is therefore an expression that falls within the protection of s. 2(b) of the *Charter* ...

114. Even the Ontario Court of Appeal takes the position that sometimes there is no substitute for the word “f##k.” See *Bracken v. Niagara Parks Police*, 2018 ONCA 261 (CanLII), at para. 57:

To take a familiar example from US First Amendment case law, the meaning conveyed by shouting “f... the draft” does not translate, without significant loss of meaning, to the quiet declaration, “I am implacably opposed to the draft” [expletive deleted] [case citation omitted]

115. I cite these freedom of expression cases, not to use the *Charter* to strike down a provision of the Code of Conduct (first, such an argument was never made in the proceeding; second, it is not established whether an Integrity Commissioner has jurisdiction to do so), but instead to interpret paragraph 10 a) of the Code according to *Charter* values. Based on *Charter* values and the jurisprudence, I believe words are not “indecent, abusive or insulting” under paragraph 10 a) simply because they include profanity or (as in this case) euphemisms for profanity. The use of profanity is part of the expression, in particular, part of the emotive content of the expression.

116. When the Mayor says, “It was important to send a strong message, and strong language is an effective means to do that,” she is referring to the emotive content and form of her expression that is as much protected as the rest of the communication.

117. I also note the great importance that the courts place on political expression, including the fundamental right to express disagreement with politicians – in this case, the Hon. Maxime Bernier and Randy Hillier. In particular, the hand gesture, the “clowns” label, and the message “Stay TF home,” constituted political expression directed to these two politicians. I have taken this into account in concluding that the Mayor did not use indecent, abusive, or insulting words or expressions.

118. It is important to observe that in this case the Mayor did not actually say or type F##k. She used GFY, GAF, TF, and a gesture that is understood to be offensive but has no specific meaning that is universally accepted. There are numerous euphemisms for vulgarity. Consider “freaking,” “friggin” and “F’ing.” (In older context, consider “darn” which replaced “damn.”) If an Integrity Commissioner decides that GFY is indecent, abusive or insulting, because of what the letters represent, then what euphemism could withstand scrutiny? Surely it is not the place of an Integrity Commissioner to determine which substitutions for profanity are acceptable and which are not. I find that the use of initials generally, and the Mayor’s four Tweets in particular, were not abusive, indecent, or insulting under paragraph 10 a) of the Code.

119. The Mayor’s response refers both to the gravity of the topic on which she was commenting (COVID is lethal and is spread through human contact) and to the tendency

of Mr. Hillier and the Hon. Mr. Bernier to use inflammatory language. I am reluctant to adopt these arguments, for fear that tying the language too closely to context may unduly restrict the speech of Council Members in future. For example, while the use of strong language may be understandable when one believes lives are at stake, strong language may also be justifiable when lives aren't at stake. The better conclusion is that the Mayor's Tweets were permitted expression, period.

120. Similarly, I am reluctant to set a precedent that strong language is an acceptable form of political expression only when directed toward politicians who used strong language first. In my view, the rights of Council Members are not so limited. Consequently, it is unnecessary for me to determine whether Mr. Hillier and the Hon. Mr. Bernier express themselves in like manner. It is also unnecessary for me to determine whether they mocked and belittled the efforts of front-line health care workers. These factors do not affect the finding that Mayor Therrien complied with the Code.

121. On the other hand, I do believe that, as seasoned politicians, Mr. Hillier and the Hon. Mr. Bernier are able to withstand offensive gestures and GFYs. I also agree with the Mayor that, "their actions as elected officials are appropriately subject to democratic discourse and debates" (as, I would add, are the actions of the Mayor, of Councillors, and of all elected officials). Both factors are relevant and support the conclusion that the Mayor's Tweets were not indecent, abusive, or insulting.

122. This leads to consideration of the non-vulgar language at issue, "clowns" and "selfish dullards." In my view, this language is not indecent, abusive or insulting. It trivializes the Code of Conduct to suggest that "clowns" or "selfish" is a contravention.

E. Did the Mayor fail to treat to treat members of the public appropriately and without abuse, bullying or intimidation?

123. No.

124. I have already found that the Mayor's Tweets were not abusive.

125. As for bullying and intimidation, these concepts are more serious than indecency and insult, and I have already found that the Tweets were not indecent or insulting.

126. Interpreting **bullying** and **intimidation** according to their ordinary meanings, I find that the Mayor's Tweets constituted neither.

127. I have already commented on trivializing the Code of Conduct and the inquiry process. In my view, to magnify the significance of "stay TF home" and "GFY" by mislabelling these comments as bullying and intimidation would be to diminish the concepts of bullying and intimidation, and ultimately to discredit the Code of Conduct.

128. Further, it is essential to interpret section 10 of the Code with an understanding of how social media function. Nobody is required to follow Mayor Therrien. People are not confronted with her opinions; they choose to access them. Canadian courts have underscored the difference between messages that people can avoid and messages that confront a captive audience.⁴³ This difference must be taken into account in interpreting “abuse, bullying or intimidation.” Only people who choose to access the Mayor’s posts will see them. In my view, their *voluntary* engagement with her online content is inconsistent with a finding that they are being abused, bullied or intimidated. One cannot be bullied or intimidated by a message that one need never view in the first place, and that one is free to ignore.

CONCLUSION

129. I find that Mayor Therrien did not, by Tweeting on April 22 and April 24, contravene the Code of Conduct.

CONTENT

130. Subsection 223.6(2) of the *Municipal Act* states that I may disclose in this report such matters as in my opinion are necessary for the purposes of the report. All the content of this report is, in my opinion, necessary.

Respectfully submitted,



Guy Giorno
Integrity Commissioner
City of Peterborough

June 3, 2021

⁴³ *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), per L’Heureux-Dubé, J.

APPENDIX – SOCIAL MEDIA POSTS

<https://twitter.com/DianeNTherrien/status/1385294963592908806>

← **Tweet**



Diane Therrien
@DianeNTherrien



TL;DR: The travelling clown convention isn't welcome here. [@randyhillier](#) [@MaximeBernier](#)

Peterborough Examiner @PtboExaminer · Apr 22

Updated with a statement from @MaryamMonsef, @DaveSmithPtbo, @DianeNTherrien and J. Murray Jones
thepeterboroughexaminer.com/news/peterboro... via @ptboexaminer

2:10 PM · Apr 22, 2021 · Twitter Web App

75 Retweets **28** Quote Tweets **468** Likes

<https://twitter.com/DianeNTherrien/status/1385352243763982339>

← **Tweet**



Diane Therrien
@DianeNTherrien



Hey @randyhillier @MaximeBernier I know you boys are bored but



5:58 PM · Apr 22, 2021 · Twitter Web App

303 Retweets 227 Quote Tweets 2,014 Likes

<https://twitter.com/DianeNTherrien/status/1385385242765271047>

← **Tweet**



Diane Therrien
@DianeNTherrien

Whoops I triggered the selfish dullards. 🙄

8:09 PM · Apr 22, 2021 · Twitter for iPhone

20 Retweets **24** Quote Tweets **483** Likes

<https://twitter.com/DianeNTherrien/status/1385951181357322241>

← **Tweet**



Diane Therrien
@DianeNTherrien



As a decent person, if I think my actions might harm others, I reconsider those actions. These clowns don't GAF about your well-being. And if you're upset about my "unprofessional" language but not upset about ENDANGERING others, well... GFY.

9:38 AM · Apr 24, 2021 · Twitter for iPhone

227 Retweets **126** Quote Tweets **1,420** Likes