

Appendix A

CITY OF PETERBOROUGH INTEGRITY COMMISSIONER,
GUY GIORNO

Citation: Ayotte v. Therrien, 2022 ONMIC 10

Date: May 18, 2022

INQUIRY REPORT

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COMPLAINT

1. The Complainant, Mr. D. Paul Ayotte, alleges that two social media posts of the Respondent, Mayor Diane Therrien, contravened By-Law Number 19-028, the City of Peterborough Council Code of Conduct, as well as the City's Social Media Policy.

SUMMARY

2. On February 6, Mayor Therrien Tweeted the following in response to her own thread on the subject of racism: "TL;DR: Nazi Punks Fuck Off."

3. On March 15, Mayor Therrien posted on Instagram a photo that shows her holding a mug on which is printed, "Today's Clusterfuck Danger."

4. Mr. Ayotte alleges that this social media activity contravened the Council Code of Conduct and the Social Media Policy.

5. I agree with the Complainant that the Respondent's Tweet and her Instagram post are subject to the Code of Conduct and subject to the Social Media Policy. She identifies herself as Mayor of Peterborough on both platforms.

6. The fact that social media activity is subject to the Code and the Policy does not necessarily mean that it contravenes either. It simply means that the activity must be evaluated in light of the Code and the Policy.

7. After careful consideration, I find no breach of the Code of Conduct and no breach of the Social Media Policy.

BACKGROUND

8. The City's [Code of Conduct](#) and [Social Media Policy](#) are both available online:

9. The Respondent maintains a personal Twitter account, @DianeNTherrien. (A separate account, @MayorPtbo, is the official Twitter account of the City's Mayor.)

10. The Respondent also maintains a personal Instagram account, @dianetherrienptbo.

11. A Twitter bio is a user's customized, self-identifying content (up to 160 characters), typically consisting of biographical information, links, and hashtags. On February 6, on her personal account, the Respondent's Twitter bio read as follows:

Mayor of the City of Peterborough ON @CityPtbo. Chair of the Eastern Ontario Mayor's Caucus. Auntie. Extrovert. She/Her.

12. The Respondent appears to edit her Twitter bio frequently. On May 17, it read:

Mayor of the City of Peterborough ON @CityPtbo. Auntie. Extrovert. Over Being Polite. She/Her. I block trolls with wild abandon. Opinions my own.

13. Twitter users also have the option of uploading “profile photos” (recommended dimensions 400 x 400 pixels) and “header images” (recommended dimensions 1500 x 500 pixels). It appears that the Respondent changes the profile photo and header image of her personal account with some frequency.

14. At the relevant times in February 2022, on her personal Twitter account, the Respondent's profile photo showed her holding up two fingers using the same gesture that was considered in a previous Integrity Commissioner inquiry, *Therrien v. Chan*, 2021 ONMIC 6 (CanLII), at para. 29. While the gesture in each image is the same, the Mayor's February 2022 profile photo was different than the profile photo reproduced in *Therrien v. Chan*.

15. At the relevant times in February 2022, the header image of the Respondent's personal Twitter account was the City's logo, including its “Outside the Ordinary” tagline. The logo and tagline had been approved by City Council in March 2018.¹

16. The Respondent now has a different profile photo and a different header image. (Twitter accounts do not display a record of when profile photos and header images change.)

17. On February 5, at 5:37 p.m., the Respondent Tweeted a five-part, anti-racism thread reading as follows:

1) it's no secret this country has a racism problem. Sometimes I feel hopeless in the face of the blatant hatred and unsure what to do. Here is what I will commit to, and ask other white ppl to join if they are able.

2) Call out racism, homophobia, sexism, transphobia, all forms of hatred when you see it. THIS INCLUDES when your buddy “makes a joke”.

3) if you see someone being harassed on the street, offer to walk with them or give them a ride or ask them what they need.

4) try and get licence plate numbers or other info, offer to help file a police report if required (obvi there is complex nuance re: the relationship between BIPOC and police).

¹ “Peterborough city council unanimously endorses new ‘Outside the Ordinary’ brand” (March 27, 2018), *kawarthaNOW*, online: <https://kawarthanow.com/2018/03/27/peterborough-city-council-unanimously-endorses-new-outside-the-ordinary-brand/>

- 5) please add other suggestions. I'm feeling so much grief and anger at this whole situation, but we need to work together to ensure safety of everyone in our community.
18. The next morning, February 6, approximately 16 hours after the original five Tweets, she responded to her own thread by Tweeting, "TL;DR: Nazi Punks Fuck Off."
19. TL; DR is an accepted short form of "Too Long; Didn't Read." In this context, the letters indicate that the words that follow (Nazi Punks Fuck Off) are meant to be a pithy summary of the original thread.
20. Responding to or reTweeting one's own thread is a common method of bringing it to the attention of users who might not have noticed the first time.
21. The Respondent's Tweeting of "Nazi Punks Fuck Off" attracted several social media comments, some supportive and some critical.
22. Starting February 14, the Respondent took a leave of absence to deal with personal health issues. She returned to work part-time, March 9, and full-time, March 15.
23. On March 15, the Respondent posted the following message on Instagram:
- Back to work in style. #messyhairdontcare Thanks again to peeps for their support and encouragement the last while. Xoxox



24. The hashtag “messyhairdontcare” is a reference to the accompanying photo, in which the Respondent’s tousled hair was prominent.
25. The photo also showed Respondent holding a white mug on which appeared the image of a gauge calibrated to four levels: “low” (green), “medium” (yellow), “high” (orange), and “extreme” (red). The needle of the gauge pointed to “extreme” (red).
26. Printed on the mug above the gauge were the words “Today’s clusterfuck danger,” followed by a colon.
27. On March 30, Mr. Ayotte signed the present Complaint. I received it in the mail on April 5.
28. I exercised my *Municipal Act* discretion to conduct an inquiry.

PROCESS FOLLOWED

29. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint (Complainant) and the Council Member responding to the Complaint (Respondent). This fair and balanced process begins with me issuing to both parties a Notice of Inquiry that sets out the issues. The Notice of Inquiry includes a copy of the Complaint. The Respondent is made aware of the Applicant’s name. I do, however, redact personal information such as phone numbers and email addresses.
30. The Respondent has an opportunity to respond. The Applicant receives the Respondent’s Response and is given an opportunity to reply. I may accept supplementary communications and submissions from the parties, generally on the condition that parties get to see each other’s communications with me. I do this in the interest of transparency and fairness.
31. I typically set deadlines for the submission of a Response and a Reply, but give reasonable extensions when requested.
32. As a further safeguard to ensure fairness, I will not help to draft a Complaint and will not help to draft a Response or Reply. I will, however, if necessary, ask a party to clarify a Complaint, Response, or Reply.
33. The Complaint alleges that the Respondent’s two social media posts contravened sections 4, 8, and 10, and paragraphs 5 b), 5 c), 5 e), and 10 a) of the Code of Conduct, and sections 2.1, 2.2, 4.2.3, 4.3.3, 4.3.6, 4.4, 4.5.3, and 4.6 of the Social Media Policy.
34. On April 16, I issued a Notice of Inquiry. I informed the parties that I would conduct an inquiry under section 223.4 of the *Municipal Act* into whether the Respondent

contravened section 8, section 10 (introductory words), and paragraph 10 a) of the Code of Conduct, and sections 4.3.3 and 4.4 of the Social Media Policy.

35. I informed the parties that, in addition to the provisions listed above, section 4 and paragraphs 5 b), 5 c), and 5 e) of the Code, and section 3.0 of the Social Media Policy, might also be relevant to the inquiry. Section 4 of the Code and paragraphs 5 b), 5 c), and 5 e) of the Code are statements of principle. They are not provisions that can be breached, but they may be relevant to the interpretation and application of the substantive rules in the Code. Section 3.0 (Definitions) of the Social Media Policy is not cited in the Complaint but I informed the parties that it might nonetheless be relevant because it defines “City Representative” and “Personal Use,” terms appearing in sections 4.3 and 4.4 of the Policy.

36. The Notice of Inquiry invited the parties to address the application of the Social Media Policy as set out in sections 2.1 and 2.2. I specifically invited the parties to address whether the Respondent’s two posts were subject to the Social Media Policy.

37. I exercised my discretion not to consider sections 4.2.3, 4.3.6, 4.5.3, and 4.6 of the Social Media Policy, and explained why in the Notice of Inquiry.

38. Section 4.2.3 of the Social Media Policy states what the City will do. It is not a rule that a Council Member can contravene.

39. Section 4.3.6 of the Policy prohibits someone from representing personal opinions as those of the City; I do not consider the facts alleged in the Complaint as capable of establishing a contravention of this section. The inquiry has, however, considered whether the use of the City logo is relevant to whether the posts were subject to the Social Media Policy.

40. Sections 4.5.3 and 4.6 of the Social Media Policy state things that the City might do. (Section 4.6 might not even apply to Council Members.) These sections are not rules that someone can contravene.

41. The Mayor responded on April 26. The Complainant replied on April 28.

42. Under the process that I follow, the parties are entitled to see and address each other’s submissions, but interviews are conducted in private. During the interview, a party or witness is entitled to be accompanied by legal counsel. A party is not permitted to participate in or attend the interview of a witness or the other party.

43. The parties’ submissions were thorough, and the case turns largely on the content of two social media posts. I determined that it was unnecessary to conduct oral interviews of either the parties or witnesses.

44. I did, however, conduct a brief written interview of the Respondent, to clarify one factual matter. This occurred May 3.

45. I also gathered evidence from the City about IT devices made available to Council Members, and evidence related to the song “Nazi Punks Fuck Off.”

46. This report concludes the inquiry and sets out my findings. In reaching the conclusions, I have considered the Complaint, all of the evidence, the submissions of both parties, the Code of Conduct, the Social Media Policy, and applicable law.

POSITIONS OF THE PARTIES

47. In this section of the report, I am summarizing the parties’ submissions relevant to the inquiry. The summaries do not include portions of the submissions not germane to the issues raised by the Complaint. The Respondent and the Complainant both commented on the Complainant’s previous political criticism of the Mayor, dating back to 2018. I do not find those historic facts relevant to the inquiry and have not taken them into account.

Complainant’s Position

48. The Complainant states that he does not use social media. The posts in question were shared with him by a concerned resident.

49. The Complainant argues that the Mayor holds a “24/7/365” position, meaning that the Mayor is always the Mayor, even when using a personal social media account. According to the Complainant, “When you are the Mayor you are the Mayor no matter where you go or what you do.”

50. The Complainant notes that the Mayor’s Twitter account includes a City of Peterborough logo and her Twitter bio identifies her as “Mayor of the City of Peterborough ON @CityPtbo.” He submits that, “it is hard to say it is a personal account.”

51. The Complainant also suspects that the social media posts were made using City equipment.

52. The Complainant has cited sections 4, 8, and 10, and paragraphs 5 b), 5 c), 5 e), and 10 a) of the Code of Conduct, and sections 2.1, 2.2, 4.2.3, 4.3.3, 4.3.6, 4.4, 4.5.3, and 4.6 of the Social Media Policy. In paragraphs 28 to 34 of this report, I explain which of these provisions I am considering in this inquiry, and why. The relevant passages of the Code and the Policy are reproduced in Appendix 1 and Appendix 2, respectively.

53. Section 10 of the Code provides that a Member must treat members of the public “appropriately and without abuse ...” It also provides that a Member shall not “a) use indecent, abusive or insulting words or expressions.”

54. Section 8 of the Code requires that a Council Member comply with the Code of Conduct and “all other policies and procedures adopted or established by Council affecting the Member.” The Social Media Policy is a policy affecting Council Members.

55. According to section 4.3.3 of the Social Media Policy, a City Representative must not post material that is “abusive, offensive, or otherwise inappropriate ...”

56. Section 4.4 of the Policy states that one who identifies as a City Representative during Personal Use of Social Media is held the same level of professional conduct as required by the applicable code of conduct. (The capitalized terms are specifically defined in section 3.0 of the Policy.)

Respondent's Position

57. The first paragraphs of the Response outline the Respondent's view that the Complainant has consistently opposed her (for example, in letters to the editor) since her election as Mayor in 2018. I have not taken in account these paragraphs or anything the parties say about their past political histories. In my view, the past is not relevant to the present issue of the Respondent's social media posts.

58. The Respondent submits that the two social media posts that are the basis of the Complaint are not subject to the Social Media Policy, because in posting she was not conducting business on behalf of the City, and her posts were not related to the operations of the City.

59. She states that her personal Twitter account (@DianeNTherrien) is separate from the Official Mayoral Twitter account (@MayorPtbo).

60. According to the Mayor, she accesses her personal Twitter account from her personal cell phone, not from City equipment.

61. The Respondent explains that her February 5 thread (see paragraph 11, above) was posted during the Freedom Convoy protest and was meant to address questions from the public about the Freedom Convoy and “the spread of propaganda, disinformation, and anti-social behaviour.”

62. She provides the following detailed explanation of why she used “Nazi Punks Fuck Off” to summarize her thread:

In any case, the slogan, “Nazi Punks Fuck Off” is a commonly used reference to the iconic 1981 song of the same name, by legendary punk band The Dead Kennedys.

The [video can be found here](#). The song “Nazi Punks Fuck Off!” has, since its release over 40 years ago, been prolific in the anti-racism movement. It is especially relevant today as we see our democracy under threat by targeted disinformation campaigns and emboldened anti-social and white nationalist behaviour that has been on display at the “freedom” convoys.

Many music fans and social justice advocates are well aware of “Nazi Punks Fuck Off” as an iconic, pithy statement used by those of us who actively work against racism, homophobia, misogyny, and all forms of hatred. I did not author the saying; I merely co-opted it in my ongoing stand against the threat of far-right neo-Nazi and white nationalist movements and the intimidation tactics that have been on display in our country for the last several months. Moreover, the Tweet was not directed at any individual, but was referencing the broader “freedom convoy” movement that was occupying Ottawa at the time. I have always been a staunch supporter of human rights and the Ontario *Human Rights Code*. I would submit that white nationalists and neo-Nazis are not protected grounds under the Code.

... Standing up for what I believe in, staying true to my principles, and speaking truth to power are part of who I am. I will not shirk that duty now, or ever. My maternal grandparents lived through WWII under German occupation in Holland. When I see and hear about racist and hateful behaviour on the rise, when I get calls and emails and social media messages from community members who don’t feel safe in our community when these “freedom convoy” crowds are gathered, and who have had racial slurs and homophobic comments yelled at them, it is my personal responsibility (I would argue it is our collective responsibility) to speak up for what is right – even though being an outspoken woman puts me at risk of vexatious complaints like this one, and more serious threats that I have received for standing up for what I believe in.

63. In response to the allegation about her coffee mug (“Today’s clusterfuck danger”), the Mayor states that the photo was a selfie taken at home. She possesses a collection of mugs, and “It just so happened that the one in the picture was not in the dishwasher that day.”

64. The Respondent notes that she purchased the mug at a well-known Peterborough business, Hi Ho Silver.

65. The also notes that the post was on her personal Instagram account.

Complainant’s Reply

66. A significant portion of the Reply relates to the past events mentioned by the Mayor in her Response. As mentioned, I am not relying on either party’s submissions about historic political differences between them.

67. The Reply reiterates the Complainant’s principal position that the Mayor is always the Mayor and, consequently, her public communications are always subject to the Code of Conduct and applicable City policies. In the Complainant’s words:

Being the Mayor is living in a fish bowl, whether you are sitting in the Council Chamber, at the grocery store, walking down George St. or sitting in a bar having a glass of wine, you are the Mayor. It is not something you can turn off for a few hours here and there. The Mayor states her personal Twitter account @DianeNTherrien is separate from her official Mayoral Twitter account @MayorPTBO but I assume she controls them both. I don't do the social media thing personally but when I was given the copy of the posting with the City of Peterborough logo in the background I did not look to see which of her accounts it was from, nor would the majority of people seeing it I suspect. What I took from it and certainly what the person that dropped it off at my home took from it was that it was from Diane Therrien and she is the Mayor of Peterborough.

68. The Complainant argues that, not only is the Respondent's activity subject to the Social Media Policy, but the use of the City Logo is unauthorized.

FINDINGS OF FACT

69. Findings of fact appear in the Background section of this report, and below. Findings are based on the evidence, according to the standard of the balance of probabilities.

70. At the time of her February 6 Tweet, the header image of the Respondent's personal Twitter account was the official City of Peterborough logo.

71. At the time of her February 6 Tweet, on her personal account, the Respondent's Twitter bio identified her as "Mayor of the City of Peterborough ON @CityPtbo."

72. At the time of her February 6 Tweet, the Respondent's personal Twitter bio did not include the statement, "Opinions my own." These words are now included in her Twitter bio, but were not present at the relevant times.

73. At the time of her March 15 Instagram post of the selfie with the mug, the Respondent's Instagram bio identified her as "Mayor of the City of Peterborough." The Instagram bio also identified that this was her "personal account."

74. The Respondent is a "City Representative" as defined in the Social Media Policy.

75. The February 5 Twitter thread about the Freedom Convoy, and the February 6 Tweet (Nazi Punks Fuck Off) that summarized the thread, were not posted on behalf of the City and did not relate to business or operations of the City.

76. The February 5 and February 6 Tweets were not work-related.

77. The February 5 and February 6 Tweets were a personal use of social media.

78. During this personal use, the Respondent identified herself as the Mayor – identified herself as a City Representative as defined in the Social Media Policy.

79. The March 15 Instagram post was not made behalf of the City and did not relate to business or operations of the City.

80. The March 15 Instagram post was not work-related. (I find that posting about coming back to work after a medical leave of absence is more personal in nature than it is work-related.)

81. The March 15 Instagram post was a personal use of social media.

82. During this personal use, the Respondent identified herself as the Mayor – identified herself as a City Representative as defined in the Social Media Policy.

83. I find that on February 5-6 and March 15, the Mayor did not represent her personal opinions as those of the City.

84. I find no reasonable observer would have mistakenly perceived that the Mayor's February 6 Tweet and her March 15 Instagram post reflected the views of the City.

85. I accept the Respondent's explanation of the context of the February 5 and February 6 Tweets:

... a thread I wrote to address questions I had been receiving from members of the public who follow my personal Twitter account regarding the "freedom protests" and the spread of propaganda, disinformation, and anti-social behaviour.

86. I find, however, that the Tweets do not specifically mention the Freedom Convoy and that most of their content is applicable to racism generally, harassment generally, and extremism generally. Regardless of the Respondent's intention, the February 5 and February 6 Tweets, as written and posted, do not refer to, or imply, any identifiable individual or organization. I find that no reasonable observer would have associated the Tweets with anyone identifiable.

87. Each Member of Council, including the Mayor, is issued a City laptop computer and cell phone. There is, however, no evidence to contradict the Mayor's statement that she used a personal device to make the posts in question.

88. "Nazi Punks Fuck Off" is a song by the punk rock group Dead Kennedys. It was released as a seven-inch single in November 1981 and was the sixth track on the EP *In God We Trust, Inc.*, released December 1981.

89. The band included with the single an armband showing a crossed-out swastika. That symbol was subsequently adopted by many prominent anti-racist movements,² including Anti-Racist Action.³

90. Writer and former lead singer Jello Biafra claims that the song was not originally aimed at ideological Nazis but at people behaving like Nazis:

My take is this: If they act like one, and behave like one, then, yeah, calling them out as such is fair game. When I wrote "Nazi Punks Fuck Off" in the first place, I wasn't writing about actual ideological Nazis. The Nazi skinhead thing hadn't yet erupted in England yet. The song, then, was about the early stages of slam-dancing where people would show up, without any interest in the music at all – real buff jock types – who would run off the stage, target someone, and punch them in the back of the head, or the face, and run off. They just wanted to wail on somebody.

Those people were acting like Nazis. So I wrote it, and the Dead Kennedys played it.⁴

91. The song quickly triggered a reaction from what Biafra calls "ideological Nazis," some of whom attacked Dead Kennedys shows:

The initial premise of the song was "You violent people at shows are acting like a bunch of Nazis," and that was as far as it went. Then the real ideological Nazis began coming out of the closet.

... So "Nazi Punks ..." evolved in people's minds into an anti-fascist, anti-Nazi anthem.⁵

92. "Nazi Punks Fuck Off" became "a rallying call against the white supremacy and anti-Semitism seeping into punk culture,"⁶ and a direct rebuke of neo-Nazis (also known as Nazi punks⁷) within punk rock.

93. The song is now considered "iconic"⁸ and is widely associated with anti-racism and anti-fascism. It has been variously described as "the anti-racist anthem,"⁹ "an explicit anti-

² Vincent Caruso, "The History and Continued Evolution of the Dead Kennedys' 'Nazi Punks F— Off'" (August 15, 2017), retrieved from Diffuser.fm.

³ Steven Heller, "Revisiting a Punk Icon," *Print* (January 2, 2018).

⁴ A.D. Amorosi, "Jello Biafra Takes on Trump, 'Nazi Punks' Then and Now, and His Former Band, Dead Kennedys," *Variety* (January 13, 2021).

⁵ August Brown, "Jello Biafra on 'Nazi Punks' and hate speech," *Los Angeles Times* (August 9, 2012).

⁶ Alexander Bullis, "Where's the outrage now?" *The McGill Daily* (October 19, 2015).

⁷ The term "Nazi punk" has two meanings. It refers both to a subgenre of music within punk (Nazi punk) and to individuals (Nazi punks).

⁸ Numerous authors.

⁹ Graham Hartmann, "Dead Kennedys' Jello Biafra Joins Napalm Death Onstage to Perform 'Nazi Punks F— Off'" (March 2, 2015), retrieved from Loudwire.com.

fascist anthem,”¹⁰ “perhaps the defining anti-Nazi punk anthem,”¹¹ “the antifa anthem,”¹² and “the quasi-anthem for the punk antifa.”¹³

94. I find as a fact that the Respondent’s use of the words “Nazi Punks Fuck Off” was a direct and intentional reference to an iconic, anti-fascist, anti-racist anthem.

95. I also find that people familiar with the anti-fascism and anti-racism would have interpreted the reference as such.

96. I take notice of the fact that racist extremism and white supremacism in Canada are real.¹⁴ The Federal Court of Canada recently took judicial notice of the prevalence of white supremacy and hate crimes,¹⁵ and the Supreme Court of Canada has affirmed judicial notice of the widespread existence of racism;¹⁶ I adopt their findings. Judicial decisions frequently confirm the existence of white nationalist and white supremacist groups and movements, and I note this fact too.¹⁷

97. While I have taken notice of these general facts, it is beyond the scope of this inquiry to probe the specific allegation of racism and extremism within the Freedom Convoy. I make no factual findings concerning the alleged extent of white nationalists’ participation in the protest. For one thing, the evidence-gathering necessary to reach such findings would far exceed the capacity of this inquiry. The conduct of the Freedom Convoy is already directly the subject of various criminal proceedings and indirectly the subject of the federal Public Inquiry into the 2022 Public Order Emergency¹⁸ and a study by Parliament’s Special Joint Committee on the Declaration of Emergency.¹⁹ The fact-finding capacities of these official processes vastly exceed the scope of a Code of Conduct inquiry. An investigation of the Freedom Convoy would also lie outside an Integrity Commissioner’s jurisdiction.

¹⁰ Caruso, note 2.

¹¹ Brown, note 5.

¹² Zack Beauchamp, “Antifa, explained,” Vox (June 8, 2020).

¹³ David Molloy, “A brief history of punks beating up Nazis” (January 30, 2017), retrieved from tonedeaf.thebrag.com.

¹⁴ Andrew Crosby, “Policing Right-Wing Extremism in Canada: Threat Frames, Ideological Motivation, and Societal Implications” (2021), *Surveillance & Society* 19(3): 359-363.

¹⁵ *Supan v. Canada (Citizenship and Immigration)*, 2022 FC 488 (CanLII), at para. 24.

¹⁶ *R. v. Spence*, 2005 SCC 71 (CanLII), [2005] 3 S.C.R. 458, at para 52.

¹⁷ *R. v. Andrews*, 1990 CanLII 25 (SCC), [1990] 3 S.C.R. 870; *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148 (CanLII), aff’d 2015 NBCA 50 (CanLII); *R. v. Mathers*, 2012 BCSC 1981 (CanLII), at para. 35; *R. v. Noble*, 2008 BCSC 215 (CanLII), at para. 33; *R. c. Presseault*, 2007 QCCQ 384 (CanLII)

¹⁸ Order-in-Council P.C. 2022-0392 (April 25, 2022).

¹⁹ The Joint Committee’s order of reference was adopted by the House of Commons on March 2 and by the Senate on March 3.

98. Further, for the reasons set out in the next section, it is unnecessary for me to make findings about the conduct of the Freedom Convoy in order to evaluate the Mayor's February 6 Tweet. Consequently, this report makes no findings concerning the Freedom Convoy and should not be interpreted as making any.

99. I find that the words on the mug ("Today's clusterfuck danger") were meant to be a joke. If anything, by holding up the mug for the selfie, the Respondent were referring to herself: that is, she was making a joke at her own expense.

ISSUES AND ANALYSIS

100. I have considered the following issues:

- A. Does the Code of Conduct apply to the Respondent's February 6 and March 15 social media posts?
- B. Does the Social Media Policy apply to the Respondent's February 6 and March 15 social media posts?
- C. Did the February 6 Tweet contravene the Code?
- D. Did the March 15 Instagram post contravene the Code?

A. Does the Code of Conduct apply to the Respondent's February 6 and March 15 social media posts?

101. Yes. This means that the social media posts are subject to being assessed under the Code of Conduct. It does not necessarily mean that the posts breached any particular sections of the Code.

102. In *Chan v. Therrien*, I considered a different issue and came to a different result. In that case, the question was whether the Mayor's Tweets were governmental action that was subject to the *Canadian Charter of Rights and Freedoms*. I concluded that the Tweets were personal, not governmental, and that the Mayor was not Tweeting on behalf of the City; consequently, the Tweets could not be found to violate people's *Charter* rights.²⁰

103. Here, the issue is whether the Code of Conduct (not the *Charter of Rights*) applies to a Council Member's social media posts.

²⁰ 2021 ONMIC 6 (CanLII), at paras. 82-90.

104. I have found that the social media posts were not posted on behalf of the City, did not relate to business or operations of the City, were not work-related, and were a personal use of social media. In general, Codes of Conduct and Integrity Commissioners' jurisdiction do not apply to personal activity unrelated to the office, role, function, influence, authority, or responsibility of a Council Member, and with no connection to the interests or business of the Municipality: *Gogos v. Jones* (CanLII), 2022 ONMIC 7, at paras. 159, 161-162, 169-185; *Pinto v. Anderson* (No. 2), 2022 ONMIC 4 (CanLII), at paras. 58-65.

105. Here, at the relevant time, both on Twitter and on Instagram, the Respondent identified herself as Peterborough's Mayor. Also at the relevant time, her Twitter header image was the City's logo. I find that this is a sufficient connection to the office of Council Member to bring the social media activity within the scope of the Code of Conduct. That does not mean that the posts contravened the Code (see discussion below) but it does mean that the posts may be assessed according to the standards of the Code. This finding is consistent with the analysis in *Chan v. Therrien*,²¹ *Gogos v. Jones*,²² and *Pinto v. Anderson* (No. 2).²³

106. In case of Instagram, the Mayor had flagged the fact that this was her "Personal account." In the case of Twitter, the Mayor did not, until some time after the relevant Tweet, include the disclaimer, "Opinions my own." In my view, neither factor displaces the significance of the Respondent's self-identification as Mayor to the threshold question of whether the Code of Conduct applies.

B. Does the Social Media Policy apply to the Respondent's February 6 and March 15 social media posts?

107. Yes, but only to the extent that the Policy provides that the posts are subject to the Code of Conduct. In this case, the consequence is academic, as I have already found that the social media posts are subject to the Code.

108. Section 8 of the Code of Conduct obliges each Council Member to observe "all other policies and procedures adopted or established by Council affecting the Member." Section 8 confirms that the Social Media Policy's provisions applicable to Council Members fall within the jurisdiction of the Integrity Commissioner.

²¹ 2021 ONMIC 6 (CanLII), at paras. 102 ff. The Mayor's Tweets were found not to contravene section 10 of the Code, but the inquiry assumed that section 10 applied.

²² 2022 ONMIC 7 (CanLII), at para. 180: "There may exist situations in which an individual's personal conduct affects a municipality – in other words, circumstances in which private conduct can have an impact on official duties. The jurisprudence on conduct makes clear, however, that the test for applying codes to personal conduct is strict."

²³ 2022 ONMIC 4 (CanLII), at para. 59: "[A] code of conduct may only apply to conduct that is connected to or affects one's office as a Council Member or member of a local board."

109. Section 4.4 of the Social Media Policy reads as follows:

Notwithstanding the *Canadian Charter of Rights and Freedoms*, those who identify themselves as a City Representative during their Personal Use of Social Media must hold themselves to the same level of professional conduct as required by relevant City Policies and Procedures and their applicable Code of Conduct.

110. In applying section 4.4 of the Policy to the Mayor's posts, I have ignored the words "Notwithstanding the *Canadian Charter of Rights and Freedoms*." First, municipal governments lack authority to provide that their rules operate notwithstanding the *Charter*. That power belongs only to Parliament and the provincial legislatures.²⁴ Second, these eight words seem not to affect the meaning of the remainder of section 4.4.

111. The Respondent identified herself as a City Representative (specifically, as the Mayor) on Instagram and Twitter. As a result, as provided by section 4.4 of the Social Media Policy, the Respondent's personal social media use was subject to the Council Code of Conduct.

112. I find that the other sections of the Social Media Policy do not apply to the Respondent's posts. In particular, section 4.3 of the Social Media Policy does not apply because the Respondent was not "engaging in Social Media on behalf of the City."

113. In the case of personal use of social media, the applicable section of the Policy is section 4.4, not section 4.3.²⁵ That being said, I note that several provisions of section 4.3, including the prohibition of discrimination, harassment, and abuse, are similar to what is already required by the Council Code of Conduct.

114. Since the effect of section 4.4 of the Social Media Policy is to cross-reference the requirements of the Code of Conduct, the analysis below refers only to the Code.

C. Did the February 6 Tweet contravene the Code?

115. No. While the Tweet was subject to the Code of Conduct, it did not contravene it.

116. I begin the analysis by reprinting the Respondent's February 5 thread on racism and hateful conduct:

²⁴ *Constitution Act, 1982*, s. 33.

²⁵ I have considered the part of section 4.4 of the Policy that says a personal social media users who identify as City Representatives must comply with "relevant City Policies and Procedures." Logically it makes sense to exclude the Social Media Policy from the term "relevant City Policies and Procedures." After all, if Council's objective were to apply the entirety of the Social Media Policy to personal use by individuals who identify as City Representatives, then the Policy would have said so simply and directly.

1) it's no secret this country has a racism problem. Sometimes I feel hopeless in the face of the blatant hatred and unsure what to do. Here is what I will commit to, and ask other white ppl to join if they are able.

2) Call out racism, homophobia, sexism, transphobia, all forms of hatred when you see it. THIS INCLUDES when your buddy "makes a joke".

3) if you see someone being harassed on the street, offer to walk with them or give them a ride or ask them what they need.

4) try and get licence plate numbers or other info, offer to help file a police report if required (obvi there is complex nuance re: the relationship between BIPOC and police).

5) please add other suggestions. I'm feeling so much grief and anger at this whole situation, but we need to work together to ensure safety of everyone in our community.

117. The above thread was summarized on February 6 in the Tweet: "TL; DR: Nazi Punks Fuck Off."

118. Section 10 of the Code proscribes the following conduct: abuse, bullying, and intimidation; indecent, abusive and insulting words and expressions; speaking in a discriminatory manner; and harassment. (The last two listed prohibitions, discrimination and harassment, appear in passages of section 10 not mentioned in the Complaint.)

119. The "Nazi Punks Fuck Off" Tweet breached none of these prohibitions.

120. We must assume that the Council Code of Conduct is not intended to contravene the *Canadian Charter of Rights and Freedoms*, which protects freedom of expression: *Newman v. Brown*, 2021 ONMIC 11 (CanLII), at para. 68; *Re VanLeeuwen*, 2021 ONMIC 13 (CanLII), at para. 179.

121. The same principle was affirmed in *Brampton Symphony Orchestra Inc. v. Palleschi*: "Freedom of expression is a fundamental right in Canada so the Code must be interpreted in a manner consistent with this fundamental right."²⁶

122. The threshold for limiting political speech must be high: *Campbell v. Schummer*, 2020 ONMIC 8 (CanLII), at para. 92.

123. I have found (paragraph 84) that the Tweet did not mention or imply any identifiable individual or organization. It does not even mention the Freedom Convoy. If the Tweet targets anyone, it targets racists generally, neo-Nazis generally, and/or white nationalists generally. A communication that is general in nature and directed to unidentified targets cannot be said bully, intimidate, or insult anyone. Another factor that militates against a

²⁶ City of Brampton Integrity Commissioner, Report No. BIC-32-1112 (December 18, 2012), Randy Pepper, Delegate of the Integrity Commissioner, para. 9.

finding of bullying or intimidation is that the impact on any recipient was attenuated by its non-targeted delivery through a social medium.²⁷

124. While discrimination is not an allegation in the Complaint, I note in any event that “Nazi Punks Fuck Off” is not discriminatory. Racism, extremism, and fascism are not prohibited grounds of discrimination under the *Human Rights Code* or the Council Code of Conduct.

125. The remaining prohibitions in section 10 of the Code cover words and expressions that are indecent and abusive. The Code does not define “abusive” and “indecent.”

126. According to dictionaries, when the adjective is applied to language, the ordinary meanings of “abusive” include “extremely offensive and insulting”²⁸ “harsh and insulting,”²⁹ “extremely rude and insulting,”³⁰ and “using rude and offensive words.”³¹

127. Definitions of “indecent” include “morally offensive, especially in a sexual way,”³² “shocking and offensive, usually because it relates to sex or nakedness,”³³ and “not conforming with generally accepted standards of behavior or propriety; obscene.”³⁴

128. The Courts have considered the meaning of “indecent” (and “indecenty”) on numerous occasions, mostly in the criminal law context. In the late 20th century, “indecent” meant acts which exceeded the boundaries of accepted community standards,³⁵ that is, went beyond the current, prevailing, community standard of decency.³⁶ Since the 2005 Supreme Court of Canada decisions in *R. v. Labaye*³⁷ and *R. v. Kouri*,³⁸ the focus has shifted away from subjective community norms to an objective assessment of harm to individuals or society. The modern jurisprudence requires a relatively high tolerance of conduct before it is held to be “indecent.”

129. For the reasons below, “Nazi Punks Fuck Off” is neither abusive nor indecent.

²⁷ *Chan v. Therrien*, note 20, at para. 100.

²⁸ Oxford Languages, online.

²⁹ Merriam-Webster, online.

³⁰ *COBUILD Advanced English Dictionary*, online.

³¹ *Cambridge Business English Dictionary*, online.

³² *Cambridge Advanced Learner's Dictionary & Thesaurus*, online.

³³ *COBUILD Advanced English Dictionary*, online.

³⁴ Oxford Languages, online.

³⁵ *Capital Distributing Co. (Canada) Limited v. Deputy Minister of National Revenue*, unreported (June 28, 1976) (Ont. Co. Ct.); *Priape Enrg. v. Canada (National Revenue)*, 1979 CanLII 2859 (Que. S.C.), 52 C.C.C. (2d) 44, at 47.

³⁶ *R. v. Pink Triangle Press*, 1980 CanLII 2816, 51 C.C.C. (2d) 485 (Ont. S.C.), at 499; *R. v. Beaupre* (1972), 7 C.C.C. (2d) 320 (B.C. S.C.), at 332, cited in *R. v. Balazsy*, 1980 CanLII 2870 (Ont. C.J.).

³⁷ 2005 SCC 80 (CanLII), [2005] 3 S.C.R. 728.

³⁸ 2005 SCC 81 (CanLII), [2005] 3 S.C.R. 789.

130. First, I have found as a fact (at paragraphs 92-93) that these words referred to an iconic, anti-racist, anti-fascist anthem of the same name, and that people familiar with anti-racism and anti-fascism would have understood the reference.

131. The musical allusion was neither abusive nor indecent. Using the iconic song title as a catchy summary³⁹ of the previous day's anti-racist thread did not contravene the Code.

132. Even if the Respondent's words are deconstructed (that is, interpreted literally to mean that she was calling unidentified persons "Nazi punks" and telling them to f— off), they are not abusive and not indecent.

133. This is not a case in which an identifiable person was called "Nazi." (I will not address that hypothetical.) The Respondent was referring to unidentified people. It is fact that white nationalists and neo-Nazis operate in Canada (see paragraph 94); in other words, such people exist. The reasonable interpretation of the Respondent's words is that the unidentified "Nazis" were people to whom the word actually applied. There is certainly no evidence that the Respondent meant anyone else.

134. As for the remaining words of the Tweet, I have previously summarized the jurisprudence holding that the use of the F-word is protected expression: *Chan v. Therrien*, at paras. 110-114. In light of the jurisprudence, I must conclude that "f— off" is not indecent. It is also not abusive, at least not when aimed at unidentifiable persons.

135. In upholding the protection of the use of this expletive, the Ontario Court of Appeal recently held:⁴⁰

The exercise of free expression is diminished by restrictions on the means that make it effective. So, it is no answer for the respondent to say there is no limit on one's exercise of freedom of expression – that everyone is free to convey whatever ideas they want – provided they use appropriately temperate language. To take a familiar example from U.S. First Amendment case law, the meaning conveyed by shouting "fuck the draft" does not translate, without significant loss of meaning, to the quiet declaration, "I am implacably opposed to the draft": *Cohen v. California*, 403 U.S. 15 (1971). [emphasis added]

136. To apply the Court's logic to the present case, "Nazi Punks Fuck Off" means something significantly different than, "White nationalists, please leave our communities alone." The Code of Conduct does not require a Council Member to jettison the former wording in favour of the latter.

³⁹ As mentioned at paragraph 17, the use of "TL;DR" or "Too Long; Didn't Read" signalled that the Respondent was offering a pithy summary of her February 5 thread.

⁴⁰ *Bracken v. Niagara Parks Police*, 2018 ONCA 261 (CanLII), at para. 57.

137. Finally, considering the ordinary meaning of “indecent,” the dictionary definitions, and judicial consideration of the adjective, it is impossible to classify the F-word as “indecent” language.

138. For the above reasons, I conclude that the February 6 Tweet did not contravene the Code. It is unnecessary to make any factual findings about the conduct of the Freedom Convoy (if I even possess jurisdiction to inquire into the conduct of the protest, which I doubt).

D. Did the March 15 Instagram Post contravene the Code?

139. No.

140. The Respondent’s use of the word “clusterfuck” (as a joke at her own expense: paragraph 97) was not abusive, insulting, bullying, or intimidating.

141. The only provision of section 10 of the Code that might *conceivably* apply to “clusterfuck” is the prohibition of indecent language. For the reasons outlined in the previous section, I conclude that the word “clusterfuck” is not indecent.

142. Given that Tweeting “f— off” is not indecent and is not contrary to the Code of Conduct, neither is posting a photo of a mug that says “clusterfuck.”

CONCLUSION

143. I am reporting to Council that the Respondent did not contravene the Code of Conduct or the Social Media Policy.

CONTENT

144. 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

May 18, 2022

APPENDIX 1: EXCERPTS FROM COUNCIL CODE OF CONDUCT

Principles upon which this Code of Conduct is Based

4. Improving the quality of municipal administration and governance can best be achieved by encouraging high standards of conduct on the part of all municipal officials. In particular, the public is entitled to expect the highest standards of conduct from the Members whom they elect to local government. In turn, adherence to these standards will protect and maintain the City's reputation and integrity.
5. Key statements of principle that underlie this Code of Conduct are as follows:
 - a) Members must serve and be seen to serve their constituents in a conscientious and diligent manner;
 - b) Members must be committed to performing their functions with integrity, avoiding the improper use of the influence of their office, and conflicts of interest;
 - c) Members are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and that will bear close public scrutiny;
 - d) Members must recognize and act upon the principle that democracy is best achieved when the operation of government is made as transparent and accountable to members of the public as possible; and
 - e) Members must seek to serve the public interest by upholding both the letter and spirit of the laws of Parliament and the Ontario Legislature, as well as the laws and policies adopted by the Council.

...

Adherence to Council Policies and Procedures

8. Each Member must observe and comply with every provision of this Code of Conduct as well as with all other policies and procedures adopted or established by Council affecting the Member. This Code of Conduct prevails to the extent of any inconsistency between this Code of Conduct and any of the aforementioned policies or procedures.

...

Conduct Respecting Others

10. 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;
- b) speak in a manner that is discriminatory to any individual, based on that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability; or
- c) engage in any Harassment of any other Member, any member of staff or any member of the public.

APPENDIX 2: EXCERPTS FROM SOCIAL MEDIA POLICY

1.0 Purpose

- 1.1 This Policy sets out the conditions upon which the City will use Social Media to improve information sharing, and engage more residents.

2.0 Application

- 2.1 This Policy and its related procedures apply to all City Representatives who use, or oversee the use of Social Media to conduct business on behalf of the City.
- 2.2 This Policy also applies to Personal Use of Social Media where that use relates to the business or operations of the City.
- 2.3 This Policy applies to City IT Resources, as defined within this Policy, used in the support, development, or use of City Social Media.

3.0 Definitions/Acronyms

...

City IT Resource - Any software, hardware, data, software licenses, intellectual property, and any other form of technology, of the City which is used for recording, storing, accessing, displaying, and/or the transmission of information. Examples include: cellular telephones, computers, laptops, e-mails, facsimiles, Internet, personal digital assistants (PDAs), voice mail or websites, etc.

City Representative - An employee, elected official, volunteer, co-op student, committee or board member, contractor or consultant who acts on behalf of the City.

...

Personal Use - Any use that is for non-work related purposes regardless of whether that use is:

- within the workplace or outside of the workplace;
- during work or non-work hours;
- accessed through City IT Resources or non City IT Resources.

Social Media (Also referred to as Social Networking) - The various online sites or technologies that enable individuals to join and/or participate in online communities for the purpose of sharing information, ideas, messages, pictures, etc.

...

4.0 Policy Statements

4.1. The City will leverage selective Social Media to:

- .1 Improve information sharing and broaden opportunities to communicate effectively.
- .2 Enable and facilitate relevant and effective Stakeholder communications.
- .3 Engage Stakeholders that traditionally have been difficult to reach.
- .4 Enhance the City's customer service efforts by increasing online opportunities for inquiries, requests, and feedback.

4.2 To ensure the appropriate, effective, and secure use of Social Media the City will:

- .1 Administer this Policy and its related Procedure in accordance with the *Municipal Act, 2001*, the *Municipal Freedom of Information and Protection of Privacy Act*, and any other relevant legislation.
- .2 Establish necessary controls and procedures related to the use and monitoring of Social Media.
- .3 Require that all Social Media activity be conducted in accordance with all related City Policies and Procedures.
- .4 Ensure regular content monitoring and prompt and proactive communications management.
- .5 Require that City Representatives promote the goals, objectives and policies of the City through Social Media in a professional manner in accordance with the applicable Code of Conduct.
- .6 Provide ongoing training for employees with respect to appropriate interactions and best practices on Social Media.

4.3 City Representatives engaging in Social Media on behalf of the City may not:

- .1 Disclose confidential information pertaining to the business or operations of the City, including items discussed in closed session meetings.
- .2 Disclose personal information about any individual, City employee, elected or appointed official, client, customer, vendor, supplier etc. without their written consent.

- .3 Post material that is discriminatory, harassing, abusive, offensive, or otherwise inappropriate in accordance with the Ontario *Human Rights Code*, applicable Code of Conduct and Workplace Harassment and Discrimination Policy.
 - .4 Promote, endorse, or allow the marketing of non-City businesses, products, or any other non-City related opportunities, with the exception of economic development/retention activities and the official role of Elected Officials as per the *Municipal Act*.
 - .5 Communicate or engage in any conversations about the City in a destructive manner.
 - .6 Represent personal opinions as those of the City.
- 4.4 Notwithstanding the *Canadian Charter of Rights and Freedoms*, those who identify themselves as a City Representative during their Personal Use of Social Media must hold themselves to the same level of professional conduct as required by relevant City Policies and Procedures and their applicable Code of Conduct.
- 4.5 The City reserves the right to:
- .1 Remove any content from the City's Social Media without notice.
 - .2 Monitor information posted on any Social Media by any individuals or groups listed in Section 3.1 of this Policy.
 - .3 Withdraw access to Social Media by Departments, Divisions, or individuals at anytime for failure to comply with the requirements of this Policy or its related Procedure.
- 4.6 Failure to comply with this Policy or its related Procedure may result in discipline up to and including dismissal.