



“Counter Encounter”

Investigation into a complaint about the
Township of Red Rock

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May 2017

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Overview

- 1 In September 2014, Lewis Martin, a longtime resident of the Township of Red Rock, decided to run for municipal council. By September 11, he had only two days left to register as a candidate. He arrived at the municipal office that day confident he had assembled all the necessary paperwork.
- 2 Unfortunately, in this small northern community, Mr. Martin and municipal staff had developed a strained relationship. Mr. Martin distrusted staff's ability to effectively follow through on his requests. Staff, in turn, saw Mr. Martin as rather demanding and difficult.
- 3 The exchange on September 11, 2014 between Mr. Martin and township staff was par for the course. The Deputy Clerk told Mr. Martin that some required registration papers were missing. He disagreed with her and insisted everything was in order. She eventually accepted his materials, but would not verify that the papers were properly filed. In response, Mr. Martin questioned her knowledge of the candidate registration process.
- 4 The next day, Mr. Martin returned to the municipal office. This was the last day to register, and he wanted to make sure that his name would be added to the ballot. According to our interviews with township staff, he repeatedly asked questions about the process and insinuated that they might intentionally make a mistake to keep him out of the election. Their recollection was that Mr. Martin did not raise his voice, swear or threaten, but he spoke sternly and condescendingly. In the end, Red Rock's Chief Administrative Officer (who is also the township Clerk) stepped in to deal with the matter, and Mr. Martin left shortly thereafter.
- 5 In the wake of this interaction, the Deputy Clerk submitted a written complaint under the township's Anti-Harassment Policy, claiming that during the September 11 and 12 encounters, Mr. Martin had made her feel bullied, belittled, uncomfortable, and "less of a dedicated and honest employee."
- 6 Despite having been a witness to the incident, the Chief Administrative Officer assumed the role of complaint investigator. He soon abandoned the steps and remedies set out in the Anti-Harassment Policy, opting instead to issue a trespass notice. It barred Mr. Martin from entering the municipal office during office hours for three months.

- 7 Mr. Martin was successful in his bid for a seat on council in the October 27, 2014 election. However, his refusal to apologize for his pre-election conduct, which he believes was perfectly justified, has left him subject to a series of trespass notices. Since July 2015, the prohibition has even extended to the entire municipal building, preventing him from accessing the township's only public library during business hours. He is still able to attend council meetings, as they take place after business hours.
- 8 My investigation found that the township's handling of the concerns about Mr. Martin was fraught with errors and missteps. The township's Anti-Harassment Policy was not followed and, in any event, it is unclear whether it encompasses staff complaints about members of the public. The "internal investigation" conducted in this case was perfunctory and procedurally unfair. Insufficient records were kept of witness accounts, the Chief Administrative Officer was an untrained investigator, and as a witness to the events in issue, lacked impartiality and independence.
- 9 Finally, the township's imposition of a series of trespass notices is not provided for in the Anti-Harassment Policy or any other policy or procedure. The Chief Administrative Officer simply issued the notices unilaterally after a defective and unfair process. The imposition and continuation of the ban on Mr. Martin, for behaviour that all concerned acknowledged was not violent or threatening, was excessive and unjustly punitive.
- 10 In order to prevent such situations from occurring in future, and to balance the interests of township staff and citizens, I have made 11 recommendations for improvement, including that Red Rock develop a procedurally fair, thorough and reasonable process for dealing with difficult interactions between staff and the public. In the case of Mr. Martin, I believe the only appropriate redress at this stage is for the trespass notice against him to be revoked immediately.

Complaint

- 11 As of January 1, 2016, the Ontario Ombudsman has the authority to carry out impartial reviews and investigations of complaints about the administrative conduct of municipalities, including municipal councils, local boards and municipally-controlled corporations.
- 12 The Township of Red Rock is located in the Thunder Bay district and has a population of less than 900. Council is made up of a mayor and four councillors, including the complainant, Lewis Martin.
- 13 Councillor Martin's complaint focused on how the township handled a harassment complaint made against him in 2014, and its ongoing issuance of trespass notices barring him from the municipal building during the day. He told us that the township failed to follow a fair process in investigating the complaint, and was unreasonable in repeatedly renewing the trespass notice. The township's office is located in the same building as its public library and a boardroom that serves as council chambers. Mr. Martin explained that the trespass notice even restricts him from accessing a computer and fax machine in the library during the municipality's business hours, which hinders his ability to conduct personal and council-related business.

Investigative Process

- 14 My Office receives more than 20,000 complaints annually, most of which are resolved expeditiously using alternative dispute resolution techniques. Consistent with our practice of attempting to resolve complaints quickly and informally wherever possible, we initially contacted the Township of Red Rock to obtain relevant information and documents, and to try to facilitate a solution to the situation. We identified best practices that the township could apply to assist with resolving this complaint, and to prevent similar issues from arising in the future.
- 15 Unfortunately, despite repeated discussions with township officials in the hope of resolving the matter informally, we received limited co-operation from the township. Ombudsman staff contacted the Chief Administrative Officer at least seven times to address the issues raised by Mr. Martin. We provided him with copies of relevant court cases on trespass notices and an example of a policy about responding to unreasonable customer behaviour. The Chief Administrative Officer was uninterested in informal

resolution and requested that our Office commence a formal investigation. We also spoke with the Mayor twice in an attempt to facilitate a resolution of the dispute, and suggested that he raise the matter with council. The issue remained unresolved. Consequently, I issued a formal notice of investigation on November 3, 2016.

- 16 Although we have received more than **4,000** complaints about municipalities since obtaining authority in the municipal sector some 15 months ago, I have only initiated **three** investigations, including a systemic investigation regarding the non-competitive procurement practices in the City of Brampton. As this was one of the first investigations we commenced, and given the level of resistance we encountered during our early resolution efforts, I assigned the matter to the Director of the Special Ombudsman Response Team, who worked in conjunction with legal staff.
- 17 On December 5, 2016, two investigators travelled to the township and conducted eight in-person interviews with township staff and all members of council, including Councillor Martin. Staff also spoke with Councillor Martin's life partner, who was present during the interactions with township staff in September 2014, and an official from the Ministry of Municipal Affairs who had dealt with Mr. Martin and the township concerning the candidacy requirements. The township co-operated with our investigation by making staff available for interviews and providing requested documents.
- 18 In April 2017, we forwarded a confidential preliminary report to the relevant municipal staff and council members, setting out my findings, opinion and proposed recommendations. The Mayor, Councillor Martin, and the Chief Administrative Officer responded with comments, which we considered in preparing this final report.

Election Countdown

- 19 In accordance with the Ontario *Municipal Elections Act*, nomination forms for the October 2014 municipal elections had to be filed, along with a fee, with municipal clerks by 2 p.m. on September 12, 2014. Municipal clerks

were required to certify the eligibility of candidates by 4 p.m. on Monday, September 15, 2014.¹

Counter encounter

- 20** Based on witness accounts and notes the Chief Administrative Officer prepared a few days after Mr. Martin's September 12, 2014 visit to the municipal office, we were able to piece together the sequence of events that led to the filing of the staff complaint against Mr. Martin. The problematic interaction took place in the municipal office, where employees' desks are arranged in an open-concept setting, separated from the public reception area by a long counter.

First encounter: September 11, 2014

- 21** According to his account, Mr. Martin went to the municipal office on Thursday, September 11, 2014 to submit his nomination papers, accompanied by his life partner. He approached the counter and spoke with the Deputy Clerk about submitting his forms. A second township employee and a member of council were also in the office.
- 22** Mr. Martin told us he believed he had all the required documents, but the Deputy Clerk said he needed to submit additional information, including papers to show that he had opened a campaign bank account. He then left the municipal office and called an advisor at the Ministry of Municipal Affairs. Township staff also spoke with the Ministry advisor. The advisor recalls explaining that although the *Municipal Elections Act* requires candidates to open a campaign-specific bank account, this could be done after the nomination papers were filed.
- 23** Mr. Martin and his partner then returned to the municipal office. He recalled that the Deputy Clerk accepted his nomination papers and fee, but told him that the Chief Administrative Officer, who is also the township's Clerk, would have to confirm that the papers were properly filed. Mr. Martin told us he suggested to the Deputy Clerk that she should know what she was doing if she was accepting the nomination forms.

¹ Ontario Ministry of Municipal Affairs and Housing, "2014 Candidates' Guide for Ontario Municipal and School Board Elections", online: <http://www.mah.gov.on.ca/AssetFactory.aspx?did=10336>.

- 24 When we interviewed the councillor who witnessed part of Mr. Martin's visit to the municipal office, he did not recall the full content of the conversation between Mr. Martin and the Deputy Clerk. However, he described Mr. Martin as being loud and accusing staff of withholding information related to his nomination package. The councillor told us that the Deputy Clerk seemed rattled, but Mr. Martin did not threaten anyone or act violently.
- 25 The Deputy Clerk told us that during this visit, Mr. Martin was badgering her and asking for additional information. He also questioned why he needed to submit bank account information. She did not recall other details of their discussion.
- 26 The other staff member who was present could not recall any specific information about the interaction between the Deputy Clerk and Mr. Martin.
- 27 Both staff members told us that Mr. Martin left the office without being asked. They said the behaviour that led to the complaint happened mainly when Mr. Martin returned to the office the next day.
- 28 The Chief Administrative Officer was not present for the encounter on September 11, 2014, but prepared notes on September 16, 2014, based on discussions with the township staff and councillor who were there. The notes are relatively sparse. They refer to Mr. Martin's initial visit – when he questioned the need to have a campaign bank account – and his return later that day to file his papers. The notes describe him as “quite rude,” and repeatedly asking about the required forms. They also refer to the Deputy Clerk as becoming “flustered” as a result.

Second encounter: September 12, 2014

- 29 As he was anxious to confirm that he had done everything necessary to assure his candidacy in the upcoming election, Mr. Martin returned to the municipal office on Friday, September 12, 2014, again with his partner. The Deputy Clerk and the other employee who was present the previous day were in the office, as well as the Chief Administrative Officer.
- 30 Mr. Martin told us he wanted a receipt for the nomination fee he had paid, and assurance from the township that his papers had been correctly filed. He said that the Deputy Clerk provided a receipt for the fee, but would not verify that the papers were filed correctly. The Chief Administrative Officer came out of his office, and Mr. Martin asked him about the nomination

papers. He and his partner each told us that the Chief Administrative Officer refused to acknowledge that his papers had been properly filed, and said Mr. Martin would find out the following Monday. As noted, clerks were required to certify eligible nominations on the following Monday under the *Municipal Elections Act*.

- 31 Unable to get the assurance he requested from staff, Mr. Martin told them he would fill out a request under the *Municipal Freedom of Information and Protection of Privacy Act* to confirm whether his papers were correctly filed. In response, staff provided him with a freedom of information request form. The Chief Administrative Officer accepted the information request, and indicated that the township would respond in two weeks. Mr. Martin then left the office.
- 32 Mr. Martin told us he could tell the Deputy Clerk was upset during his visit, but did not know why. He said he, too, was upset because he felt ignored and disrespected. Mr. Martin told us that he never raised his voice, insulted the employees, swore, or threatened anyone, and he was not asked to leave, but did so of his own accord.
- 33 His partner supports his recollection of events. She told us Mr. Martin never raised his voice, and was only asking staff questions because the Deputy Clerk appeared not to know what paperwork she needed to collect. She also said the Chief Administrative Officer refused to answer when Mr. Martin asked if his papers had been filed properly, and insisted that he would have to wait until Monday to find out. She recalled that the Deputy Clerk seemed upset, but she believed this was because of the actions of the Chief Administrative Officer, who she felt made the situation worse by refusing to give the confirmation Mr. Martin requested.
- 34 According to the Deputy Clerk, throughout the interaction with Mr. Martin, he badgered her, peppered her with questions, and implied that she was not doing her job. She told us she felt uncomfortable, intimidated, and belittled because Mr. Martin was commenting on everything she did. She recalled him saying things like, “You should know this,” when she was trying to confirm that he had submitted the correct paperwork. She said Mr. Martin did not swear or threaten her, and there was no physical violence or threat of violence, but his attitude seemed violent and intimidating. The police were not called, and she said she does not believe anyone asked Mr. Martin to leave the office.
- 35 The other employee who witnessed the interaction said it grew tense, and she heard Mr. Martin saying that he believed the Deputy Clerk was going

- to intentionally make a mistake with the paperwork so he would not be registered as a candidate. She said he did not yell, but was speaking sternly and “talking down” to the Deputy Clerk. She said she heard him say things like, “Is this going to get misplaced?” and “You’re purposely going to mess this up so I can’t run.” She explained that the Deputy Clerk remained courteous throughout the encounter, but was flustered by the questioning. She confirmed that there was no physical violence or threat of violence, and no one asked Mr. Martin to leave.
- 36** The Chief Administrative Officer told us he overheard Mr. Martin raising his voice and came out of his office to take over the interaction. He described that Mr. Martin was demanding information that he believed the township was not providing. He said he interpreted Mr. Martin’s remarks as suggesting that the employee was lying, and characterized this behaviour as “abusive.” He told us Mr. Martin made no physical threats, but described his body language as “pacing back and forth” and “grabbing things off the counter.” He also recalled that he had to ask Mr. Martin to leave the office. In response to my preliminary report, the Chief Administrative Officer said he has a “low voice that does not travel” and might not have been heard when he asked Mr. Martin to leave.
- 37** The Chief Administrative Officer’s notes from September 16, 2014 refer to Mr. Martin arguing with the Deputy Clerk, demanding forms to file a freedom of information request, and then doing so. The notes describe Mr. Martin as “belligerent.” There is also reference to a call to a Ministry advisor to confirm the required nomination forms, and Mr. Martin complaining about having to fill them out.
- 38** We interviewed the Chief Administrative Officer on December 5, 2016 and he responded to our preliminary report on May 17, 2017. The more contemporaneous written account does not refer to Mr. Martin pacing, grabbing things off the counter or being asked to leave on September 12, 2014. No other witnesses supported this characterization of Mr. Martin’s physical movements, or recalled the Chief Administrative Officer asking him to leave. Under the circumstances, I do not consider this aspect of the Chief Administrative Officer’s evidence to be reliable and do not find, on a balance of probabilities, that Mr. Martin engaged in this behaviour or that he was asked to leave the municipal office on September 12.

Harassment complaint and investigation

- 39 The Deputy Clerk drafted a harassment complaint on the evening of Friday, September 12, 2014. The complaint states that on September 11 and 12, 2014, the Deputy Clerk felt “bullied” and that Mr. Martin’s “constant questioning” made her feel uncomfortable and belittled. It also states that Mr. Martin’s actions made her feel and look like “less of a dedicated and honest employee.”

Anti-harassment policy

- 40 The Deputy Clerk’s complaint was filed under the township’s Anti-Harassment Policy. Dated July 9, 2010, the policy refers to the township’s commitment to providing a safe and respectful work environment for all staff and customers. It contains the following general description of harassment:

any behaviour that demeans, humiliates, or embarrasses a person, and that a reasonable person should have known would be unwelcome. It includes actions, comments, or displays. It may be a single incident or continue over time.

- 41 Under the policy, the Deputy Clerk is the designated person for receiving complaints. If she is involved in a complaint, the Mayor is personally responsible for addressing the matter.
- 42 The policy sets out three different options for dealing with complaints: Informal resolution with the help of the designated person; mediation by the designated person or an external mediator; and formal investigation, “either by a specially trained person from within the organization or a consultant.” If a matter is investigated and the complaint substantiated, the investigator is to report in writing to council with recommendations for remedies and corrective action. Council then decides what action will be taken.

Handling of the harassment complaint

- 43 The Deputy Clerk told us she emailed her complaint about Mr. Martin to the Chief Administrative Officer late on Friday, September 12. She then filed a formal complaint with the Chief Administrative Officer when she returned to work after the weekend, on Monday, September 15, 2014. She

also said that she met that day with the Chief Administrative Officer and the Mayor to discuss her concerns.

- 44 The Mayor told us he attempted to resolve the matter informally and phoned Mr. Martin to ask him to attend a meeting to discuss “a matter of some urgency.” Mr. Martin told us the Mayor called him but did not leave any message. He said he subsequently agreed to meet with the Mayor, if he could audio-record it. He told us that the Mayor refused this request, offering instead to have someone take notes. Based on his past negative experiences at the township office, Mr. Martin decided not to meet with the Mayor. The Mayor does not recall any discussion with Mr. Martin about audio-recording or taking notes of a meeting. On September 22, 2014, the Mayor sent a registered letter to Mr. Martin to reschedule the meeting for September 29. Mr. Martin again chose not to meet with the Mayor.
- 45 The township did not attempt to pursue mediation of the issue, as provided for under its Anti-Harassment Policy. However, the Chief Administrative Officer told us that he did an investigation under the policy.² He did so by questioning the Deputy Clerk, the other staff member who was present on September 11 and 12, 2014, and the councillor who witnessed the exchange on September 11.
- 46 The Chief Administrative Officer did not keep separate notes of any of his interviews with the three witnesses. He prepared two and a half pages of handwritten notes in total, without any attribution, dated September 16, 2014.
- 47 He did not proceed to the next stage under the Anti-Harassment Policy, which is to prepare a report substantiating the complaint to council and making remedial recommendations. He told us that, at some point, he switched from conducting an investigation under the township’s harassment policy to operating under the *Occupational Health and Safety Act*. He said that, under that Act, he has an obligation to keep township employees safe. He could not remember when he changed his focus. However, instead of seeking a remedy under the Anti-Harassment Policy, he opted to issue a trespass notice against Mr. Martin under Ontario’s *Trespass to Property Act*. The notice, dated October 20, 2014, restricted

² In response to our preliminary report, the Chief Administrative Officer stated that the Mayor did the investigation under the policy and that he was the “recorder.” However, this characterization of the Chief Administrative Officer’s role is inconsistent with his previous evidence and the fact that he carried out interviews with witnesses.

Mr. Martin from entering the municipal office between 8:30 a.m. and 4:30 p.m. for a three-month period.

- 48 A letter from the Chief Administrative Officer accompanying the notice states that the notice is “self-explanatory.” It says the notice can “only be revoked upon receipt of a written apology above your signature and is accepted by [the Deputy Clerk].” It also warns: “Should an apology not be received and accepted by [the Deputy Clerk] the Trespass Warrant may be extended.”
- 49 The Chief Administrative Officer informed the Deputy Clerk – and, later, the township’s council – that he had issued a trespass notice to Mr. Martin. His report to council simply states that the OPP delivered the trespass notice banning entry to the municipal office. The minutes for the November 3, 2014 council meeting during which the report was considered do not indicate that there was any related discussion of the issue or formal approval of this sanction through resolution or by-law.

Serial trespass notices

- 50 Mr. Martin was elected on October 27, 2014, and took office as a councillor for the Township of Red Rock on December 1, 2014. When the initial trespass notice expired in January 2015, the Chief Administrative Officer issued a new trespass notice for the next six months, extending to July 2015. He then issued another trespass notice, this time barring Councillor Martin’s entry to the entire municipal building during regular business hours (8:30 a.m. to 4:30 p.m., Monday to Friday) for a one-year period. He told us that the trespass notice was expanded when it became apparent that the Deputy Clerk had to conduct business throughout the building during working hours. In July 2016, a fourth trespass notice, again for one year and for the entire municipal building, was issued. As a result, Mr. Martin has been barred from entering either the municipal office or municipal building during regular business hours since October 2014.
- 51 In each instance, the Chief Administrative Officer unilaterally issued the notice and then reported to council. Council never passed a resolution or by-law respecting Mr. Martin or the trespass notices. However, when interviewed, all members of council except Councillor Martin confirmed that they individually supported the Chief Administrative Officer’s decision to continue the notices until Mr. Martin apologizes and the Deputy Clerk “feels safe.”

- 52 The Deputy Clerk told us that the situation continues to make her uncomfortable and she would like to see it resolved.

Litany of Errors

- 53 I recognize that Red Rock is a small community with limited resources. However, its citizens are still entitled to expect that municipal services will be administered fairly, reasonably, and responsibly. Unfortunately, the way in which the complaint against Mr. Martin was handled reflects a combination of unclear policy, poor administrative practices and misunderstanding and misapplication of the law.
- 54 From the outset, difficulties arose as a result of an Anti-Harassment Policy that was singularly unsuited to addressing the Deputy Clerk's concerns about Mr. Martin.

Harassment and the Occupational Health and Safety Act

- 55 The *Occupational Health and Safety Act* addresses workplace harassment, which it defines as:
- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
 - (b) workplace sexual harassment.³
- 56 The Act is intended to be applied through the development and implementation of individual employer workplace harassment policies and programs. Section 32.0.1 requires every employer to prepare a policy with respect to workplace harassment, and to develop and maintain a program to implement that policy. Red Rock developed its Anti-Harassment Policy as required by the Act in 2010.

³ *Occupational Health and Safety Act*, R.S.O. 1990, CHAPTER O.1, s. 1(1).

Lack of policy clarity

- 57 Township staff told us that its Anti-Harassment Policy was copied from an online template. It is clear that the policy was not tailored to reflect the specific workplace. For instance, substantiated complaints are to be reported in writing to “the President,” although no township official bears that title. In addition, in the remedies section, there is an inexplicable reference to obtaining apologies “from the harasser and XYZ Company.”
- 58 Members of council (with the exception of Councillor Martin), as well as township staff, told us the Anti-Harassment Policy applies to everyone, including members of council, contractors and citizens. However, this is not apparent from the language of the policy. The policy says that harassment can take place between an employee and a “client” or a “job applicant.” The Chief Administrative Officer told us that a non-employee is considered a “client.” However, there is no specific reference to complaints against members of the general public. The corrective remedies set out in the township’s policy also appear to primarily address circumstances of workplace harassment between co-workers. For instance, they refer to written reprimands, fines, suspensions, transfers, demotions, dismissal and anti-harassment training.
- 59 From the outset, based on the limitations of its language, the Anti-Harassment Policy was not a good fit for addressing the complaint against Mr. Martin. The policy’s unclear scope may explain, in part, why it was soon abandoned in favour of a remedy under the *Trespass to Property Act*. Consistent with the township’s obligations under the *Occupational Health and Safety Act*, it is justified in seeking to protect its staff from harassment from members of the public. Unfortunately, its Anti-Harassment Policy is an ineffective mechanism for achieving this purpose. To avoid confusion in future, the township should ensure that its Anti-Harassment Policy specifically addresses the various categories of persons it applies to, and adapt its procedures and remedies accordingly.
- 60 It has now been more than six years since the township developed its template-based Anti-Harassment Policy. My investigation revealed that it is deficient in several respects. The township should revise its policy, to correct the drafting errors evident from copying the policy without individualizing it, and to reflect current best practices. In doing so, the township should review the information on this subject

available through the Ministry of Labour⁴. The Association of Municipal Managers, Clerks and Treasurers of Ontario also has an excellent research tool on its website, the AMCTO Municipal Google search, which can be used to find workplace harassment and violence policies applied by municipalities of various sizes.⁵

Recommendation 1

The Township of Red Rock should conduct research, and review and revise its Anti-Harassment Policy to ensure that it:

- **Reflects its specific workplace;**
- **Adopts municipal best practices; and**
- **Specifically addresses the categories of alleged harassers it is intended to cover.**

61 The township should also consider whether it is more appropriate to address certain conduct through a separate policy. For instance, many municipalities have established a code of conduct under the *Municipal Act, 2001* to deal with inappropriate conduct of council members, including in their interactions with staff. Bill 68, *Modernizing Ontario's Municipal Legislation Act, 2016*, which was before the Legislature at the time this report was written, proposes to make codes of conduct mandatory for all municipalities and to require that they obtain the services of an integrity commissioner to enforce them. The township should consider adopting, as a best practice, a code of conduct to address the conduct of council members, together with appointing an integrity commissioner to enforce it.

Recommendation 2

The Township of Red Rock should consider adopting a code of conduct for council members and appointing an integrity commissioner.

⁴ <https://www.labour.gov.on.ca/english/hs/topics/workplaceviolence.php>

⁵ AMCTO Municipal Google Search, online:

<http://www.amcto.com/imis15/content/GoogleSearchPage.html>.

Choosing the Act over policy

- 62 After initially proceeding to address the complaint against Mr. Martin under Red Rock's Anti-Harassment Policy, the Chief Administrative Officer later chose to ignore it. He did not prepare a report on his investigation for council's consideration, but took it upon himself to frame a remedy. Although it would have been challenging to apply the township's policy in the context of this case, given its deficiencies, the process the Chief Administrative Officer did adopt was superficial, arbitrary and procedurally unfair.
- 63 The Chief Administrative Officer justified his approach by saying since Mr. Martin would not co-operate by meeting with the Mayor, he chose to apply the *Occupational Health and Safety Act* rather than the policy. The Chief Administrative Officer told us several times that he was required by the *Occupational Health and Safety Act* to take every reasonable precaution to protect a worker. Under that Act, there is a general duty imposed on a supervisor to "take every precaution reasonable in the circumstances for the protection of a worker" (s.27(2)(c)). However, the *Occupational Health and Safety Act* contains specific provisions relating to workplace violence and harassment. The Act requires employers to develop and implement policies against violence and harassment in the workplace. There is no legislative framework for applying the Act generally instead of a specific workplace policy and program developed in compliance with the Act. The policy also continues to apply even if the respondent is unco-operative. The Chief Administrative Officer's evidence on this point demonstrates a lack of understanding of the law relating to workplace violence and harassment.
- 64 While the Township's Anti-Harassment Policy is in desperate need of a refresh, if a complaint is made under it, and in the absence of any other specific policies applying to a situation, the township should ensure the steps set out in the policy are followed. As demonstrated in this case, the alternative is an unauthorized, unclear, and unfair process, which is inconsistent with the intent of the *Occupational Health and Safety Act*.

Recommendation 3

The township should ensure that complaints under its Anti-Harassment Policy are handled in accordance with that policy.

Remedial confusion

- 65 It is clear that an investigator under the township's Anti-Harassment Policy has no authority to impose a remedy unilaterally. Council alone has the power to sanction harassers under the policy, after receiving the investigator's report and recommendations. Issuing a trespass notice is also not one of the corrective actions that can be taken under the policy. Despite these jurisdictional limits, the Chief Administrative Officer issued the trespass notice on his own initiative and then reissued it three times. The township should ensure that the authority to grant remedies and issue corrective actions is only exercised in strict compliance with the terms of the policy.

Recommendation 4

The township should ensure that remedial authority under its Anti-Harassment Policy is only exercised in accordance with the terms of the policy.

Specially trained investigator

- 66 Under the *Occupational Health and Safety Act*, employers are obligated to conduct investigations of incidents and complaints of workplace harassment that are appropriate in the circumstances (s. 32.0.7 (1)).
- 67 The township's Anti-Harassment Policy calls for a specially trained person from within the organization or a consultant to conduct complaint investigations, which are not resolved informally or through mediation. In discussing his training and experience with us, the Chief Administrative Officer expressed confidence in his abilities to investigate such matters. However, the process that he followed clearly demonstrates his lack of understanding of basic investigative principles.
- 68 The Ministry of Labour recently issued a Code of Practice to Address Workplace Harassment. It refers to best practices in meeting obligations

under the *Occupational Health and Safety Act*, including for conducting investigations.⁶

- 69** For instance, it provides that the individual conducting a workplace harassment complaint investigation should have knowledge of how to conduct an appropriate investigation. It also refers to minimum investigative standards that should be followed, such as:
- Thoroughly and separately interviewing the complaining worker, other relevant witnesses, and if the alleged harasser is not an employee, making reasonable efforts to interview them;
 - Taking appropriate notes and statements during interviews; and
 - Preparing a written report summarizing the steps taken during the investigation, the complaint, the allegations of the worker claiming harassment, the alleged harasser's response, the evidence of any witnesses and other evidence gathered, and setting out findings of fact and a conclusion about whether harassment was found or not.
- 70** In addressing the complaint against Mr. Martin, the Chief Administrative Officer failed to follow even these basic steps. He apparently interviewed various witnesses, but there are no individual witness statements or notes from interviews. The Mayor sent letters to Mr. Martin asking him to meet, but the Chief Administrative Officer took no further steps to try to obtain Mr. Martin's evidence. The bare record consists of the letter of complaint and a sparse and composite summary of information about Mr. Martin's visits to the municipal office on September 11 and 12, 2014, without any attribution to specific witnesses. Finally, no investigative report was prepared, in contravention of the township's Anti-Harassment Policy as well as the best practices reflected in the Ministry's code.
- 71** In future, the township should ensure that only an appropriately trained individual carries out investigations under the Anti-Harassment Policy. I recognize that it might present a challenge to this small community to retain an experienced workplace investigator. However, there are various courses offered in Ontario to train individuals to conduct thorough, well-documented and fair investigations, including specialized training on conducting a workplace investigation.

⁶ Ontario Ministry of Labour, "Code of Practice to Address Workplace Harassment Under Ontario's Occupational Health and Safety Act" (August 2016), online: <www.labour.gov.on.ca/english/hs/pdf/harassment.pdf>.

- 72 In accordance with its existing policy, the Township of Red Rock's Anti-Harassment Policy should ensure that all investigations are carried out by a person with special training on conducting workplace investigations, or by a consultant with relevant expertise. Failure to do so may serve to undermine public confidence in its administration.

Recommendation 5

In accordance with its policy, investigations conducted under the Township of Red Rock's Anti-Harassment Policy should be conducted by a person with special training on conducting workplace investigations, or by a consultant with relevant expertise.

Tainted investigative process

- 73 It is fundamental to credible investigations that investigators be independent and unbiased. As the Ministry's code states, an investigation must be objective, and the person investigating "must not be directly involved in the incident or complaint."⁷ Not all organizations can afford to hire external counsel to conduct every investigation, but as a senior labour lawyer recently remarked, at a basic level, the investigator should be neutral and "have no direct involvement in the matters being investigated".⁸
- 74 Ultimately, the whole investigative process followed in this case was tainted by the fact that the Chief Administrative Officer appointed himself as investigator. The Chief Administrative Officer's proper role was as a witness to the exchange that led to the complaint. He lacked the impartiality and independence necessary to carry out a credible investigation.
- 75 The township should ensure that, in future, complaints are investigated by individuals who have no direct involvement in the events or complaint under consideration. Failure to abide by this principle will inevitably result

⁷ Ontario Ministry of Labour, "Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act, Part III: Employer's Duties Concerning Workplace Harassment", online: <www.labour.gov.on.ca/english/hs/pubs/harassment/>.

⁸ Kelly J. Harbridge, Workplace Investigations: A Management Perspective, Canadian Bar Association 2011 National Administrative Law, Labour & Employment Conference, November 25-26, 2011, Ottawa, online: <www.cba.org/cba/cle/PDF/ADM11_Kelly_Harbridge_paper.pdf>.

in investigations under the policy being procedurally unfair and subject to reproach. When investigations are perceived to be unfair, it undermines the credibility of the process and makes it less likely that the public will trust in and accept the results.

Recommendation 6

The Township of Red Rock should ensure that investigators appointed to address complaints under its Anti-Harassment Policy have no direct involvement in the events or incident leading to the complaint.

For the record

- 76 The township's record of the investigation consisted solely of the complaint and the superficial and composite investigative summary. Failure to keep proper records and follow a principled and thorough investigative process leaves the township open to allegations of impropriety and incompetence. Consistent with the recommendations reflected in the Ministry's code and general best investigative practices, the township should ensure that all aspects of its workplace investigations are fully documented.⁹ By adopting this practice, the township will be better placed to demonstrate that it is following a fair process and complying with applicable rules.

Recommendation 7

The Township of Red Rock should fully document all complaints received and investigations conducted under its Anti-Harassment Policy.

Adoption of best practices

- 77 The township should also develop detailed procedures under its Anti-Harassment Policy to ensure that its staff follow an investigative process consistent with the requirements of the *Occupational Health and Safety Act* and that reflect the best practices promoted by the Ministry of Labour.

⁹ See e.g. Dean Benard, "Protecting investigations from allegations of impropriety or incompetence" (2013) 3:4 *Journal of Nursing Regulation* 35.

Recommendation 8

The township should develop procedures under its Anti-Harassment Policy that reflect the requirements of the *Occupational Health and Safety Act* and the best practices in the Ministry of Labour’s Code of Practice to Address Workplace Harassment.

Lack of a trespass policy

- 78 Under the *Trespass to Property Act*, persons who are responsible for premises or controlling activities on them have the authority to prohibit entry by notice, either outright or subject to various conditions.¹⁰ Failure to obey a trespass notice is a provincial offence, which may attract a fine of not more than \$10,000.¹¹ The township does not have any by-law, procedure, or policy relating to issuing trespass notices.
- 79 Although municipalities have the authority to issue no trespass notices under the *Trespass to Property Act* to protect municipal staff and property, this is a remedy that should be exercised judiciously. Some municipalities have developed policies specifically addressing when and how trespass notices can be issued; Red Rock has not. In the absence of a clear process, the Chief Administrative Officer has been exercising the authority to issue trespass notices without any specific delegation from council.
- 80 In three recent cases, the Ontario courts have considered the propriety of trespass notices issued by municipalities. Although these cases focused on citizens’ rights to attend council meetings, they suggest that trespass notices should be considered a recourse of last resort when it comes to limiting public access to municipal services.
- 81 In the 2014 decision *Gammie v. Town of South Bruce Peninsula*,¹² the court considered two resolutions passed by a municipality that, among other restrictions, barred a member of the public from entering the municipal building. The town argued that it had to issue the resolutions to protect employees under the *Occupational Health and Safety Act*,

¹⁰ S.1(1), 2 *Trespass to Property Act*

¹¹ S. 2 *Trespass to Property Act*

¹² *Gammie v. South Bruce Peninsula (Town)* [2014] O.J. No. 5157 [QL].

asserting that Mr. Gammie was a threat to the safety of public officials, staff or members of the public.

- 82** The court was not satisfied, on a balance of probabilities, that Mr. Gammie was violent or made threats of violence that reasonably caused town officials, staff, or members of the public to fear for their safety. The court considered this to be the threshold for triggering the municipality's obligations respecting workplace violence under the *Occupational Health and Safety Act*.
- 83** The court concluded that the restriction on Mr. Gammie attending council meetings violated his section 2(b) right to freedom of expression under the *Charter of Rights and Freedoms*. It found the town's ban was also overbroad and that it failed to carefully design a remedy that impaired Mr. Gammie's rights as little as possible. The court gave examples of how the town could have addressed the disruptive behaviour short of an outright ban, such as by limiting Mr. Gammie's communications with town staff to a designated person.
- 84** The court also concluded that the ban deprived Mr. Gammie of his right to liberty and security of the person under s. 7 of the *Charter*, because, "[b]anning an individual in a public space where the rest of the public is free to attend engages section 7 of the *Charter* when the individual is using the public place in a manner consistent with the public purpose for that space."¹³
- 85** In *Bracken v. Regional Municipality of Niagara*,¹⁴ the court considered a trespass notice issued by the Regional Municipality of Niagara against a member of the public. In that case, the region's Chief Administrative Officer issued the notice based on two incidents – one in which Mr. Bracken was asked to stop filming a council meeting, and a second in which a member of council claimed that Mr. Bracken made her feel intimidated and threatened. The evidence was that Mr. Bracken spoke calmly and was not asked to leave. The court found that Mr. Bracken did not exercise or attempt to exercise any physical force, or make any statements or behave in a manner that could reasonably have been interpreted as a threat of physical force engaging the municipality's

¹³ *Gammie, supra* at 106.

¹⁴ 2015 ONSC 6934.

obligations under the *Occupational Health and Safety Act*. The court concluded that the trespass notice was invalid under the circumstances.

- 86 In contrast, the court came to a different conclusion in 2016 with respect to a trespass notice issued against Mr. Bracken by the Town of Fort Erie.¹⁵ The court upheld that notice, finding that Mr. Bracken’s behaviour differed significantly from the behaviour that led to the notice in *Bracken v. Niagara*, and was not protected under the *Charter*.
- 87 In *Fort Erie*, the town issued a trespass notice to Mr. Bracken after he protested outside the town hall with a megaphone and siren. Town staff testified that Mr. Bracken paced, swore, shouted, acted erratically and aggressively, and raced up to members of the public trying to enter the municipal building for a council meeting, causing staff to fear for their safety and that of the public. The police were called, and officers said they found Mr. Bracken agitated and incomprehensible. He refused to leave when asked to do so multiple times by police, tore up a ticket the police issued to him, and police had to physically remove and detain him. The court upheld the trespass notice, finding that Mr. Bracken’s behaviour was violent, harassing, erratic and disruptive and went “far outside the limits of peaceful protest.”

Mr. Martin’s case

- 88 In Mr. Martin’s case, there is no evidence that he was violent or threatened violence during the interactions at the municipal office on September 11 or 12, 2014. While the Deputy Clerk might have been uncomfortable as a result of the exchange, it does not appear to rise to the level the courts suggest would justify a response under the *Occupational Health and Safety Act* and/or imposition of a trespass notice. In addition, the perpetual renewal of the trespass notice without any further consideration of its reasonableness or Mr. Martin’s interests is extremely problematic.
- 89 Mr. Martin is also now an elected councillor. He has regularly attended council meetings since December 2014, and there have been no further incidents or complaints relating to his conduct.
- 90 In addition, Red Rock’s trespass notice against Mr. Martin is extremely broad. If the intent of the trespass notice was to limit disruptive behaviour

¹⁵ *Bracken v. Town of Fort Erie*, [2016] O.J. No. 862.

in the municipal office, the least restrictive remedy should have been imposed; for instance, requiring that he communicate with a specific staff member, or in writing. Instead, Red Rock's trespass notices became even more restrictive after July 2015, when Mr. Martin was banned from accessing the entire municipal building without explanation or justification.

- 91 Under the circumstances, the trespass notice was a disproportionate and arbitrary remedy. It should be withdrawn immediately.

Recommendation 9

The Township of Red Rock should immediately withdraw the trespass notice issued against Mr. Martin.

- 92 In order to avoid a similar situation arising in future, the township should develop a policy relating to the issuance of trespass notices consistent with the principles established by the courts. It should consider using such tools as the AMCTO Municipal Google Search to find samples of trespass policies used in other jurisdictions.

Recommendation 10

The Township of Red Rock should develop and publicize a trespass policy, setting out at a minimum:

- **the circumstances that might justify issuance of a notice, including examples;**
- **the procedure for issuing and serving trespass notices, including appropriate delegation to staff;**
- **required documentation to support the issuance of a notice, including records of the complaint and any investigation undertaken;**
- **time limits for notices; and**
- **a right for an affected individual to request a review and/or appeal of the notice.**

Conduct policy

- 93** Although I do not believe that Mr. Martin’s conduct represented “harassment” as contemplated under the township’s Anti-Harassment Policy, Red Rock is entitled to encourage respectful and courteous interactions with its staff. Other municipalities in Ontario, both large and small, have developed policies for responding to difficult or unreasonable behavior on the part of citizens. These public conduct policies are distinct from the workplace violence and harassment policies required by the provincial legislation. They enable administrators to respond in a more appropriate, proportionate and fair manner when dealing with citizens, and specifically include reference to such remedies as trespass notices.
- 94** For example, the Town of Wasaga Beach has a policy called “Handling Unreasonable Customer Behaviour.”¹⁶ It states that it is intended to address “[v]exatious, frivolous and/or unreasonably persistent” conduct, rather than “generally difficult customers.” It provides:
- Concrete examples of unreasonable behaviour and vexatious or frivolous requests, without limiting the application of the policy to those examples;
 - Clear steps to follow in response to such behaviour;
 - A non-exhaustive list of potential restrictions that may be imposed by the municipality;
 - A requirement for the restrictions to be reviewed after a certain amount of time, with the length based on the severity of the situation; and
 - A process for appeal or review of any sanctions.
- 95** Another example is the “Rzone” Procedure (the “R” standing for respect), which the Town of Oakville developed under its Respectful Conduct Policy.¹⁷ This procedure sets out examples of inappropriate behaviour, as well as detailed responding steps and remedial options, from letters of warning to trespass notices that vary in length depending on the

¹⁶ Town of Wasaga Beach, Policy 2-15, “Handling Unreasonable Customer Behaviour” (2016), online: <<http://www.wasagabeach.com/Bylaws/2-15%20Handling%20Unreasonable%20Customer%20Behaviour.pdf>>.

¹⁷ Town of Oakville, Respectful Conduct Policy - HR-MNG-008, online: <<http://www.oakville.ca/townhall/hr-mng-008.html>>.

circumstances. Members of the public subject to corrective action under the procedure can also request a review by someone else in the municipality. In addition, the procedure explicitly specifies that training and education on the procedure will be provided to all staff.

- 96 Oakville's RZone procedure has been adopted by at least eight other municipalities, including the Cities of London, Guelph, and Niagara Falls, the Municipalities of North Perth and Middlesex Centre, the Towns of Orangeville and Shelburne, and the Township of Centre Wellington.
- 97 Having a well-publicized policy that establishes clear expectations for the conduct of members of the public and for responding to problematic behaviour, enhances the consistency and transparency of municipal administration. It is a best practice that should be adopted by Red Rock for the benefit of its staff and citizens alike.

Recommendation 11

The Township of Red Rock should create and implement a policy specifically designed to apply to conduct by members of the public. This should be distinct from the Township's Anti-Harassment Policy.

Opinion

- 98 The Township of Red Rock failed to follow a fair and reasonable process in response to a complaint made against Lewis Martin under its Anti-Harassment Policy. The policy was unsuited to the circumstances, and ultimately abandoned in favour of an overly punitive and disproportionate remedy that was unauthorized by any existing by-law or policy. Under the circumstances, I find that its actions were unreasonable, unjust, wrong and contrary to law in accordance with s. 21(1)(a), (b) and (d) of the *Ombudsman Act*.

Recommendations

99 To address the concerns that I have identified in my investigation, I make the following recommendations:

1. **The Township of Red Rock should conduct research, and review and revise its Anti-Harassment Policy to ensure that it:**
 - **Reflects its specific workplace;**
 - **Adopts municipal best practices; and**
 - **Specifically addresses the categories of alleged harassers it is intended to cover.**
2. **The Township of Red Rock should consider adopting a code of conduct for council members and appointing an integrity commissioner.**
3. **The township should ensure that complaints under its Anti-Harassment Policy are handled in accordance with that policy.**
4. **The township should ensure that remedial authority under its Anti-Harassment Policy is only exercised in accordance with the terms of the policy.**
5. **In accordance with its policy, investigations conducted under the Township of Red Rock’s Anti-Harassment Policy should be conducted by a person with special training on conducting workplace investigations, or by a consultant with relevant expertise.**
6. **The Township of Red Rock should ensure that investigators appointed to address complaints under its Anti-Harassment Policy have no direct involvement in the events or incident leading to the complaint.**
7. **The Township of Red Rock should fully document all complaints received and investigations conducted under its Anti-Harassment Policy.**
8. **The township should develop procedures under its Anti-Harassment Policy that reflect the requirements of the**

***Occupational Health and Safety Act* and the best practices in the Ministry of Labour’s Code of Practice to Address Workplace Harassment.**

- 9. The Township of Red Rock should immediately withdraw the trespass notice issued against Mr. Martin.**
- 10. The Township of Red Rock should develop and publicize a trespass policy, setting out at a minimum:**
 - **the circumstances that might justify issuance of a notice, including examples;**
 - **the procedure for issuing and serving trespass notices, including appropriate delegation to staff;**
 - **required documentation to support the issuance of a notice, including records of the complaint and any investigation undertaken;**
 - **time limits for notices; and**
 - **a right for an affected individual to request a review and/or appeal of the notice.**
- 11. The Township of Red Rock should create and implement a policy specifically designed to apply to conduct by members of the public. This should be distinct from the Township’s Anti-Harassment Policy.**

Response

- 100** The township was provided with a preliminary report setting out my findings, opinion and recommendations, and given an opportunity to respond.
- 101** The Mayor provided a brief written response on May 18, 2017. He asserted that the township followed a fair process. The Mayor also confirmed that, other than Councillor Martin, all council members individually supported the Chief Administrative Officer’s decision to continue to issue trespass notices until Councillor Martin apologizes. The Mayor, by implication, did not accept my **Recommendation 9**, calling for withdrawal of the trespass notice. However, he did not address any of my other 10 recommendations.

- 102 The Chief Administrative Officer also provided a response. With respect to **Recommendation 1** about reviewing and revising the township’s Anti-Harassment Policy, he wrote that “all policies can be improved and I am sure Council will consider doing so.”
- 103 He also requested removal of **Recommendation 2**, which recommends that the township adopt a code of conduct and appoint an integrity commissioner. He maintained that this recommendation was irrelevant to the investigation and premature, given the state of the law. At the time of writing this report, legislative amendments requiring all municipalities to have a code of conduct and use the services of an integrity commissioner are not yet in force. However, I continue to encourage municipalities to develop codes of conduct and appoint integrity commissioners to assist in their enforcement, as a best practice and matter of good governance.
- 104 Consistent with the Mayor’s position, the Chief Administrative Officer rejected **Recommendation 9**, refusing to withdraw the trespass notice. He told us that the trespass notice would remain in place until Councillor Martin apologizes to the satisfaction of the Deputy Clerk. He also emphasized that the onus is on Councillor Martin to resolve the situation.
- 105 It is obvious that Councillor Martin, the Chief Administrative Officer, and other council members are entrenched in their positions on the matter of the trespass notice. This impasse threatens to undermine public confidence in the township’s administration. A recent example of dysfunction related to this situation occurred when my preliminary report was provided to the municipality for review. The Chief Administrative Officer distributed copies of the report to all members of council other than Councillor Martin. Our Office had to arrange for direct delivery of the report to him. More concerning, when council met to consider the preliminary report in closed session, the Ontario Provincial Police were called to remove Councillor Martin from the session. The Mayor justified this action on the basis that the councillor was in a “conflict of interest” position.
- 106 The township is misguided in placing full responsibility for resolving the situation on Councillor Martin. It has not taken ownership of the problem, acknowledged any of the procedural deficiencies identified by my investigation, or recognized that issuing serial trespass notices to Mr. Martin was excessive and inconsistent with the existing law. Under the circumstances, I find the township’s response to my preliminary report to be wholly unsatisfactory.

107 My investigation has confirmed that the township acted unreasonably, unjustly and contrary to law. Its failure to provide a meaningful and positive response to my report and recommendations represents a disservice to the citizens of Red Rock. I am finalizing my report in the hope that council will take a sober second look at this matter, reconsider its position with the public interest in mind, and agree to implement my recommendations.



Paul Dubé
Ombudsman of Ontario