



# The Marrocco-Collingwood inquiry (Part 2)

## Judicial inquiry's impact on municipal governance



Michael Fenn is a former deputy minister of municipal affairs and housing. He can be reached at [mfenn@cogeco.ca](mailto:mfenn@cogeco.ca)



David Siegel is Professor Emeritus of Political Science, Brock University. He can be reached at [dsiegel@brocku.ca](mailto:dsiegel@brocku.ca).

Part 1 described the findings of Associate Chief Justice Frank N. Marrocco about a series of events in Collingwood. As judicial inquiry commissioner, Marrocco made it clear in his findings that he was providing recommendations specifically for Collingwood, but he also wanted his findings to improve the quality of municipal governance throughout the entire municipal system.

Part 2 discusses the impact his findings should have on municipal governance. Part 3 will discuss the impact the findings should have on the city management profession.

### Good Policies for Procurement and Sale of Assets – and Following Them

The major issues that prompted the inquiry were the sale of 50 percent of one of the town's major assets – its electrical utility – and the construction of two major recreational facilities: the enclosing of a pre-existing swimming pool and the construction of an arena.

The town had the proper policies and procedures in place that should have governed these transactions. However, in both cases, the mayor, deputy mayor, and a senior public servant decided that they would simply ignore the existing rules and twist the processes to achieve their preferred outcomes.

The electrical utility was sold to a buyer who was given preferential treatment, even though at least one different purchaser would have paid more to the municipality. Contracts for the two recreational facilities were let on a sole-source basis, even though it was quite clear that the bidding could have been handled on a competitive basis.

This triumvirate of municipal officials did not have any real authority to handle these transactions in the manner that they did; power is vested in the full council. However, these three knew one another very well and had worked together on

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various issues in the past. They simply took control of the situation, and no one stopped them.

The primary fault lies with the triumvirate, but some blame also goes to the other members of council. This house of cards started to collapse when an experienced CAO was hired and he began to ask probing questions:

- What advice did the consultant provide on this?
- Who gave the town legal advice on these transactions?

If councillors had asked these questions as the transactions were unfolding, the transactions might not have happened. For whatever reason, councillors did not come forward. The CAO could also have been the guardian of proper process. However, the three main actors took actions to ensure that she was frozen out of the transactions.

The town began down this path of misadventure because it simply ignored its own policies – policies that it had in place to ensure the public interest was protected.

## Roles of Mayor and Council Need to be Defined

The roles of the mayor as head of council and council as a collective decision-making body need to be clarified. There is no doubt where Marrocco thinks the remedial work should begin. It starts at the top, with the role clarity that comes from principles-based “good governance.” Of his 306 specific recommendations, he selects these as the first two:

- The Province of Ontario should amend sections 225 and 226.1 of the *Municipal Act* to remove the inaccurate description of the head of council as the chief executive officer of the municipality. The head of council of a municipality is responsible to council and does not have the authority to bind council.
- Describing the mayor as both the head of council and chief executive officer blurs the fact that the mayor is the head of council, and the chief

administrative officer (CAO) is the head of staff. There must be a clear division of roles and responsibilities between the mayor and the CAO, a separation of the political from the administrative.<sup>1</sup>

Marrocco summarizes his reasoning this way:

*It became evident during the Part One and Part Two hearings that the mayor’s roles and responsibilities were misunderstood.*

*That misunderstanding flowed, at least in part, from the description in the Municipal Act, 2001, of the head of council ... as the “chief executive officer of the municipality.” The role and responsibilities of a head of council differ from those of a corporate chief executive officer (CEO) in a meaningful way: the head of council does not have the same powers as the CEO of a corporation. More specifically, unlike a corporate CEO, the head of council does not have the power to commit the municipality to anything unilaterally. The head of council becomes a trustee in the public interest when she or he accepts the role, and that trust is in danger when imprecise analogies are drawn.*

*The erroneous belief that the mayor, by virtue of being described as the “chief executive officer of the municipality,” had the power to provide unilateral direction on behalf of council, without council’s agreement or approval, underpinned the lack of transparency ... That misunderstanding contributed in part to the blurring of the lines between council and staff ...<sup>2</sup>*

Marrocco noted that Ontario’s *Municipal Act* goes further than most other municipal legislation in Canada in identifying the mayor as the municipality’s chief executive officer. An overall reading of the *Municipal Act* makes it clear that only full council can make decisions that bind the municipality. The mayor is the political leader of council, but the mayor has one vote, just like any other councillor.

Especially to those outside the municipal organization, the title “chief executive officer” (CEO) has echoes of someone heading a Fortune 500 company, with independent authority and standing

above their subordinates. In contrast, the title (and position) of mayor has its own prestige and prerogatives, but it does not create a gulf between the mayor and individual councillors. When organizations and individuals are dealing with a municipality, they need to understand this important distinction.

The title CEO also muddies the relationship between the mayor and the CAO. The CAO works for council collectively, not the mayor, but the title CEO makes this unclear. Marrocco recommends that the *Municipal Act* be amended to delete the reference to the mayor as CEO and make the collective responsibility of council clearer.

## Recommendations to Strengthen the Role of the Integrity Commissioner and Increase its Scope

Marrocco puts great reliance on the integrity commissioner as fulfilling many roles as an advisor/educator/adjudicator of disputes with regard to integrity/ethics/conflict of interest:

*The integrity commissioner should have the necessary resources to provide ethical education and material for council members. Council members must receive training and education on the code of conduct, conflict of interest rules, and other pertinent legislation and policies. Conveying accurate and comprehensive information to council members on managing conflicts must be a priority. The training should also make it clear that each time a council member reviews a report, the council member should consider whether the report affects his or her business interests or property, or whether it affects a family member, relative, or friend.<sup>3</sup>*

Marrocco expects the integrity commissioner to be proactive in beginning this training immediately after the election and continuing this involvement by means of annual meetings with each councillor. The integrity commissioner should maintain a website that would contain the code of conduct, conflict of interest rules, interpretation bulletins, and FAQs.

1 Associate Justice Frank N. Marrocco, Commissioner, “Transparency and the Public Trust: Report of the Collingwood Judicial Inquiry,” Volume IV, recs. 1 and 2, p. 5, <https://www.collingwoodinquiry.ca/>.

2 Marrocco, Vol. IV, pp. 4-5.

3 Marrocco, Vol. IV, pp. 19-20.

Marrocco says that the authority of the integrity commissioner should extend to resolving disputes between councillors. When a councillor feels that another councillor has violated the code of conduct, the councillor should notify the commissioner who would investigate and take the appropriate action:

*The integrity commissioner should be responsible for submitting an annual report to council on the number of code of conduct complaints received and processed, the nature of the allegations, the resolution of the complaints, and any recommendations made by the integrity commissioner. Council should disclose this annual report at an open council meeting. The annual report should be available to the public and placed on the website of the integrity commissioner.*<sup>4</sup>

Given the mess that Marrocco untangled, it is understandable that he put considerable reliance on a mechanism like the integrity commissioner to prevent a repeat. However, it is important to understand the cumulative impact of this group of recommendations about the integrity commissioner.

Do these recommendations risk moving the integrity commissioner's current role of occasional visitor to council meetings to having a continuing place around the council table, with significant financial and related implications? A stronger role for the integrity commissioner is probably warranted, but exactly what that would look like might require additional thought.

## Lobbying Recommendations

Marrocco pointed out that a great deal of lobbying took place around both the sale of the utility and the purchase of the buildings. He argued that lobbying can be beneficial in that it provides the municipality with information to assist its decision making. What offended Marrocco in this case was the clandestine nature of much of the lobbying. He argued that this was destructive of the public trust.

His recommendation is that Collingwood establish a lobbyist's registry and a code of conduct for lobbyists. The registry would include information about who the lobbyist is representing and which elected and appointed officials the lobbyist will be approaching.

The code of conduct would set out certain allowable and prohibited behaviours. For example, lobbyists would be prohibited from providing gifts and other rewards, and they would be prohibited from contacting officials during certain stages of the procurement process.

This would be administered by a lobbyist registrar, who could also be the integrity commissioner. The lobbyist registrar would have continuing responsibility for educating everyone involved in lobbying, including councillors and staff, about appropriate behaviour. The duties that Marrocco assigns to this position are quite extensive.

## Relationship between Council and Municipally Owned Corporations

On the matter of municipally owned corporations, Marrocco observed:

*The governance of municipally owned corporations presents unique issues for council, municipal staff, the corporation's board of directors, and its management. A clear understanding of the roles, responsibilities, and obligations of corporate management and the board of directors is required to ensure that decisions are made by the proper parties and that there is an appropriate and timely flow of information between the corporation and the municipality. As I discuss in Part One of my report, the misplaced belief that corporate management was acting in the best interests of the municipality led to the subordination of the town's interests to those of the corporation in the Collus share sale.*<sup>5</sup>

The board is the main linkage between the corporation and the municipality. Therefore, council should take care to select board members based on merit and the skill set that each member would bring to the board. Deeply embedded in the selection process should be a clear expectation that the appointee understands the obligations that go with their fiduciary responsibility at the board table.

Building on that notion, board directors typically become fiduciaries of that corporation, regardless of the source of their appointment. Councillors and staff members of the municipality who serve on the board of the corporation must be aware that they might well be put in

conflict-of-interest situations from time to time. They should rely on their integrity commissioner to guide them through these situations.

There is an arm's length relationship between a council and a corporation that it owns. However, where the council is a majority shareholder, it has a right to issue a shareholders' resolution/direction requiring that the corporation take some action or specify the limits of its authority.

The chair of the board should demonstrate accountability to council by submitting an annual report containing operational, financial, and any other information that the council needs to ensure that the corporation is being managed efficiently in line with the goals of the municipal council. A wise council would use this opportunity to ask the chair to make a presentation and respond to questions.

## Cumulative Impact of the Integrity Commissioner and Lobbyist Registrar Recommendations

Marrocco had the opportunity to see some examples of municipal governance at its worst. In the two transactions he examined, just about everything that could go wrong, did go wrong. It is not surprising that he responded by inserting a role for the integrity commissioner/ lobbyist registrar in virtually every step of the process. The people whose behaviour Marrocco was discussing had proven themselves to be less than trustworthy.

However, full acceptance of this recommendation would make the integrity commissioner/lobbyist registrar a major player in the governing system of every municipality in the province. This would significantly increase the cost and complexity of municipal governance. It would be beneficial to give some thought to other measures that could be adopted.

## A Place for Values

Much of this story is about people who had no qualms about violating the rules that were in place. Is creating more rules really a solution to the problem of people who have no qualms about violating the existing rules?

4 Marrocco, Vol. IV, p. 21.

5 Marrocco, Vol. IV, p. 60.

A more effective tool for influencing behaviour might be instilling values in the participants in the local government system. Values are “enduring beliefs that influence the choices made by individuals, groups, or organizations from among available means or ends.”<sup>6</sup>

Many organizations try to instill a uniform set of values and beliefs in members. The federal government has gone through several values exercises resulting in values such as: Respect for

democracy, Respect for people, Integrity, Stewardship, and Excellence.

Local government could develop a similar value-set around ideas of public service, and public trust and transparency (see the title of Justice Marrocco’s report). One of the benefits of a values-based approach is that when people have properly internalized the values, they do not need to be subject to a surfeit of detailed rules and regulations.

**Next month** – The impact on the municipal management profession. **MW**

## CORRECTION

In Part 1 of the “The Marrocco-Collingwood Inquiry” series (August 2021), it was indicated that the integrity commissioner reported the lobbyist’s “success fee” and other compensation as approximately \$750,000, including HST. However, the fee of \$756,740 was not for the sale of the utility as indicated, but rather for the recreation facilities deal (see Vol. 3, p. 106). The integrity commissioner reported the utility deal lobbyist fee and expenses as \$324,977 (see Vol. 3, p. 230). We apologize for the error.

<sup>6</sup> Kenneth Kernaghan and David Siegel (1999), *Public Administration in Canada: A Text*, 4th ed., Scarborough: ITP Nelson, p. 325.

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