



## Councillor Codes of Conduct

# *A Guide for Municipalities*

2023 Version

The following has been prepared by Alberta Municipalities (ABmunis) and the Rural Municipalities of Alberta (RMA), in partnership with Brownlee LLP.

**This Guide is an educational tool that contains general information intended to assist Councils in reviewing and updating their Code of Conduct Bylaw. This Guide is NOT a substitute for legal advice and municipalities are encouraged to consult with their legal advisors.**

## Introduction

In 2018, Alberta Municipalities (ABmunis) and the Rural Municipalities of Alberta (RMA), in partnership with Brownlee LLP, first published Councillor Codes of Conduct: A Guide for Municipalities in response to legislative changes that were about to take effect in Alberta. This updated version of the Guide highlights many lessons-learned since mandatory Codes of Conduct were implemented in Alberta and provides tips (including pitfalls to avoid) and issues for Councils to consider when reviewing their Codes of Conduct.

### A Brief Legislative Refresher

Section 146.1 of the *Municipal Government Act* (MGA) requires every Council in Alberta to establish, by bylaw, a Code of Conduct governing the conduct of councillors. The Code of Conduct must apply to all councillors equally. Additionally, a Council may, in its sole discretion, by bylaw, establish a Code of Conduct governing the conduct of members of Council committees and other bodies established by the Council who are not councillors. For the purposes of this Guide, we will use the term “councillors” recognizing a Code of Conduct may apply to both councillors and members.

There is no model Code of Conduct prescribed by legislation. Instead, the *Code of Conduct for Elected Officials Regulation* (Regulation) simply mandates what topics must, at a minimum, be addressed in a Code of Conduct, namely:

- a. representing the municipality;
- b. communicating on behalf of the municipality;
- c. respecting the decision-making process;
- d. adherence to policies, procedures and bylaws;
- e. respectful interactions with councillors, staff, the public and others;
- f. confidential information;
- g. conflicts of interest;
- h. improper use of influence;
- i. use of municipal assets and services; and,
- j. orientation and other training attendance.

Additionally, every Code of Conduct must:

- a. adopt a complaint system outlining who can make complaints, the method by which complaints can be made, the process to determine a complaint’s validity, and the process to determine how sanctions will be imposed for valid complaints;
- b. incorporate by reference any matter required in the Code that is addressed or included in another bylaw; and
- c. include a provision for the review of the Code and any bylaws incorporated by reference at least once every four years from the date the Code was passed.

The Regulation provides that a Council must consider sections 3 and 153 of the MGA when drafting their Code. A Council is prohibited from including provisions or sanctions that prevent a councillor from fulfilling their legislated duties as a councillor and a councillor may not be disqualified or removed from office for a breach of the Code. Alberta Municipal Affairs has developed an “Implementation Fact Sheet” for Codes of Conduct, which outlines the intent and rationale of each of the topics.<sup>1</sup>

## **Why a Code of Conduct?**

Beyond the legislative requirement to adopt a Code of Conduct, the Code of Conduct can be an effective governance tool for Council and a useful educational tool for the public. It can guide councillors in respect of how to carry out their roles and responsibilities and it can educate members of the public about the role of councillors and what the public can reasonably expect from their councillors.

A Code of Conduct establishes an agreed upon framework to guide the behaviour of councillors. by setting clear, concise and enforceable rules of conduct. Not everyone universally agrees on how councillors should be expected to behave. Reasonable people can disagree on what makes an effective councillor. One person’s view of a badly behaving councillor may be another’s highly-esteemed Council watchdog and champion of the people. Absent any agreed upon norms of behaviour, misunderstandings and frustration may ensue. A well-drafted Code of Conduct serves as the benchmark for behaviour and is the ruler by which alleged misconduct can be measured, acted upon and (hopefully) corrected.

A well drafted and considered Code of Conduct can be a useful tool to facilitate good governance, but Councils should remember that good governance cannot rely on the Code of Conduct. The Code of Conduct should compliment and reinforce principles of democracy, transparency and accountability that already exist in the MGA.

## **Reviewing Your Code**

A Code of Conduct must be reviewed at least once every four years from the date the Code was adopted. However, beyond the minimum statutory requirement, Council may wish to consider additional reviews as appropriate and necessary to ensure the Code is relevant and enforceable.

Council may decide to bring the Code forward for review at the beginning of each Council term. This will provide an opportunity to orient the new Council regarding the current standards of behaviour expected of them, but also to consider what, if any, updates may be required or beneficial to enhance the Code. Alternatively, Council may bring the Code forward for formal review midway through its term of office. This will allow newly elected councillors, who are often overwhelmed by the sheer breadth and scope of information they are presented with and asked to retain at the beginning of their term, a chance to consider the Code after having some real Council experience. It will also allow Council as a whole to assess how they interact as a team and whether the Code needs to be revised to accommodate the team dynamic. Other Councils find it beneficial to review the Code towards the end of the term of office in the hopes of leaving

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<sup>1</sup> See “Implementation Fact Sheet: Code for Elected Officials” at <https://open.alberta.ca/dataset/ab5db63d-302c-4c1b-b777-1eeb0fe23090/resource/7909d159-924a-4429-a3ea-062d1197e136/download/code-of-conduct-for-elected-officials.pdf>

a better Code for their successors (although a new Council is always free to make further amendments at any time).

Of course, if relevant amendments to either the MGA or the Regulation are passed by the Legislature, the Code may need to be brought forward to ensure compliance with the updated legislative scheme. Council should provide for a review of the Code to meet the minimum legislative requirement and Council may want to provide for additional opportunities to review as needed.

## **Setting the Bar**

A Code of Conduct is a bylaw - a legally binding and enforceable set of local rules. As such, councillors should carefully consider precisely what standards of behaviour they are prepared to accept and be held accountable to when reviewing the content of their Code of Conduct. Setting the bar too high or being overly prescriptive can trap Council in an endless cycle where standards of near perfection are bound to be breached from time to time and formal complaints are all too frequent. Conversely, setting the bar too low does little to enhance accountability and engender public trust in Council. The role of a Code of Conduct is to supplement, not replace, the legal rules and municipal policies that are already in place. The goal should be to set reasonable expectations for behaviour that are achievable and reflect community standards.

It is simply not possible, or practicable, to draft a Code of Conduct to address every possible scenario. Council should carefully consider including fewer, more general statements, with discrete prescriptions and prohibitions, as appropriate, over attempting to create an exhaustive Code by generating a voluminous list of do's and don'ts. The broader the scope of the Code and the more complexity and nuance Council introduces, the more challenging, time consuming and costly it will likely be to implement and administer the Code. For example, the more detailed and issue-specific a Code becomes, the more vulnerable the Code may be to being exploited for loopholes. Likewise, the more onerous the Code's regulation of councillor conduct becomes, the more likely the volume of complaints received will rise, whether from members of Council or members of the public, as applicable.

## **Drafting Code Provisions**

Wherever the bar is set, Council should ensure that the standards of behaviour prescribed in the Code can be properly evaluated. This means using clear, concise language to outline objective standards of conduct. Using subjective words and phrases that are open to multiple interpretations should be avoided. For example, saying "councillors shall adequately communicate the attitudes of Council" is vague and therefore difficult to assess and enforce. Instead, it is clearer to say "councillors shall accurately communicate the position of Council".

Additionally, the Code must be internally consistent; that is, provisions within the Code cannot conflict with one another. For example, if the Code places a limit of \$100 on the acceptance of hospitality, gifts or other benefits related to the councillor's office, having a further provision requiring councillors to report to Council any gifts or benefits they receive that exceed the \$100 limits raises the question of whether such gifts may be accepted or must be declined.

## **Jurisdiction**

When updating the Code, Council must ensure it does not exceed its jurisdiction. For example, once a councillor's term of office is over, or they resign or are removed from office by order of

the Court, that individual is no longer subject to the Code of Conduct. As such, provisions that state a councillor will remain subject to the Code “for at least 12 months after leaving office” (or any other period of time) are invalid and of no force and effect. Council must also remain mindful that the Code does not replace existing legislation governing the conduct of councillors and that the Code must comply with the *Canadian Charter of Rights and Freedoms*. While a Code may impose reasonable limits on protected *Charter* rights and freedoms it cannot, as an example, attempt to completely extinguish a councillor’s right to freedom of expression. For example, it may be reasonable to say that councillors shall not speak for Council unless specifically authorized by Council. This is a reasonable limit because Council acts as a group and in most municipalities the chief elected official is the spokesperson of Council.

### **To Whom Does the Code Apply?**

As noted above, a Code of Conduct must apply to all councillors equally, which includes the chief elected official. However, Council is free to decide whether to establish a Code of Conduct governing the conduct of members of Council committees and other bodies established by the Council who are not councillors. This can be done in one of two ways: (a) incorporating members of committees and other bodies who are not councillors into the Code of Conduct for councillors, as appropriate; or (b) establishing a separate and distinct Code of Conduct exclusively to govern members who are not councillors. It is critical to remember, however, that the MGA only authorizes Council to establish a Code for members of Council committees and other bodies established by the Council. In other words, Council cannot impose a Code of Conduct on members of third-party organizations that were not established by the Council even if Council has the right to appoint one or more members to the board of that organization. Third-party organizations may include regional service commissions or library boards.

Before adopting a Code of Conduct that applies to members who are not councillors, Council should carefully consider whether it is necessary or desirable to do so. Absent any Code, appointed members simply serve at the pleasure of Council, subject only to the terms and conditions of their appointment as prescribed by the terms of reference or bylaw establishing the committee or other body. Imposing a Code of Conduct on appointed members can be an effective governance tool that sets clear standards of conduct expected of all members; however, imposing rules of behaviour by way of a Code of Conduct will also necessitate some form of a complaint process with the requisite procedural fairness safeguards. Depending on the sheer number of committees and other bodies a Council has established and how many members appointed to those committees are not councillors, some Councils may struggle to administer a Code of Conduct for its unelected members.

If Council is considering expanding the Code of Conduct to include members of Council committees and other bodies established by the Council who are not councillors, a further consideration is whether to treat all committees and other bodies as the same and regulate them collectively. Specifically, the definition of “council committee” in the MGA expressly excludes an assessment review board established under section 454 or a subdivision and development appeal board established under section 627. Careful consideration should be given to whether these quasi-judicial adjudicative bodies should be treated the same as Council committees, which are typically only advisory, not decision-making bodies. Different considerations and different rules of behaviour may be appropriate for each given their distinct mandates and roles.

## **Additional Topics to Consider**

The Regulation specifies the bare *minimum* topics the Code must address. Additional topics to consider to address in order to enhance a Code of Conduct may include one or more of the following:

### (i) Conduct at Meetings

If not already dealt with in Council's Procedure Bylaw, the Code could set out appropriate standards of behaviours expected of councillors during meetings of Council, Council committees and other bodies. Such items may include a general requirement to maintain decorum during meetings, prohibitions on the use of inappropriate, foul and abusive language and restrictions on the use of electronic devices, including the unauthorized recording of meetings, live streaming or posting on social media by councillors while the meeting is in session (e.g. live tweeting debates).

### (ii) Social Media

Although a Code of Conduct may simply state that "this bylaw applies to all forms of communication", many Councils find it beneficial to expressly address the use of social media as a standalone in the Code. The sheer pervasiveness of social media in our daily lives, coupled with the unique role that elected officials play in society, can make articulating what constitutes appropriate and inappropriate use of social media a challenging topic of discussion. Council will need to balance the individual rights and autonomy of each councillor with the legitimate desire to protect the collective reputation of Council and the municipality as a whole. Individual councillors may struggle to accept that while they have a right to maintain a personal life, as a holder of public office, "councillor" is not a title they simply assume before each Council meeting and put away once the meeting is adjourned.

Basic rules of engagement may include prohibitions on obscenity, bullying, harassment, threats, knowingly posting false or misleading information and the like. Council may want to provide that disseminating or amplifying inappropriate content of third parties, including reposting, linking to, or "liking" someone else's post on a social media platform is prohibited. Many councillors are shocked to learn that reposting or retweeting someone else's defamatory post is considered to be a "publication" according to the law of defamation and can result in the councillor being held liable for damages.

Careful consideration should be given to whether councillors will be provided with official social media accounts expressly for municipal purposes while in office or if they will be left to use their own existing personal social media accounts or create new personal accounts if they so choose. If Council adopts official social media accounts for its members what rules of engagement will apply? Is it appropriate to promote a particular local business on a councillor's social media account or is that inappropriate because it may be perceived as the councillor showing favoritism to one business over another? What about use of the municipality's logo or crest on a councillor's social media? What about a councillor's personal social media accounts? Are those accounts subject to the Code? Where does Council draw the line? Are you a councillor 24/7 or does Council accept that every councillor is entitled to have a private life that is beyond the reach of Council even if "off-duty conduct" could bring Council and the municipality into disrepute? Council may also want to develop protocols about how councillors should respond to comments from residents posted on social media sites, whether these are service requests, compliments or complaints.

### (iii) Election Activities

The regulation of municipal election campaigns is governed by the *Local Authorities Election Act* (LAEA). Nevertheless, your Code may address campaign-related issues in a manner that complements the LAEA. For example, your Code may stipulate that councillors are not permitted to use the municipality's equipment and facilities for campaign-related activities. Similarly, the Code may provide that councillors may not engage municipal staff for any election-related purpose during working hours. It would also be prudent to prohibit the use of municipal websites, email and social media accounts for election campaigning, including restricting the linking of private campaign websites and social media accounts to the municipality's website. Further, your Code may stipulate that councillors are personally responsible for ensuring their compliance with all applicable election-related statutes, and therefore should not make inquiries of, or rely on municipal employees for advice and direction in this regard.

Nothing in statute prevents a sitting councillor from seeking the nomination and, if successful, running for elected office of another order of government (e.g. Member of the Legislative Assembly or Member of Parliament) while serving as a councillor. The rules simply require the councillor to resign from office if they are elected as a person cannot hold both offices concurrently. While legally it is permissible, practically speaking many issues can arise if a sitting councillor decides to run for another elected office. It is recommended that Council get out ahead of this issue and proactively address what is expected of a councillor should they find themselves in this situation. Council may want to consider including provisions in the Code that prohibit councillors from using their office as councillor or their official duties to campaign for another elected office, that require councillors to take a leave of absence to campaign, and that clarify whether councillors will continue to receive any remuneration while on a leave of absence for campaign purposes.

### (iv) Gifts and Benefits

Council may wish to include provisions about the acceptance of gifts, including prizes, and hospitality in its Code, which are items closely related to the topics of "conflict of interest" and "undue influence". Councillors often receive gifts or hospitality as an incidental benefit and as a genuine token of appreciation. However, if a gift or hospitality is given, or perceived to be given, in an effort to influence, or manipulate a councillor, it may be problematic. Council may want to include provisions in its Code to clarify when acceptance of a gift or offer of hospitality is acceptable, including protocols and parameters which address the following:

- circumstances where a councillor receives a benefit from a supplier and subsequently participates in a decision involving that supplier;
- the receipt of food, alcoholic beverages, lodging, transportation and/or entertainment from third parties;
- the entitlement of councillors to accept a complementary ticket or a reduced ticket rate for events such as fundraisers, golf tournaments, concerts, sporting events, etc., and if so when and in what context;
- the use of property or facilities such as vehicles, office space, or vacation property from third parties;

- the maximum value of gifts which may be accepted by an individual councillor; and,
- the receipt of a gift on behalf of the municipality.

It is common for Codes to recognize certain exemptions for gifts and benefits received by a councillor that “normally accompany the responsibilities of office” and are received “as an incident of protocol or social obligation”. Food and beverages consumed by a councillor at events that serve “a legitimate business purpose” is another common exception to the rule against accepting gifts, although additional parameters may be established, such as requiring a representative of the organization extending the invitation to be in attendance and/or a stipulation that the value of the food/drink be “reasonable” and the invitations “infrequent”.

As noted above, your Code may also establish reasonable monetary limits respecting the receipt of gifts and benefits from any one person or organization over the course of a specified period. Further, or in the alternative, your Code might require that councillors file an annual disclosure statement listing the gifts and benefits received during a specified period, including an approximation of their monetary value. Council may also want to address the receipt of “official gifts” received on behalf of the municipality by a councillor as a matter of protocol. The Code may, for example, clarify that such gifts are the property of the municipality and will remain with the municipality after the councillor ceases to hold office.

Before embarking on amendments to its Code in this regard, Council should thoroughly inventory the list of events councillors are routinely invited to and attend, the types of gifts and other benefits councillors have historically received and attempt to quantify the dollar values associated with the gifts, hospitality and other benefits councillors have received. Then Council should ask what legitimate business purpose was served in each case and attempt to weigh that against public perceptions and concerns regarding undue influence and conflicts of interest.

### **Who Can Make a Complaint?**

As part of establishing a complaint system for the Code of Conduct, Council must identify who may make a complaint alleging a breach of the Code. Who may make a complaint is not prescribed in the MGA. When mandatory Codes of Conduct were first introduced in Alberta, many Councils were concerned they could be flooded with illegitimate, frivolous and vexatious complaints lodged by a small number of disgruntled residents or political rivals. As such, some Councils restricted the ability to lodge a complaint under the Code of Conduct to members of Council only. Others decided that the Code of Conduct is a document internal to the municipal corporation and limited complainants to include members of Council and staff within Administration.

Both examples are legitimate exercises of a Council’s discretion; however, experience has since shown that Councils that allowed members of the public to lodge complaints under the Code of Conduct have not been inundated with unfounded allegations of misconduct. Moreover, opening up the complaint system to include members of the public has in some cases allowed members of the public to bring forward legitimate allegations that warrant investigation without requiring a councillor to awkwardly lodge the complaint on their behalf. Similarly, allegations of inappropriate councillor conduct involving an elected official of a neighbouring municipality can more readily be dealt with when complaints may be made by any member of the public (including councillors of other municipalities).



Regardless of what Council decides, the Code should be clear about who can file a complaint and how the complaint is filed.

### **Dealing with Improper Complaints**

It is prudent to include a process to address frivolous, vexatious and bad faith complaints within the Code of Conduct complaint system. Not every complaint legitimately warrants investigation and having a process whereby a complaint can be initially vetted and, where appropriate, summarily dismissed without investigation or further process is an effective means of limiting the time and resources dedicated to improper complaints. Council will need to carefully consider who is authorized to initially vet a complaint to determine whether it merits investigation or not. Is this done internally by the chief elected official or the deputy chief elected official, or by a committee of Council or by Council itself? Or externally by a third-party investigator? Further, is there a common understanding of what constitutes a “frivolous”, “vexatious” or “bad faith” complaint or is there a need to expressly define these terms in the Code.

Additional clarity can be brought to the Code by also expressly addressing complaints that are clearly outside of Council’s jurisdiction. For example, the Code could provide that any complaint that is not about a current councillor, does not allege a breach of the Code of Conduct, or is covered by another applicable legislative appeal, complaint or court process will be immediately dismissed without further process.

### **Informal Complaint Process**

The Regulation mandates that every Code of Conduct include a complaint system, but not every alleged breach of the Code may warrant a lengthy (and often costly) third-party investigation. Councils should carefully consider including an *informal complaint* process in their Code. Minor, inadvertent or first-time breaches may be addressed more efficiently and effectively through one or more of the following means:

- a one-on-one private conversation between the complainant and the councillor who is alleged to have breached the Code;
- an informal discussion among the parties, facilitated by the chief elected official or deputy if the informal complaint is about the chief elected official;
- a closed session discussion among all of Council if the complaint is internal to Council;
- the parties voluntarily agreeing to engage in some form of conflict resolution (e.g. mediation); or
- if the misconduct is admitted by the councillor in question, when confronted with the complaint, the councillor may voluntarily offer to apologize or otherwise make amends, take training, etc.

Filing a formal complaint under the Code of Conduct should, ideally, be a last resort after all other reasonable means to resolve the matter have been exhausted. That said, there are rare occasions when a single incident of misconduct, even a first instance, is so serious or the nature of the misconduct is such that it would not be reasonable or advisable to encourage, let alone require, a complainant to exhaust the informal complaint process before filing a formal

complaint. For this reason, Councils are cautioned against mandating that a complainant must exhaust the informal complaint process before filing a formal complaint.

### **Formal Complaint Process**

In addition to determining who is entitled to file a complaint under the Code of Conduct, Council should review its formal complaint process to ensure the procedures are clear, do not create unreasonable barriers to filing a formal complaint and provide adequate procedural fairness to any councillor against whom a complaint is made. Issues to consider may include:

- whether anonymous complaints will be accepted or whether a complaint must be signed by an identifiable individual;
- whether complaints must be made on a specific form approved by Council or whether an email or handwritten note suffice;
- whether a complaint must be filed within a specified period of time after the alleged misconduct (e.g. 30, 60, 90 days or more) to ensure complaints are dealt with in a timely manner or whether a complaint may be filed at any time; and
- whether to include provisions outlining the investigator's authority to decide on questions of jurisdiction and summarily dismiss complaints that are not about a current councillor, are not a formal complaint under the Code of Conduct or that make allegations that are more properly addressed through other applicable legislative appeals, complaint or court processes.

If the Code imposes a timeline within which a complaint must be filed it is prudent to consider giving Council, or the investigator, the authority to accept a complaint that is filed outside the time limit in specific circumstances. A delay in filing a complaint may occur in good faith, through no fault of the complainant, and it would serve the public interest to investigate the complaint even though it is, technically, filed out of time. For example, allegations of bullying, harassment or abuse may be difficult for a complainant to bring forward in a timely manner due to trauma, shame or fear of reprisals. Of course, Council will need to balance any exercise of discretion in favour of a complainant who files a late complaint against any substantial prejudice to the councillor whose conduct is in question as a result of the delay.

### **Who Should Investigate Complaints?**

The statutory scheme does not prescribe who may investigate complaints – instead, each Council is authorized to decide this matter when establishing and reviewing its Code of Conduct complaint process. A recent Alberta Court decision does, however, provide some helpful guidance to inform Council's decision on this issue:

*“The importance of transparent, accountable and trusted municipal governments would be supported by the appointment of an investigator who is, and is reasonably perceived by informed persons to be, independent and unbiased.”*

If Council intends to investigate complaints internally, either collectively as Council as a whole, or by assigning the role of investigator to the chief elected official, deputy chief elected official, or to a Council committee, it is critically important consider and address how Council will safeguard against any real or perceived bias inherent to an internal investigation process.

Alternatively, engaging an independent third-party investigator can be an effective means to ensure impartiality and eliminate most allegations of bias. Due to concerns around reasonable apprehension of bias, it is not recommended that Council engage its in-house legal counsel, if such resources exist, to conduct the investigation. Likewise, caution should be exercised when engaging external legal counsel to investigate a Code of Conduct complaint if the lawyer/firm is the municipality's solicitor(s) of record and has a vested interest in maintaining and/or generating future legal work from the municipality outside of the Code of Conduct investigation.

Beyond ensuring the independence and impartiality of the investigator, Council should carefully consider the qualifications required of an investigator. For example, if Council is looking to keep investigations internal, the question to ask is whether members of Council have the requisite knowledge and training, as well as the necessary time and resources, to serve as an investigator. Investigating Code of Conduct complaints requires skills in interviewing witnesses, assessing the credibility of witnesses, gathering evidence, document review, making findings of fact, interpreting the Code and applying facts to the Code, along with investigation report writing, among other things. Considerable time is often required to conduct a thorough investigation, time which many councillors likely don't have, particularly if they're already juggling serving on Council with a full-time job, other community involvement and/or family commitments.

If Council is looking to retain an independent, third-party investigator, typical candidates usually include lawyers and consultants. The statutory scheme does not require an investigator to be a member in good standing of the Law Society of Alberta, or even legally trained, but suitably experienced lawyers will have the necessary skills to conduct an investigation, as well as the benefit of extensive knowledge of the case law and principles of statutory interpretation. That said, not every investigation necessarily requires a lawyer and the cost to engage a lawyer as an investigator may put this option out of reach for some municipalities. Among the broad spectrum of consultants, there are individuals and firms with suitable knowledge and experience to undertake investigations including, but not limited to, former police officers, human resources professionals, management consultants and the like. When selecting either a lawyer or a consultant, Council would be wise to look for firms and individuals with municipal knowledge and experience. A Council Code of Conduct investigation is not an HR investigation; councillors are not municipal employees. Similarly, councillors are not shareholder appointees to a board of directors; they are locally elected officials (i.e. politicians). Appointing an investigator who is live to these distinctions and is familiar with the MGA and the inner workings of municipalities is a real asset and will go a long way to avoiding any misapprehension or misapplication of the Code of Conduct by the investigator.

### **What About the Chief Administrative Officer?**

Every councillor who has completed orientation training is familiar with the phrase "Council only has one employee – the Chief Administrative Officer (CAO)." The CAO *is* Council's employee and, as such, the CAO should not be tasked with conducting investigations into the conduct of the CAO's employer, effectively the members of Council. This also applies to HR staff or other staff in Administration, all of whom report up to and through the CAO.

However, the CAO still has a legitimate role to play in Council's review of the Code of Conduct and in the processing of complaints brought under the Code. The CAO is Council's chief advisor (MGA, s 207) and brings to the role a wealth of knowledge and experience that can assist Council in its decision-making processes. The CAO is also typically responsible for retaining and instructing legal counsel and otherwise procuring the services of consultants on behalf of the municipality. While the CAO should have no role in investigating and/or deciding on the

merits of a complaint under the Code of Conduct, they may provide Council with advice on the process, assist Council in setting up a special meeting of Council to review a complaint, ensure the confidential agenda package is sent out, engage legal counsel to advise Council, retain a third-party investigator on Council's request and so on.

### **What Does Procedural Fairness Require?**

The Supreme Court of Canada has held that administrative decision-making processes can give rise to a duty of procedural fairness. The content of this duty is "eminently variable" and the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances, having regard for what are known as the *Baker Factors*:

- 1) the nature of the decision being made and the process followed in making it;
- 2) the nature of the statutory scheme;
- 3) the importance of the decision to the individual or individuals affected;
- 4) the legitimate expectations of the person challenging the decision; and
- 5) the choices of procedure made by the administrative decision maker itself.

In the context of Council Code of Conduct complaints, there is still limited case law directly on point in Alberta. However, a recent Court decision has held that such decisions are adjudicative in nature, which suggests a higher standard of procedural fairness than would be owed if Council were acting in a purely legislative capacity (e.g. passing a bylaw of general application). The Court went on to find that the nature of the statutory scheme laid out in the MGA is to maintain public confidence in municipal councils and ensure effective decision making through establishing and enforcing ethical conduct standards, which also points to a higher degree of procedural fairness. Further, the Court held that a finding of a serious ethical breach or the imposition of a serious sanction threatens a councillor's dignity (as a public figure in local politics and the impact on their reputation) and livelihood, giving rise to a higher degree of procedural fair being owed.

In general terms, the content of the duty of procedural fairness in the Code of Conduct context may include:

- adequate notice of a complaint;
- disclosure of the complaint, including any evidence gathered during the investigation;
- the right to be heard before any decision is made or sanctions imposed;
- the opportunity to respond to the complaint and the investigator's report;
- the right to an impartial decision maker; and
- the right to a timely decision.

It remains a live issue whether Council should provide written reasons for its decision on a Code of Conduct complaint. Reasons are not mandated by the MGA, but may be required as part of the duty of procedural fairness owed to the parties to a Code of Conduct complaint. Written reasons are intended to provide a transparent and intelligible justification for the decision. In the absence of written reasons being provided it may be exceedingly difficult for the parties (or a reviewing Court) to determine whether Council's decision is justified, particularly if the Council proceedings were largely conducted in a meeting closed to the public for reasons of

confidentiality. A failure to provide reasons may require the decision to be set aside and the matter remitted back to the decision maker for reconsideration and preparation of written reasons. The Alberta Ombudsman’s “Administrative Fairness Guidelines”<sup>2</sup> note that Canadian courts impose a common law obligation on administrative decision-makers to provide adequate reasons for their decisions as part of the duty of fairness. Although not binding precedent here in Alberta, a recent Court decision out of Saskatchewan had this to say regarding the need for written reasons in the Code of Conduct context:

*“[W]hen a decision-maker’s deliberations in support of its decision are undertaken in camera - rather than through a public debate – it will be considerably more difficult for those affected by the decision to understand why the decision was made. When deliberations take place in private, as is the case here, reasons may be required to explain a decision.”*

Until either the MGA or Regulation is amended to clarify this issue or a binding decision from the Courts is issued, each Council will need to decide whether to impose a requirement in its Code of Conduct Bylaw that any decision on a complaint be supported by a written decision with reasons or not. Additionally, Council must consider if the reasons will be made public in all situations or only if sanctions are imposed.

### **Imposing Sanctions**

If a formal complaint has been filed under the Code of Code and is determined to be valid then Council may, in its discretion, impose sanctions for the breach of the Code. Section 5 of the Regulation provides that sanctions may be imposed, including any of the following:

- (a) a letter of reprimand addressed to the councillor;
- (b) requesting the councillor to issue a letter of apology;
- (c) publication of a letter of reprimand or request for apology and the councillor’s response;
- (d) a requirement to attend training;
- (e) suspension or removal of the appointment of a councillor as the chief elected official under section 150(2) of the Act;
- (f) suspension or removal of the appointment of a councillor as the deputy chief elected official or acting chief elected official under section 152 of the Act;
- (g) suspension or removal of the chief elected official’s presiding duties under section 154 of the Act;
- (h) suspension or removal from some or all council committees and bodies to which council has the right to appoint members; and
- (i) reduction or suspension of remuneration as defined in section 275.1 of the Act corresponding to a reduction in duties, excluding allowances for attendance at council meetings.

A recent Alberta Court decision held that the list of sanctions contained in the Regulation is not exhaustive. Other sanctions not contemplated in the Regulation may be justified to fulfill the object and purpose of a Code of Conduct. For example, a Code may include, and Council may impose, a communication sanction on a councillor to address the improper disclosure of confidential information or harassing of staff in order to protect the municipality’s interests in confidentiality or maintain a work environment free of harassment. Such a sanction would be

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<sup>2</sup> [https://www.ombudsman.ab.ca/wp-content/uploads/2019/01/OMB-Administrative-Fairness-Guidebooks\\_web.pdf](https://www.ombudsman.ab.ca/wp-content/uploads/2019/01/OMB-Administrative-Fairness-Guidebooks_web.pdf)

upheld provided that it was reasonably connected to the misconduct and would not effectively prevent the councillor from performing their functions in a meaningful way. However, the Regulation is clear that Council may not impose any sanction that prevents a councillor from fulfilling the legislative duties of a councillor. Further, a councillor may not be disqualified and removed from office for a breach of the Code.

It is well established in the case law that regulatory sanctions are not intended to be punitive, but rather remedial in nature, although specific and general deterrence may be taken into account. The objective is to correct behaviour and discourage future misconduct. Sanctions should not be arbitrary; there needs to be a rational connection between the sanction being imposed and the conduct. Further, the principle of proportionality applies to sanctions; that is, the nature of the conduct and its impact must be in proportion to the penalty being imposed. A recent Alberta Court decision held:

*“Imposing crushing or unfit sanctions can undermine public confidence in the institution or its processes and thereby defeat the purpose of the enforcement system...”*

When Council is considering a sanction, some of the factors Council should consider include the following:

- whether it is a first-time offence or a repeated pattern of behaviour;
- the nature and severity of the breach of the Code;
- whether the breach arose inadvertently or by reason of a genuine error in judgment;
- the extent to which the behaviour is impeding the functioning of Council;
- the impact of the misconduct on the public’s image of Council; and
- any other mitigating or aggravating factors.

Council is cautioned to avoid lashing out in anger or frustration and “throwing the book” at a recalcitrant councillor found in breach of the Code. Instead, Council is encouraged to abide by the principle of progressive discipline with a view to using sanctions to correct bad behaviour; recognizing that the sanctioning tools available to Council are somewhat limited and unleashing multiple sanctions on a councillor for a first offence leaves little room for Council to address any subsequent breach down the road. Further, sanctions cannot be indefinite or subject to a discretionary term with no standards or conditions attached to the exercise of discretion. Councillors have a right to know how long a sanction will apply and exactly what, if anything, they must do in order to get out from under the effect of a sanction.

There is no statutory obligation to impose sanctions for misconduct. Whether to sanction or not is a discretionary decision of Council, although Council needs to be consistent, not selective, in its application and enforcement of the Code. It may be prudent to expressly state in the Code that Council retains discretion to not impose a sanction in a particular case even if a breach has been found. For example, for a first offence of a minor nature or in a case where the misconduct is freely admitted by the councillor and they voluntarily apologize for their misconduct or otherwise make amends, there may be no legitimate purpose served by imposing sanctions.

## Dealing with A Defiant Councillor

Councillors are entitled to vigorously defend themselves throughout the Code of Conduct complaint process. As one recent Alberta Court decision held:

*“An apology can be mitigating, but a fair system of justice does not regard a failure to apologize as aggravating. [...] Forcing them to apologize on pain of a greater sanction would place them in an impossible position.”*

In rare cases, however, a councillor who has been found in breach of the Code may try to wear it as a badge of honour, dig in their heels, and simply refuse to comply with any sanctions imposed. Council will likely have a pretty clear idea of how a particular councillor may react to having sanctions imposed on them and Council should carefully consider and tailor any sanctions to the individual. For example, requesting a councillor to apologize may not be an effective sanction if the councillor clearly shows no remorse and has no intention of apologizing (although Council may decide to publish the councillor’s refusal to apologize). Similarly, Council may wish to reflect on whether requesting an apology may be a hollow sanction; how sincere really is an apology that has to be coerced by way of sanction?

If Council imposes a requirement that a councillor attend training, does the sanction make it clear who decides what specific training program must be completed and how course completion will be verified? If the training is not completed within the time specified does this failure to comply automatically trigger a further specified sanction or is this failure deemed to be a further breach of the Code that Council will need to consider?

Following the principle of progressive discipline will allow Council to impose a series of escalating sanctions for repeated breaches of the Code by the same councillor. For example, escalating sanctions could move from suspending the councillor from one or more Council committees to removal from one or more (or even all) committee appointments until the next organizational meeting of Council, or even for the balance of the Council term in appropriate circumstances. If it appears that a councillor may be beyond redemption under the Code of Conduct, Council may simply need to move on in the knowledge that Council is governed by the will of the majority of its members and a delinquent councillor is but one voice and one vote at the Council table. In an extreme case, steps may need to be taken to alert the Minister of Municipal Affairs of serious and/or serial misconduct by a councillor and request that the Minister undertake an inspection or inquiry into the conduct of the councillor. Further, or in the alternative, Council may determine it is in the public interest to bring an application before the Court of King’s Bench for either an injunction to compel the councillor to cease their misconduct or for an order removing the councillor from office for breaching their fiduciary duty to the municipality.

## Final Thoughts

It should go without saying that the Code of Conduct must not be used as a political weapon to silence or smear a political rival or to retaliate for a perceived slight (including filing a retaliatory complaint under the Code). The Code of Conduct is a governance tool and is intended to serve as one aspect of accountability both internally, as among the members of Council and as between Council and the staff in Administration, and externally, as between Council and the public at large.

The vast majority of councillors in Alberta serve on Council out of a sense of civic duty, not as their chosen career, and may come to the role without any prior governance experience. Being a councillor can be challenging and individuals may have varied views on what the role entails and how to effectively represent their community. The Code is a governance tool which every Council can tailor to fit their local values and community to facilitate civil and, ultimately, effective governance.

An effective Code of Conduct is there to instruct councillors on the way they are to govern and conduct themselves and to educate the public on what they can reasonably expect of their elected officials. When alleged misconduct arises, the Code provides a process for complaints to be brought forward (ideally for informal resolution, if possible) and where necessary for thorough investigations to be conducted in a procedurally fair manner that respects the rights of all parties. If a breach of the Code is found, Council may impose sanctions commensurate to the misconduct in order to correct and deter bad behaviour. Councils are encouraged to embrace the Code of Conduct as an effective governance tool and continuously work to enhance and improve its Code of Conduct and ensure it meets the needs and expectations of Council and the public its members were elected to serve.