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Communication
COUNCIL: <u>Jun 12/19</u>
<u>CW</u> Rpt. No. <u>20</u> Item <u>35</u>

DATE: Tuesday, June 4, 2019

TO: Mayor and Members of Council

FROM: Suzanne Craig, Integrity Commissioner and Lobbyist Registrar

RE: **AMENDMENTS TO THE CODE OF CONDUCT FOR MEMBERS OF COUNCIL, LOCAL BOARD AND COMMITTEES**
Item 35, Report 20 - Committee of the Whole, June 4, 2019
(Council May 1, 2019)

Background:

At the Committee of the Whole meeting on April 2, 2019, the Committee recommended approval of the proposed Code subject to "adding language to the code portion clarifying the definition of Family Members." There were questions raised about the definition of "Family Member", as there are differences between the definition in the Code of Conduct for Members of Council, Local Boards and Committees and the Municipal Conflict of Interest Act (MCIA). It was recommended that the revised definition of "Family Member" be included in the Code of Conduct, and that the Integrity Commissioner would rely on the MCIA list of family members when reviewing Code of Conduct complaints in respect of sections 5, 5.1 and 5.2 of the MCIA.

At the May 1, 2019 Council Meeting, the Deputy City Manager, Corporate Services, in consultation with the City Clerk and the Integrity Commissioner, submitted the following:

1. That the definition of "Family Member" in the proposed "Code of Ethical Conduct for Members of Council and Local Boards" be revised as follows:
 - a. "Family Member" ¹ means,
 - Spouse, common-law partner, or any person with whom the person is living as a Spouse outside of marriage
 - Parent, including step-parent and legal guardian
 - Child, including step-child and grandchild
 - siblings and children of siblings
 - aunt/uncle, niece/nephew, first cousins
 - in-laws, including mother/father, sister/brother, daughter/son
 - any person who lives with the Member on a permanent basis

¹ When considering whether a complaint triggers sections 5, 5.1 and 5.2 of the Municipal Conflict of Interest Act (MCIA), the Integrity Commissioner will adopt the definitions contained in the MCIA, section 3 in respect of an interest of certain persons deemed that of the Member.

At the May 1st Council meeting, Council raised concerns that the above-noted Code definition of "Family Member" was too broad and would put Members of Council at risk of unintended contraventions of sections 5, 5.1 and 5.2 of the MCIA. As a result, the approval of the updated

Code was deferred until the June 4th Committee of the Whole. There were Members who suggested that the definition of "Family Member" in the Code be the same as the definition set out in section 3 the MCIA.

Analysis

In *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, Sopinka J, writing for the majority of the **Supreme Court of Canada**, commented on the meaning of "conflict of interest", as understood under common law:

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent ... that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest[...] It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.¹

The common law recognizes two types of conflicts of interest:

1. non-pecuniary private or personal interest, and
2. pecuniary interest

I. ***A Non-pecuniary conflicts of interest*** (or Code conflict):

may arise out of proximate personal relationship and it applies when a Member has associations or connections within the community such that the Member's own interest might override the public interest when making a decision. In this scenario, a reasonably well-informed person would find that the Member might be influenced in the exercise of public duty by his or her personal interests. A Member ***should avoid*** non-pecuniary conflicts of interest. Even though at the conclusion of a Code investigation, the Integrity Commissioner may rule that a Member was influenced in their public duty by their personal interest and has therefore breached the Code, there is no ***requirement*** for the Member to declare a conflict as is the case under the rules of the MCIA. Non-pecuniary Code conflicts that, by definition, do not involve the potential for financial benefit, can be just as damaging to the public trust as conflicts that involve financial gain (or loss). In common law, a Council Member has a non-pecuniary conflict of interest if:

1. the member's interest in the matter is immediate and distinct from the public interest;
2. it can be reasonably determined that the member's private interest in the matter will influence his or her vote on the matter;

¹ *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at para 55, Sopinka J

3. the member, or one of his or her relations or associates or otherwise, stands to realize a personal benefit from a favourable decision by Council on the matter; and
4. the potential benefit **to the member** is not financial in nature

In the Report of the Mississauga Judicial Inquiry by Commissioner J. Douglas Cunningham states that:

Optics are important. It is essential to consider how a reasonable person would view the actions of the municipal councillor. As Commissioner Jeffrey Oliphant put it in his 2010 Report:

Public office holders ultimately owe their position to the public, whose business they are conducting. Ensuring they do not prefer their private interests at the expense of their public duties is a fundamental objective of ethics standards.

In summary, the ethics standards to which Justices Bellamy, Cunningham and Oliphant refer, are set out in a Code of Conduct. A Code conflict occurs when a Member participates in activities that grant, or appear to grant, any special consideration, treatment, or advantage to an individual which is not available to every other individual.

- II. A **Pecuniary (Conflict of) Interest** (or MCIA conflict) has three prerequisites:
 1. the existence of a private **financial** interest;
 2. that is **known** to the Member of Council or Local Board; and
 3. that has a **direct link** to his or her public duties and responsibilities and that **is not in common with other electors or so insignificant** that it cannot be reasonably regarded as likely to influence the Member (or one of the other section 4 exceptions)

Definition of "Family Member"

MCIA definitions:

The MCIA does not contain a definition of "Family Member" and only defines "child", "parent" and "spouse". However, section 3 of the MCIA provides that:

For the purposes of this Act, the pecuniary interest, direct or indirect, of a **parent** or the **spouse** or **any child** of the member shall, **if known to the member**, be deemed to be also the pecuniary interest of the member [emphasis added].

When the Integrity Commissioner receives a Code complaint alleging a contravention of section 5, 5.1 or 5.2 of the MCIA, the Integrity Commissioner will only consider a pecuniary (financial) interest direct or indirect of the Member, parent, spouse or any child, that is known to the Member. The Integrity Commissioner **will not consider the broader Code definition** of "Family Member" when investigating MCIA complaints.

Code of Ethical Conduct definitions:

The Code has contained a definition of "Family Member" for the last 10 years, since it came into force in 2009. During the original discussions of the Accountability and Transparency Committee, Members decided to include in the guiding principles of the Code, a provision that prohibits the improper use of influence of their office. This prohibition is commonly known as a "Code conflict" and means that Members shall not extend, in their discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Member have a pecuniary interest. During the discussions of the Accountability and Transparency Committee and public consultations, the question arose as to whether any family member could potentially be the subject of the prohibition. The pivotal issue is not how far removed the lineage of the family member, but rather ***whether a Member of Council is granting or appearing to grant preferential treatment to any individual (family member, friend, associate or otherwise) who may have a personal or financial interest in the matter being discussed at Council.***

In 2009, municipal Integrity Commissioners did not have statutory jurisdiction to receive or investigate MCIA complaints. At that time the receipt and enforcement of complaints alleging contraventions of the MCIA could only be received and investigated by the courts. The Code prohibition was the rule against which the Integrity Commissioner relied in Complaint Investigation Report #0114 in which the former Deputy Mayor was found to have breach the Code of Conduct by attempting to grant preferential treatment for the awarding of the City contracts to individuals with whom he had a personal relationship.

Code of Conduct and MCIA conflicts of interest lie on a continuum of conduct that engages important ethical and legal questions. Very importantly, from a practical point of view, a finding of breach of a Code conflict carries the potential penalty of up to 90 days suspension of pay, while the penalty for a finding of a breach of the MCIA can be the removal of office of a Member of Council and suspension from holding office for up to 7 years. Code contraventions, while significant, do not carry penalties as severe as MCIA contraventions. It is for this reason that the list of family members whose pecuniary interest trigger a MCIA contravention is restricted to those set out in the MCIA.

Conclusion

In Madam Justice Bellamy's Speech on the release of the Report of the Toronto Computer Leasing Inquiry on Monday, September 12, 2005, her comments included the following:

It was my job to unravel what happened, to find out what went wrong and most importantly, I think, to make recommendations that might prevent the Same or similar mistakes in the future.

[...]

In 214 day of hearings, I heard from 156 witnesses. I saw witnesses who had disgraced themselves, who had failed in their duty to the City, who had put self-interest first...This is a report to City Council, and through them, to the public. The story is an important one. It is really about democracy, and it should be of interest to every single member of the Toronto community because it is also about how the City spends the public's money.

[...]

I consider the recommendations to be the heart of my report. They are what will ultimately affect the residents of the City the most. My recommendations are aimed at improving practices in governance, ethics, lobbying, and procurement. What this means is that they relate fundamentally to the integrity of municipal government and to the people who run it. The recommendations are the most hopeful part of the report. They are forward-looking and are offered with well-founded optimism that things are getting better and can continue to improve. They are directed to the City of Toronto, of course, but there are general principles that can apply to every other municipality in Canada and other levels of government.

Recommendation 30 – Preferential Treatment

30. Elected officials and staff should take all necessary steps to avoid preferential treatment or the appearance of preferential treatment for friends or family.

Recommendations 31-32 – Disclosure and Recusal

31. Councillors should not vote on any issue at Council or committee that puts them in a real or apparent conflict with their potential finances. They should declare their conflicts and recuse themselves.

32. Councillors should recuse themselves from matters that pose a real or apparent conflict with the finances of their spouse, parents and siblings.

The Code definition of “Family Member” has not changed since the Code came into force in 2009. The only change that is being recommended to the definition of “Family Member” in the updated Code, is to add a footnote to clarify that “when considering whether a complaint triggers sections 5, 5.1 and 5.2 of the Municipal Conflict of Interest Act (MCIA), the Integrity Commissioner will adopt the definitions contained in the MCIA, section 3 in respect of an interest of certain persons deemed that of the Member. This means that when investigating MCIA complaints, the Integrity Commissioner **will only** consider pecuniary interests of the Member’s child, parent or spouse.

This recommended addition of the footnote in the revised Code will bring clarity to the definitions being used in the Code of Conduct for Members of Council, Local Boards and Committees and in the interpretation of the Municipal Conflict of Interest Act.

Understanding and managing the above-noted concepts is fundamental to risk management within municipal government and imperative to maintaining the public trust regarding the accountability of elected officials. It is essential that municipal government operate with a clear understanding of acceptable and unacceptable conduct.

The effect of restricting the Code definition of “Family Member” will mean that the guiding principle of the Code that states:

Members shall not extend, in their discharge of their official duties, preferential treatment to Family Members, organizations or groups in which they or their Family Member have a pecuniary interest.

Will be changed to read:

Members shall not extend, in their discharge of their official duties, preferential treatment to their [spouse, their parent or their child], organizations or groups in which they or their [spouse, their parent or their child] have a pecuniary interest. However, extending preferential treatment to any other Family Member that is not a spouse, their parents or their child] is allowed under the Code.

This is not the intent of Part V.I of the Accountability and Transparency section of the *Municipal Act*. The Province of Ontario amended the *Municipal Act* in 2006, adding Part V.I, as a direct result of the recommendations of the Honourable Madam Justice Denise Bellamy and the Toronto Computer Leasing Inquiry. The recommendations of the Bellamy Report were to include "family and friends" and the "family" was not intended to be limited to "spouse", "parent", "child".

Options for Amendments to the Code regarding the definition of "Family Member"

Option 1: Recommended Option

Use the current Code definition of "Family Member" and add the footnote to clarify that: when considering whether a complaint triggers sections 5, 5.1 and 5.2 of the Municipal Conflict of Interest Act (MCIA), the Integrity Commissioner will adopt the definitions contained in the MCIA, section 3 in respect of an interest of certain persons deemed that of the Member.

Option 2:

Use another Code definition of "Family Member".

If Council chooses Option 2 and decides to adopt another Code definition, the Integrity Commissioner respectfully invites Members to carefully consider the recommendations of both Justice Bellamy and Justice Cunningham in the Toronto and Mississauga public inquiries² and the intent of Part V.I of the *Municipal Act*.



Suzanne Craig
Integrity Commissioner

² The Bellamy Inquiry Report and the Mississauga Inquiry Report contained numerous Recommendations including: Councillors and staff should take all necessary steps to avoid preferential treatment or the appearance of preferential treatment for friends or family