

## ADVISORY BULLETIN

### PARTICIPATION ON COMMISSIONS, BOARDS OR AGENCIES

#### I. Purpose of the bulletin

Members of Council are regularly appointed by Council to participate on various commissions, boards or agencies, ranging from museums and galleries to business improvement zones. A full listing of these organizations can be found here: <http://winnipeg.ca/clerks/boards/boards.stm>.

Generally, the rationale for appointing Members of Council to sit on commissions, boards or agencies is to help ensure that a civic voice is heard on such entities.

Members of Council may also sit voluntarily on a commission, board or agency in their private life.

In certain cases, participation on a commission, board or agency can lead to a real or apparent conflict of interest with respect to the Member's role on Council. The purpose of this Bulletin is to provide guidance with respect to determining whether participating on a particular commission, board or agency gives rise to a conflict of interest in connection with the performance of the Member's duties of office.

#### II. Executive Summary

- 1) Members of Council are presumed not to have a conflict of interest in any appointment made by Council, to serve in their official capacity on a commission, board or agency or in matters arising in relation to that commission, board or agency. The reason for this presumption is that typically such appointments involve a public interest rather than a Member's personal or private interest.
- 2) From time to time, Members may find they have a conflict of **duty** (as opposed to **interest**) by virtue of their obligation to a commission, board or agency to which Council has appointed them. That is, a Member may feel that the duty they owe to a commission, board or agency clashes with their role as a Member of Council. This is an ethical issue but not one which is covered directly by the *Code of Conduct for Members of Council for the City of Winnipeg* ("the Code").

Members of Council must consider whether they have a clash of duties and if so, how to resolve such a clash, on a case-by-case basis.

- 3) When Members of Council voluntarily sit on a commission, board or agency, as opposed to being appointed to that position by Council, they must take particular care to avoid real or apparent conflicts of interest. Again, each situation will need to be considered on a case-by-case basis.

### III. Analysis

#### Conflicts of Interest

In the public sector, a conflict of interest occurs:

“When an elected or appointed public official attempts to promote a private interest for him – or herself, or for some other person(s), that results, or appears to result, in interference in the impartial discharge of one’s duties or a gain or advantage by virtue of his or her position ... where there is a conflict between public and private interest, the public should always prevail.”

*Honest Politics Now*, Ed. Ian Greene and David P Shugarman,  
2017, James Lorimer & Company Ltd., pages 70-71

#### Appointment by Council

Both the *Code* and *The Municipal Council Conflict of Interest Act* ("the *Act*") state that a Member of Council is presumed **not** to have an interest when serving on a commission, board or agency to which they been appointed by Council, in their official capacity. The relevant provisions of these authorities are reproduced at section V of this Bulletin.

It is important to remember that while the *Act* only relates to interests which are of a pecuniary nature the *Code* defines "private interest" to include **any** personal benefit.

Keep in mind, as well, that both the *Act* and the *Code* use the word "presume" in recognition of the fact that there may be specific situations in which a Member does have a pecuniary or private interest, depending on the given facts. In such cases, a conflict of interest could still arise.

An example of how this issue has been addressed by the courts can be found in *Blyth v. Northumberland (County)*, 1990 CanLII 6752 (ONSC). In that case, three municipal councillors who voted on a by-law regarding a hospital administration building were also members of the Board of Health which administered the local health unit and which was a potential lessee of the administration building. The applicants in that case submitted that the three councillors had a conflict of interest in voting on the by-law relating to the building. The court disagreed.

In addition to finding that the three councillors had no pecuniary interest in the matter, the court went on to note that the municipal conflict of interest legislation contained an exception to the conflict rules in the case of interests arising solely by virtue of being appointed by council to sit as a member of a board, commission or other body. The court cited S.M. Mackuch, *Canadian Municipal and Planning Law* (Toronto: Carswell 1983), at p.312 where the author described this exception as "common sense" and stated:

"such interests embody public duties similar to those of the member as a councillor or board member and any conflict must be accepted since private or personal interests are not involved."

*Blythe, supra*, p.12

## Voluntary Participation

Where Members of Council voluntarily choose to sit on boards such as, for example, the board of a community-based agency, the presumption provided in the *Code* and the *Act* that they do not have an interest in sitting on the board, does **not** apply.

Members of Council should, therefore, consider whether they have a private interest in a matter which comes before Council, arising from their voluntary participation on a board, and if so, should declare the interest and avoid voting on or influencing a decision on the matter.

The determination of what amounts to a private interest is fact specific and must be determined on a case-by-case basis. Members are, as always, strongly encouraged to seek the advice of the Integrity Commissioner.

## Interests and Duties

"Conflict of interest in the public sector is the clash of a private interest with a public duty. It involves the potential to further private, personal interest at the expense of fulfilling public duty and acting in the public interest. Conflict of interest is often mistakenly confused with conflict of duties, where two public duties of one official clash, or where competing public interests appear to clash. These are not conflicts of interest in the public sector, as it is clear from law and practice that such conflict of interest must entail personal and private interest."

*The Law of Government Ethics, 2nd Edition, G. Levine, Canada Law Book, 2015, p.9*

A Member of Council who is appointed to serve in their official capacity as a Councillor on any commission, board or agency owes a duty to that commission, board or agency when they are making decisions on behalf of, and as a member of that entity. In doing so, they are not bound to vote in accordance with Council's view on a particular matter. While it is true that Members owe a fiduciary duty to Council, when they are participating on a commission, board or agency to which Council has appointed them, their duty is to participate meaningfully and honestly on that entity.

This means that they must attend meetings and comply with the rules, procedures and policies of the given commission, board or agency. In doing so, they are free to vote on a given matter in the manner in which they believe is most appropriate.

The issue of a municipal official being faced with a clash of public duties has been discussed in a number of authorities.

For example, the Ontario Superior Court considered council members' conflicting duties where several members were appointed to sit as commissioners on the Toronto Harbour Commission.

The Court held that the City appointed commissioners were required to act in the best interests of the Toronto Harbour Commission regardless of who appointed them and even if that interest was contrary to the wishes of those who appointed them, i.e. City Council:

7 ... The problem is that the applicants believe that they are acting in the best interests of the THC. It would appear that Mayor Rowlands believes that the city-appointed commissioners should act in a way representing the interests of the City. If she believes that the three city-appointed

commissioners are agents of the City, she is in error. The THC commissioners' responsibility is not only to the City but to the Federal Government and the public generally. The members thereof must act in the best interests of the THC regardless of who appointed them, even if that interest is contrary to the wishes of those who appointed them. This principle applies whether the city appointees are members of the city council, members of the city staff or outsiders.

*Walker v Toronto (City), 1993 CarswellOnt 521 (ONSC)*

Please note that how a Member resolves what they may perceive as a conflict of public duties is not an ethical problem which is covered directly by the *Code* or the *Act*.

The Integrity Commissioner does not have jurisdiction, therefore, to give advice to Members of Council as to how they should comport themselves on external commissions, boards or agencies nor to consider complaints about such conduct unless the conduct also involves matters which fall within the parameters of the *Code*.

## V. Authorities

### *The Code of Conduct for Members of Council for the City of Winnipeg*

#### 2. Conflict of Interest

- a. Members must not act in situations in which they have a real or apparent conflict of interest, whether during a meeting of Council or Committee of Council or at any other time while performing their duties of office.
  - i. A conflict of interest exists when a Member exercises their duties of office and at the same time knows that in the performance of those duties there is the opportunity to further their private interests.
  - ii. A **real conflict of interest** exists when a Member has knowledge of a private interest that is sufficient to influence the exercise of their duties of office.
  - iii. An **apparent conflict of interest** exists when there is a reasonable perception, which a reasonably well-informed person could properly have, that the Member's ability to perform any official duty or function must be influenced by their private interest.
- b. A Member is presumed not to have a private interest in any appointment to serve in their official capacity on any commission, board or agency, or in matters arising in relation to that commission, board or agency.
- c. A Member who has a conflict of interest with respect to any matter must refrain from influencing the matter and from discussing or voting on any decision with respect to the matter.
- d. Should a conflict of interest, real or apparent, arise with respect to a matter that will be discussed or determined at a meeting of Council or a Committee of Council, the Member must:
  - i. disclose the general nature of the Member's interest, and
  - ii. withdraw from the meeting without voting or participating in the discussion.

e. Where a Member does not disclose a private interest under Rule 2.d. because they are not in attendance at the meeting at which the matter arose, the Member must disclose the general nature of their interest at the next meeting of the same body before which the matter arose.

f. Where, by reason of withdrawal from a meeting because of non-pecuniary interests, there would be fewer Members remaining than are needed to meet quorum, those Members who have withdrawn by reason of a non-pecuniary interest must disclose their interest, but may still vote in respect of the matter.

***The Municipal Council Conflict of Interest Act, CCSM c M255***

**Appointments**

4(6) For purposes of this Act, where a councillor is appointed to serve in his official capacity as a councillor on any commission, board or agency, the councillor shall be presumed not to have a direct pecuniary interest in the appointment and the councillor shall not be presumed, solely by virtue of that appointment, to have

(a) an indirect pecuniary interest in a matter in which the commission, board or agency has a direct pecuniary interest; or

(b) an indirect pecuniary liability to another person or to a corporation, partnership, or organization to whom or which the commission, board or agency has a direct pecuniary liability.

Date: July 15, 2020