

GOVERNANCE: CONFLICTS, CODES OF CONDUCT, AND BEYOND

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I. ETHICAL STANDARDS AND OBLIGATIONS OF COUNCIL AND BOARD MEMBERS

The *Local Government Act* and the *Community Charter* provide council members and regional board members with broad authority to act in a wide variety of situations, subject to a number of “ethical conduct” rules. Ethical conduct broadly refers to how locally elected officials conduct themselves with their elected colleagues, with staff, and with the public. Ethical conduct is grounded in elected officials conducting themselves with honesty and integrity and in a way that furthers a local government’s ability to provide good governance to their community.

This paper will explore the preconditions to becoming a council or board member, discuss the ethical rules in practice, with a focus on conflict of interest, and finally, consider a local government’s ability to adopt its own code of conduct and establish an independent ethics commissioner, as recently done in the City of Surrey.

A. Eligibility

The preconditions to becoming a council or board member include qualifications with respect to age, residence and citizenship, and taking the oath of office. With respect to eligibility, candidates who wish to be nominated for, elected to, and hold office as a member of a local government must meet the requirements as set out in section 81 of the *Local Government Act*:

- The person must be an individual who is, or who will be on general voting day for the election, 18 years of age or older;
- The person must be a Canadian citizen;
- The person must have been a resident of British Columbia, as determined in accordance with section 67, for at least 6 months immediately before the relevant time; and,
- The person must not be disqualified under this Act or any other enactment from voting in an election in British Columbia or from being nominated for, being elected to or holding the office, or be otherwise disqualified by law.

Additional restrictions are set out in subsection 81(2), including, for example, that local government employees who wish to run for office must give written notice to the local government employer prior to being nominated. If a candidate does not meet all the eligibility criteria, then they are disqualified from holding office.

B. Oath of Office

Once elected, the *Community Charter* and *Local Government Act* require elected council members and board members, respectively, to take an oath or solemn affirmation of office, within 45 days of the declaration of election results or 50 days of being elected by acclamation (*Community Charter* s. 120 & *Local Government Act* s. 202). The oath must be made before a judge or justice of the peace, a commissioner for taking affidavits (including lawyers and notaries), the local government's corporate officer, or the chief election officer, and the completed oath of office must be filed with the corporate officer.

Until the oath of office has been made, the council or board member cannot take office. As per section 120(1.1) of the *Community Charter*, a council member will be disqualified from taking and holding office until the next general election for the failure to make the oath of office within the time limit.

The form of the oath is prescribed by the *Local Government Elections Regulation*, BC Reg. 380/93, or, alternatively, may be prescribed by bylaw. Some local governments may choose to include an acknowledgement of the duty of a councillor to respect council confidentiality and an undertaking not to breach it; however, the breach of one's oath of office is not an act for which a member of council can be disqualified.

C. Conflicts of Interest

Once in office, the ethical conduct rules that council and board members must adhere to include rules on accepting gifts and identifying conflicts of interest, among others. The *Community Charter* conflict of interest rules provide that local elected officials who have a financial (pecuniary) interest in a matter that will be discussed or voted on at their municipal council or regional district board meetings must declare that interest in the matter. Following this declaration, the council or board member may not attend meetings, participate in discussions or vote or exercise any influence with respect to that matter; however, a locally elected official who declares a conflict of interest, and subsequently obtains legal advice and determines that they are not in a conflict position, may withdraw the original declaration and participate in subsequent discussions and vote on the matter being considered.

1. Recognizing Potential Conflicts of Interest

Legislation does not set out the substance of what is or is not considered to be a prohibited pecuniary interest, given that conflicts of interest are incredibly fact-specific. As such, the common law provides guidance whether or not a particular set of circumstances will give rise to a conflict of interest, and the concepts of pecuniary and non-pecuniary conflicts of interest are accordingly in a constant evolution.

Generally speaking, a council or board member will have a non-pecuniary conflict of interest if: (1) their interest in the matter is immediate and distinct from the public interest; (2) their private interest in the matter is likely to influence their vote on the matter; and (3) they, or one

of their relations or associates, stands to realize a personal benefit from a favourable decision on the matter. Ultimately, the key consideration is whether a reasonable person would conclude that a private interest or personal benefit could influence or affect the decision making and be in conflict with the locally elected official's public duties.

2. Exceptions

The *Community Charter* goes on to provide certain exceptions to the restrictions on conflict of interest and inside and outside influence, including:

- The council or board member's pecuniary interest is an interest in common with electors of the jurisdiction;
- The elected official's pecuniary interest, related to a local service, is in common with other persons who are or would be liable for the local service tax;
- A matter under consideration relates to the remuneration, expenses or benefits payable to elected officials in their capacity as members of that elected body;
- The pecuniary interest is so remote or insignificant that it cannot reasonably be viewed as likely to influence the elected official;
- An elected official has a legal right to be heard in respect of a matter or to make representations to the elected body, in which case the official may appoint a representative to exercise that right; and,
- The pecuniary interest or conflict is allowed through a regulation.

Additionally, the *Conflict of Interest Exceptions Regulation* allows council and board members to be appointed by their local government to serve as directors of non-profit societies, or of corporations incorporated by the local government, without risk of disqualification based on financial conflict of interest simply because of their appointment. In such circumstances, a council or board member appointed by the local government will not be in a pecuniary conflict of interest simply because of their appointment when discussing and voting on certain financial matters (specified in the Regulation) concerning the society or corporation.

D. Penalties

A locally elected official who contravenes the pecuniary conflict of interest standards in the *Community Charter* may be disqualified from holding public office, provided the contravention was not done inadvertently or because of an error in judgment made in good faith. Section 108 of the *Community Charter* sets out that an elected official who is disqualified cannot run until the next general local election if the Supreme Court of British Columbia (the "SCBC") finds them in contravention of these rules. Section 111 of the *Community Charter* sets out the procedure for applying to the SCBC to have an elected official declared disqualified, a

process that may be initiated by the local government or 10 or more electors of the local government. Section 109 introduces the ability of the local government or an elector to apply to the SCBC for an order requiring a member, or former elected official, to pay to the local government all or part of the elected official's financial gain obtained as a result of contravening the rules setting ethical standards.

II. LOCAL GOVERNMENT CODE OF CONDUCT

A. General Comments

In addition to the statutory requirements noted above, a local government may choose to establish its own Code of Conduct specifically directed at its elected officials. Such Codes are becoming more commonplace around British Columbia. Although each Code is drafted with the specific locale in mind, they often include a set of behavioural expectations and a process by which breaches are investigated and sanctions imposed for non-compliance with these expectations.

It should be noted, however, that there is no legislative requirement on any BC local government to have such a Code of Conduct, nor are there any provisions in the *Community Charter* or the *Local Government Act* that provide specific authority for such Codes. It is generally accepted that such Codes are created through the local government's authority at section 114(4) of the *Community Charter*.

The situation in BC is contrasted with enabling legislation found in many jurisdictions across Canada. In Toronto, for example, the role of the Integrity Commissioner is entrenched through Chapter 3 of the *Toronto Municipal Code*, as one component of the City of Toronto's accountability framework. The City of Toronto is not alone in Ontario as each local government in that jurisdiction is not only required to have a Code of Conduct but also access to an Integrity Commissioner. In Alberta, the *Municipal Government Act*, RSA 2000, c M-26 requires local governments to establish by bylaw a code of conduct governing the conduct of members of Council (s. 146.1). More recently, the Province of Manitoba adopted the *Council Members' Code of Conduct Regulation 98/2020* under its *Municipal Act*. This is not an exhaustive list of such provisions around Canada but a sampling to draw the distinction with British Columbia.

B. City of Surrey

The City of Surrey is the first local government in British Columbia to establish its own Office of the Ethics Commissioner. The City has done this despite the lack of any specific requirement under Provincial legislation to do so in an effort to assist its Council and provide enhanced governance.

The City cites section 154(1)(b) of the *Community Charter* which authorizes a local government to delegate its powers, duties and functions to an officer or employee of the municipality by bylaw, as enabling the City to establish and appoint its own Ethics Commissioner. Additional authority comes from section 114(4) of the *Community Charter*, which provides council with the

power “to do anything incidental or conducive to the exercise or performance of any power, duty or function conferred on a council or municipality by this or any other enactment”. An Ethics Commissioner (often referred to as an “Integrity Commissioner” in other provinces, as above) is essentially a neutral, independent officer who oversees the conduct of elected officials, and operates independently of the council or board and the local government’s administration.

The Office of the Ethics Commissioner was established on February 24, 2020, to advise and assist council in furthering its objectives with respect to enhancing the openness, transparency and accountability of its decision making. Council established the role of Ethics Commissioner and adopted the Code of Conduct by bylaw, through the *Ethics Commissioner Establishment Bylaw, 2020, No. 20018* (the “Establishment Bylaw”), and the *Council Code of Conduct Bylaw, 2020, No. 20020* (the “Code of Conduct”), respectively. The Code of Conduct prohibits council members from:

- Bullying or harassing another person;
- Defaming another person;
- Abusing their office;
- Contravening any City bylaw, including the [Council Procedure Bylaw, No. 15300](#); and,
- Contravening any provincial or federal laws.

In Surrey, the Ethics Commissioner has the following roles and responsibilities:

- Advise council members on behaviour that is consistent with their ethical obligations under the Code of Conduct, and delivers any necessary training;
- Receive, review, investigate and adjudicate complaints related to the conduct of a council member and violations of the Code of Conduct;
- Adopt procedures, policies and protocols to ensure that complaints are fully and fairly investigated; and,
- Provide advice and recommendations to council regarding amendments to the Code of Conduct and any other policies, procedures or protocols governing council members' ethical behaviour.

Accordingly, there are two main components to the Ethics Commissioner’s role: 1) educational and advisory role and 2) administration of the complaints process.

With respect to the advisory and educational role, the Ethics Commissioner provides advice to council members on behaviour that would be consistent with their ethical obligations under the Code of Conduct (for example, the Ethics Commissioner might advise council members on whether their outside activities and business relations are compatible with their obligations under the Code of Conduct) and provides orientation training or annual training, as necessary, on any aspects of ethical conduct.

The Ethics Commissioner's role in the complaints process differs from the advisory and educational role, as the Ethics Commissioner must remain neutral in processing any complaints. Neutrality in the complaints process not only safeguards the integrity of the office in the eyes of the public, but also protects the procedural rights of both complainants and council members against whom a complaint is filed. Therefore, in this aspect of the role, the Ethics Commissioner is limited to conducting investigations of allegations (or utilizing informal resolution procedures), determining whether a breach of the Code of Conduct has occurred and, if so, providing a written report and recommendations to council concerning the proper remedy.

C. Concluding Comments

Despite any direct legislative requirement to do so, many local governments around BC are adopting council Codes of Conduct. The City of Surrey has taken this a step further by creating an independent Office of the Ethics Commissioner to provide educational and advisory guidance to its council and to provide investigatory functions where necessary if a council member is alleged to have breached the council Code of Conduct.

While this is happening, it should be noted that the tri-partite Working Group of Responsible Conduct¹ continues its good work on providing additional resources to local governments and their councils when dealing with challenges around ethics and governance throughout BC. Whether the work of this group will eventually lead to legislative amendments requiring Codes of Conduct and enforcement schemes in BC is an open question. However, it is clear that in British Columbia we are lagging behind other Canadian jurisdictions in providing our local governments with legislative tools to address ethics and governance. Whether a made in BC solution will be forthcoming will be of interest to those working in this area.

¹ The Working Group on Responsible Conduct is a joint initiative of the Union of BC Municipalities (UBCM), the Ministry of Community Sport and Cultural Development (the Ministry) and the Local Government Management Association (LGMA). The staff-level Working Group was formed to undertake policy work in response to a 2016 resolution to UBCM that addressed the issue of questionable conduct by local government elected officials. Delegates referred the matter to UBCM Executive, with the direction that further policy work should be undertaken jointly with the Ministry and LGMA. At its November 2016 meeting, UBCM Executive approved a [Terms of Reference](#) for a joint Working Group.

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