An Ethical Approach to Democratic Government

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Agenda

- Introduction
  - Government Ethics and Public Trust
- Sources of Ethical Obligations
- Accountability frameworks for municipalities
  - Code of Conduct
  - What to regulate
  - Tools to enforce
  - Sanctions
- Other Issues
  - Ontario Legislation
  - Move to legislate in Manitoba

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Government Ethics and Public Trust

Introduction

Integrity

"Government ethics is not about *being* "good" or " a person of integrity".... In fact, conduct that is praiseworthy outside of government , such as helping a family member get a job or returning a favor one has been given, is considered wrong in a government context.
Government ethics is about *acting* responsibly and professionally, as a government official or employee, under certain circumstances and following certain rules and procedures. It is about preserving *institutional* rather than *personal* integrity. Government ethics decision-making should be just another professional routine."

Robert Weschler, Cityethics.org

- Three primary ethical duties required of public officials:
  1. Do not abuse the public's trust that you will put the public interest before your private interest;
  2. Act impartially when carrying out programs which are established by law; and
  3. Account to the public for your activities and decisions.

Public Trust

- "The proper operation of our city's government requires:
  - That its public officials and employees act as fiduciaries entrusted with and responsible for the property and resources of the community;
  - That they make governmental decisions and policies in the proper channels of the government structure , free of coercive or other improper influence;
  - That they use their position in the best interests of the city rather than for personal interests, whether their own interests or those of their family, friends or business associates; and
  - That they do not, directly or indirectly, in a positive or negative sense, treat anyone preferentially, that is, other than in a manner generally accorded to city residents.“

Robert Weschler, Cityethics.org

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- " When public servants make decisions that are not or do not appear to be impartial, this seriously undermines public confidence in government....
- While the vast majority of municipal officials are well-meaning, being well meaning is not enough . It is important that officials understand the conflicts they confront every day, appreciate their fiduciary obligations to city residents and recognize the importance of preventing conflicts from occurring, disclosing conflicts when they arise and withdrawing from any involvement in a matter where they have a conflict."

Robert Weschler, Cityethics.org

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Sources of Ethical Obligations

- *The Municipal Act*
- *The Municipal Council Conflict of Interest Act ("MCCIA")*
- *The Human Rights Code of Manitoba*
- *The Freedom of Information and Protection of Privacy Act*
- *The Criminal Code of Canada*
- *Codes of Conduct for City Boards or Commissions*
- Relevant municipal by-laws, policies, and protocols

Municipal Act

General duties of members

- 83(1) Each member of a council has the following duties:
  - (a) to consider the well-being and interests of the municipality as a whole and to bring to the council's attention anything that would promote the well-being or interests of the municipality;
  - (b) to participate generally in developing and evaluating the policies and programs of the municipality;
  - (c) to participate in meetings of the council and of council committees and other bodies to which the member is appointed by the council;
  - (d) to keep in confidence a matter that is discussed at a meeting closed to the public under subsection 152(3) and that the committee decides to keep confidential until the matter is discussed at a meeting of the council or of a committee conducted in public;
  - (d.1) to comply with the code of conduct for members of council;
  - (e) to perform any other duty or function imposed on the member by the council or this or any other Act.

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Municipal Act

Duties of the head of council

- 83(2) In addition to performing the duties of a member of a council, the head of council has a duty
  - (a) to preside when in attendance at a council meeting, except where the procedures by-law or this or any other Act otherwise provides;
  - (b) to provide leadership and direction to the council; and
  - (c) to perform any other duty or function assigned to a head of council by the council or by this or any other Act.

Member may discuss confidential matter with C.A.O.

- 84 Despite clause 83(1)(d), a member may discuss with the chief administrative officer or a designated officer a matter referred to in that clause before the matter is made public as provided in that clause.

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Oath of Office for Members of Council

Oath of office

- 101(1) A person elected as a member of a council must make and file with the chief administrative officer an oath of office in the form approved by the minister, and the person may not carry out a power, duty or function as a member of the council until the oath of office is filed.

Failure to comply

- 101(2) If an elected person does not, within 30 days after being elected, comply with subsection (1), the position to which the person was elected is deemed to be vacant and the person is disqualified from being nominated for, being elected to and from membership on the council until the next general election.
- "… I will faithfully in the office of _____ without fear, favour, or affection and will truly, faithfully and impartially, and to the best of my knowledge and ability execute the duties and responsibilities of that office."

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http://web2.gov.mb.ca/laws/statutes/ccsm/m255e.php

The Municipal Council Conflict of Interest Act

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The Municipal Council Conflict of Interest Act

- Covers:
  - What is a pecuniary interest
  - What to do when faced with a pecuniary conflict of interest
  - Filing an Annual statement of assets and interests, including gifts received
  - Insider information
  - Compensation for services (“Bribery”)
  - Use of influence
  - Consequences for violations of the Act

- The Municipal Council Conflict of Interest Act deals primarily with conflicts arising from financial (pecuniary interests)
- It requires all Members of Council to disclose matters where they have a direct or indirect financial interest
- Note: Pecuniary or financial interests include financial liabilities

What is a Pecuniary Interest

- Direct Pecuniary Interests and Liabilities of yourself or your dependant (spouse, partner or child who lives with you)
- Indirect Pecuniary Interests and Liabilities
  - Holding a beneficial interest in respect of 5% or more of the value of the issued capital stock of a corporation; or
  - Being the director or officer of a corporation which has a direct pecuniary interest in a matter; or
  - Being a partner of or employed by or a guarantor for, or a creditor of a person, corporation, partnership or organization with a pecuniary interest in a matter

Exceptions

- Example - Exception for indemnity or expenses
  - Councillors are presumed not to have a have a direct or indirect pecuniary interest in any matter involving the indemnity, expenses or remuneration payable to councillors.

- Example – Presumption of no pecuniary interest in certain transactions
  - Holding bonds or debentures of the municipality
  - Receiving reasonable compensation or expense money for services as a volunteer firefighter or driver of an emergency vehicle

- Pecuniary interest or Liability must be **significant**
  - Beyond that of an ordinary resident
  - Valued at $500 or more
- Member of Council presumed not to have an interest in an appointment to serve in his or her official capacity on any commission, board, or agency

Ask Yourself:

- Could I profit financially or could I be financially disadvantaged, directly or indirectly, by a decision made by council, committee or a body of council?

Examples of Financial Conflicts of Interest

- Your non-municipal employer is seeking a benefit from the municipality (contract, zoning, etc.)
- You see that a property acquired by the municipality through tax proceedings is coming up for sale. You are interested in the property and feel that you will likely be making an offer to purchase the property.

What to do when faced with a pecuniary conflict of interest

- Disclose the general nature of the interest
- Withdraw from the meeting without voting or participating in the discussion
- Refrain at all times from attempting to influence the matter

What Constitutes Influencing the Matter?

- Deliberate actions that the councillor knew or should have reasonably known could influence or would reasonably look like an attempt to influence.

Conflicts and Quorum

- Where a Member of Council withdraws from a meeting, quorum will be the majority of remaining councillors, as long as there are at least 2.
- If there are less than 2 councillors, the council must apply to The Municipal Board for an order authorizing council to discuss and vote on the matter.

Annual Statement of Assets and Interests

- Councillors are obliged to disclose assets including:
  - Any of their or their dependants' interest in land, excluding their principal residence;
  - Holdings in investment funds, excluding RRSPs; and
  - Gifts
- Gifts:
  - Councillors must disclose:
    - Nature of the gift and
    - Identity of the donor
  - Of every gift given to the Councillor **or any of his dependants**
  - Excluding gifts from a family member
  - Excluding gifts worth less than $250, unless the total value of the gifts from the donor in the past year exceeded $250

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Insider Information

- No councillor shall use, for personal gain or the gain of any other person, information which is not available to the public and which the councillor acquires in the performance of his official powers, duties and functions.

Compensation for Services (Bribery)

- No councillor shall receive or agree to receive any compensation, directly or indirectly, for services rendered or to be rendered by the councillor
  - (a) to any person, corporation, partnership or organization in relation to any by-law, resolution, contract, proceeding, or other matter before the council or any committee, subcommittee or community committee thereof, before any subcommittee of a committee, or before any commission, board or agency on which a councillor serves in his official capacity as a councillor; or
  - (b) in order to influence or attempt to influence any other councillor.

Use of Influence

- No councillor shall, himself or through any other person, communicate with another councillor or with an officer or employee of the municipality for the purpose of influencing the municipality to enter into any contract or other transaction, or to confer any benefit, in which the councillor or any of his dependants has a direct or indirect pecuniary interest.

Violations of the Act

- Consequences:
  - Voidability of a contract or other transaction by the municipality
  - Disqualification of the councillor's seat on council
  - Possibility of the councillor making restitution
- Alleged violations must go through a court process.
- Only electors or the Clerk may bring applications that a Member of Council has breached the Act.
- Unknowing or inadvertent breaches will not disqualify the councillor from office

Other Accountability Measures

Building an Accountability Toolbox

- A Code of Conduct for Members of Council
- Enforcement mechanisms for the Code
- Someone to investigate breaches of the Code of Conduct
- Someone to give advice to Members of Council on how to follow the Code of Conduct

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Code of Conduct

- The Municipal Act s. 84.1
  - A council must establish a code of conduct that applies to members of council.
  - The code of conduct is to set guidelines that define the standards and values that the council expects members to meet in their dealings with each other, employees of the municipality and the public.
  - A council may censure a member if it determines that the member has breached the code of conduct.

Code of Conduct – What to Regulate

- Regulation of Conflicts of Interest, Confidential Information, Use of Influence, Acceptability of Gifts and Benefits in a broader scope than found in the MCCIA
- Regulation of use of Municipal Staff and Resources, including during elections
- Regulation of conduct towards staff, the public and each other

Conflict of Interest

- Encountering a conflict of interest is not generally a problem. What matters is that the conflict should be dealt with responsibly and transparently.
- In addition to conflicts under the MCCIA, a Code should regulate and clarify rules about:
  - Non-pecuniary interests
  - Apparent conflicts of interest

- “Intimacy, between sexual partners, family members, or close friends, naturally carries with it some measure of emotional attachment. That emotional attachment can, perhaps quite inadvertently, influence a decision-maker’s judgment. In the context of municipal government, where public money is being spent, citizens are entitled to expect clearheaded and fair-minded analysis of the public good.”

Justice Bellamy, Toronto Computer Leasing Inquiry

Use of Influence

- Use of influence for purposes other than your official duties in office
- Examples:
  - Using Municipality letterhead to write a personal reference letter for a former employee of yours, before you became a Councillor
  - Ticket fixing for yourself or others
  - Giving someone preferential treatment outside of standard municipal processes

Gifts and Benefits

- "Officials are merely part of the government, individuals sitting in government positions at the moment. They are doing, or supposed to be doing, nothing but their government work, and to be paid nothing but what the budget says they are paid. In other words, **officials do not personally act and should not personally benefit from what they are required to do as part of their public role**. They should not be given special treatment, that is, no tickets, invitations to play golf or go on a vacation, or the like, because they should do nothing special for anyone. **They should not be involved in reciprocity or feel gratitude to anyone in their role as an official**."

- Robert Wechsler

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- Any gift or benefit which might reasonably be seen to have been given to influence the Member in the exercise of a duty or function or his or her office should not be accepted.
- A Member's family member shouldn't accept gifts which give the same appearance.

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Examples

- Tickets to events like sports games
- A bottle of wine
- A free haircut
- Lunch paid for by a large local construction company

Disclosure of Gifts

- Gifts which are accepted by a Member should be disclosed to the public.
- Many municipalities have a ‘threshold’ for the value of gifts which must be disclosed (the threshold varies greatly, from anything more than a nominal gift to gifts of $500 or more)
- Remember, under the Municipal Council Conflict of Interest Act, gifts with a value of $250 or more must be disclosed unless they are from a family member

Regulation of Conduct Towards Staff, the Public and Each Other

- The Code of Conduct for the Members of Council of the City of Winnipeg provides:
  - 7. Conduct Concerning Staff
    - Members must not directly or indirectly, request, induce, encourage, aid, or permit City staff or their own staff to do something which, if done by the Member, would be a breach of this Code of Conduct.
    - Members must not compel City staff or their own staff to engage in partisan political activities or subject them to reprisal of any kind for refusing to engage in such activities.
    - Members must not use, or attempt to use, their authority for the purpose of intimidating, coercing, or influencing City staff or their own staff with the intent of interfering with such staff's duties.
    - Members must not maliciously or falsely impugn or injure the professional or ethical reputation or the prospects or practice of City staff or their own staff and must at all times show respect for staff's professional capacities.

Workplace Harassment

- The Code of Conduct for the Members of Council of the City of Winnipeg provides:
  - **8. Respectful Conduct**
    - All Members have a duty to treat members of the public, one another, City staff and their own staff with respect and without abuse, harassment, or intimidation.
    - **Harassment** includes:
      - any behaviour, whether a single incident or a course of conduct, that a reasonable person should have known would be unwelcome, and that is inappropriate, demeaning, humiliating, embarrassing, or otherwise offensive, including but not limited to:
        - verbal or written insults, abuse or threats;
        - racial or ethnic slurs, including racially derogatory nicknames;
        - leering or other offensive gestures;
        - bullying; or
        - patronizing or condescending behaviour; and
      - objectionable and unwelcome sexual solicitations or advances.
      - While Members may passionately debate issues and promote ideas, they must maintain proper decorum during meetings of: Council, Committees of Council, and boards, agencies or commissions on which they serve as part of their duties of office.

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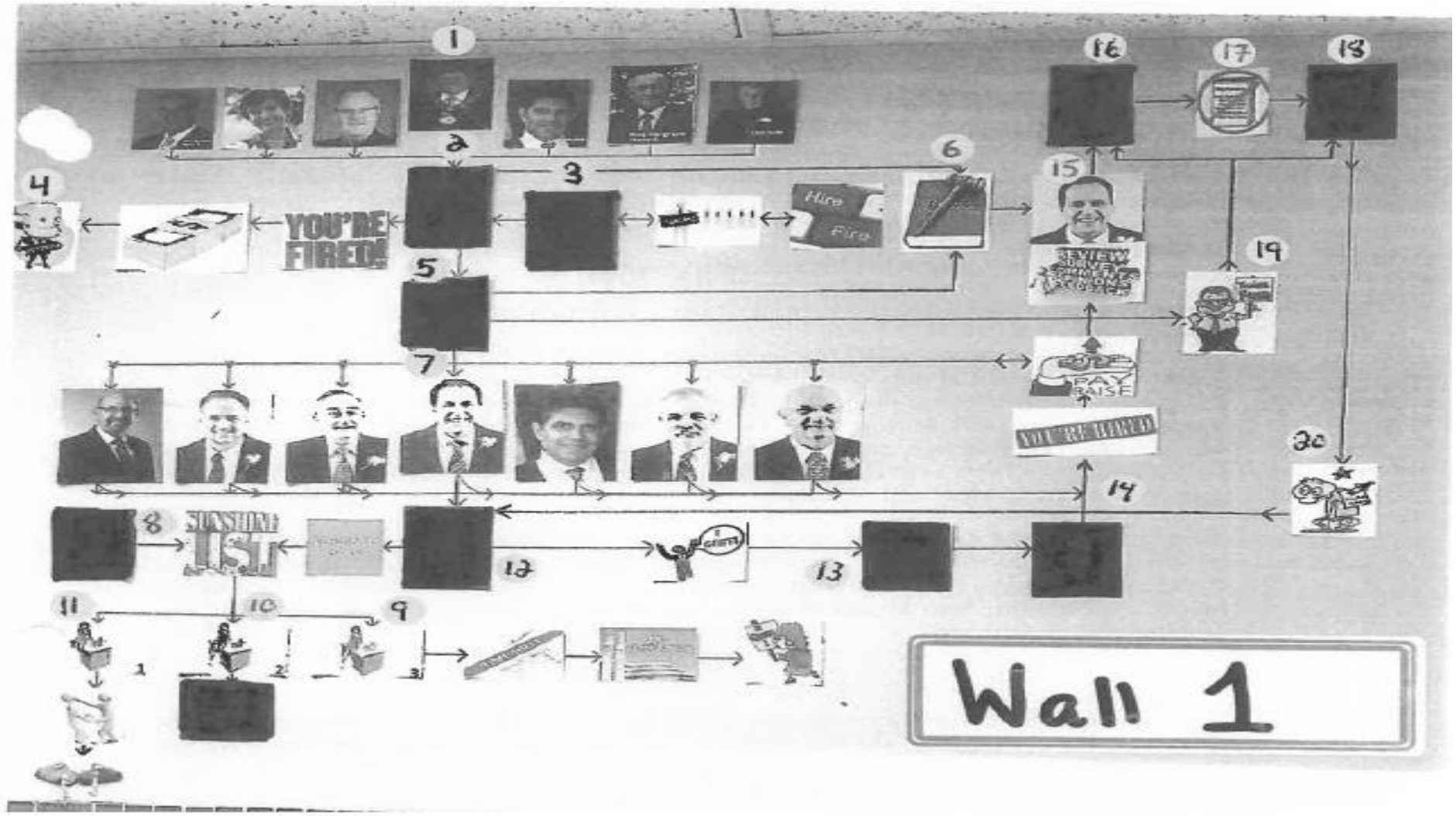
Recent Example of Workplace Harassment

Taken from the Office of the Integrity Commissioner of Whitchurch-Stouffville, Final Report, September 20, 2017



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Enforcement

- The creation of mechanisms to deal with complaints about illegal or unethical conduct is essential to assuring the public that the Code is working in a meaningful manner.

- Enforcement is where your accountability toolbox comes into play – having a mechanism for individuals to make complaints and an independent person to investigate those complaints is key

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Sanctions

- The Municipal Act s.84.1(3)
  - A council may **censure** a member if it determines that the member has breached the code of conduct.
- Other Sanctions?

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Legislative Changes

Ontario Legislation

Amendments to The Municipal Act to Come into Force March 1, 2019

- Every Municipality must have an Integrity Commissioner or access to an Integrity Commissioner for advice and investigation of complaints.
- Many small municipalities have joined together in retaining an Integrity Commissioner

Ontario Legislation

Amendments to The Municipal Act to Come into Force March 1, 2019

Current

- **223.2(1) Code of conduct**
  Without limiting sections 9, 10 and 11, those sections authorize the municipality to establish codes of conduct for members of the council of the municipality and of local boards of the municipality.
- **223.2(2) No offence**
  A by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence.

To Come into Force March 1, 2019

- **223.2(1)** ***Code of conduct***
  A municipality shall establish codes of conduct for members of the council of the municipality and of its local boards.
- **223.2(2)** ***Same***
  Without limiting sections 9, 10 and 11, those sections authorize the municipality to establish codes of conduct.
- **223.2(3)** ***No offence or administrative penalty***
  A by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence or is required to pay an administrative penalty.
- **223.2(4)** ***Regulations***
  The Minister may make regulations prescribing one or more subject matters that a municipality is required to include in a code of conduct.

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Amendments to the Regulation of The Municipal Act of Ontario to Come into Force March 1, 2019

- Prescribed subject matters
  - **1.** For the purposes of section 223.2 of the Act, the following are the prescribed subject matters that a municipality is required to include in the codes of conduct for members of the council of the municipality and of its local boards:

    1. Gifts, benefits and hospitality.
    2. Respectful conduct, including conduct toward officers and employees of the municipality or the local board, as the case may be.
    3. Confidential information.
    4. Use of property of the municipality or of the local board, as the case may be.

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Manitoba

- Nothing currently relating to Integrity Commissioners at the municipal level
- Winnipeg has implemented an Integrity Commissioner and will be seeking legislation changes to support the role and to give Council the ability to impose more stringent sanctions for breaching the Code of Conduct
- Possibility of changes to the Municipal Act, City of Winnipeg Charter, Municipal Council Conflict of Interest Act.