

Councillor Conduct in Relation to the Toronto Local Appeal Body

Date: September 28, 2016
To: City Council
From: Valerie Jepson, Integrity Commissioner
Wards: All
Reference:

SUMMARY

At its March 31, 2016 meeting, City Council authorized City staff to take a number of steps to implement its decision to establish a Local Appeal Body known as the Toronto Local Appeal Body (the "TLAB"). City Council also requested that the Integrity Commissioner report on how members of Council ought to conduct themselves in relation to the TLAB. This report responds to City Council's request.

Members of Council have a role to play to enhance and build trust in the City's institutions such as the TLAB. In consideration of the unique features of the TLAB, I offer the following advice:

Interacting with the LAB Nominating Panel and the Appointment Process

1. Members of City Council and their staff should not request information from any person in the Office of the City Clerk with respect to the work of the LAB Nominating Panel.
2. Members of City Council and their staff should not have discussions with members of the LAB Nominating Panel while the Nominating Panel is constituted.
3. When provided with recommendations for nominees to the TLAB, City Council should either: adopt the recommendation(s); or, request that the Nominating Panel return with alternate recommendation(s). City Council should not substitute its own nominee(s) in place of the recommendations of the Nominating Panel.

Interacting with the TLAB

4. Members of City Council and their staff should not have any discussions with any member of the TLAB.

5. Members of City Council and their staff should not appear before or make representations of any kind to the TLAB in relation to a specific matter.

Representing the public and advancing the well-being of the City with respect to TLAB matters

6. Members of City Council may represent the public and advance the well-being of the City as it relates to matters that come before the TLAB by participating in decisions about whether the City should take positions for or against matters at the TLAB.

7. Members of Council and their staff may provide information to the community about matters coming before the TLAB and about the TLAB's policies, procedures and processes. When communicating about the TLAB members of Council should use care to enhance the public's awareness that the TLAB is independent from City Council and the City Planning Division.

RECOMMENDATIONS

The Integrity Commissioner recommends that:

1. City Council receive the report for information.

FINANCIAL IMPACT

This report has no financial implications.

DECISION HISTORY

At its March 31, 2016 meeting, City Council authorized City staff to take a number of steps to implement its decision to establish a Local Appeal Body. City Council also requested that the Integrity Commissioner report on how members of City Council should conduct themselves in relation to the Local Appeal Body, when established. The Local Appeal Body is now known as the Toronto Local Appeal Body. This report responds to City Council's request.

COMMENTS

Introduction

This report contains a brief overview of the concept of tribunal independence; describes how independence can be challenged; situates the Toronto Local Appeal Body (TLAB) in the context of other adjudicative boards in place in Toronto; and, sets out my advice.

Independence

The TLAB will have jurisdiction over matters that are, at present, within the jurisdiction of a provincially-appointed tribunal, the Ontario Municipal Board (OMB). Those appearing before the TLAB are entitled to the same degree of procedural fairness and Natural Justice that are afforded to parties at the OMB. A key component of Natural

Justice is that the TLAB will operate with an appropriate degree of independence from City Council and City administration.

The TLAB will be required to carry out its work in an independent manner and one that reflects its adjudicative and quasi-judicial nature. This obligation arises out of the common law (*2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 1996 CanLII 153 (SCC)) and, as will be discussed in more detail below, is also set down in the [Code of Conduct for Members of Adjudicative Boards](#), which states, "An adjudicative tribunal is required by the applicable laws to operate at arm's-length from and independently of Council" (Code of Conduct, Article XVI).

Challenges to Independence

Stated plainly, the duty to be independent arises from the requirement that the TLAB be **free from political interference in form and substance**. Achieving true independence can be challenged because City Council is responsible for creating the TLAB and appointing its members.

Tribunal independence can be challenged at the appointment stage when there is a risk of actual or perceived appointments based on political patronage instead of merit. Tribunal independence can be challenged in the context of particular cases when those with responsibility for appointing (or re-appointing members) attempt to intervene or exert undue influence in the disposition of a case (*Roncarelli v. Duplessis*, [1959] S.C.R. 121).

Bolstering tribunal independence is an issue faced by all orders of government. In response to concerns at the appointment stage, governments in recent years have placed a greater emphasis on recruiting and appointing members of tribunals on the basis of merit and on providing tribunal members with sufficient security of tenure (i.e. fixed terms).

In response to concerns about interference at the case stage, conventions or practices have developed in some jurisdictions to ensure that those with authority to appoint members do not appear before the same members they appointed. For instance, in Ontario it is recognized that:

Ontario parliamentary convention prohibits ministers from appearing as advocates or supporters of a decision to be made by a provincial agency, board or commission about a particular matter affecting an individual or organization. The convention has evolved to ensure that members of these bodies can carry out their duties free from influence or the appearance of influence by cabinet ministers. (Ontario Integrity Commissioner, Annual Report 2012-2013, at 9)

There is a similar understanding at the Federal level about the role that Cabinet Ministers play with respect to tribunals. The Conflict of Interest and Ethics Commissioner has provided the following advice with respect to administrative tribunals:

Ministers and parliamentary secretaries, as well as their staff (ministerial, Hill or constituency), may not under any circumstances attempt to intervene in the decision-making process of an administrative tribunal on behalf of any

constituent in any riding, or to expedite the processing of an application. Such contact may be considered an attempt to influence a decision, in breach of section 9 of the Act.

Section 9 states:

9. No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further another person's private interests.

Staff may, however, assist constituents by explaining processes to them or providing them with relevant contact information for them to direct their inquiries elsewhere. (Guideline: Serving your constituents when you are a minister or a parliamentary secretary, October 2013)

There appears to be consensus across the country that when it comes to direct advocacy, cabinet ministers should have a "very circumscribed role." (See Underhill, Mark G. and Voell, Matthew R., Tribunal Independence and the Role of Elected Officials: a Critical Examination of the Pat Pimm Conflict of Interest Opinion, Continuing Legal Education Society of British Columbia, Administrative Law Conference 2014).

The guidance that applies to cabinet members is reflective of the high degree of influence that cabinet members have over the administration of tribunals, including the authority to create, dissolve, set budgets for and appoint members to tribunals.

Independence of Adjudicative Boards within the City of Toronto Framework

In addition to the common law requirement that the TLAB carry out its work in an independent manner, the TLAB must also adhere to the *Statutory Powers Procedure Act* (a provincial statute that provides minimum procedural rights to parties). Further, its members are bound by the *Municipal Conflict of Interest Act* and the *Code of Conduct for Members of Adjudicative Boards*.

The *Code of Conduct for Members of Adjudicative Boards* contains special provisions to reflect the unique nature of adjudicative tribunals. For instance, Article VI stipulates that communication between the board and parties can only occur in writing to the board's administration or in an open oral hearing. Article XIII, the article that deals with lobbying, clarifies that members of adjudicative boards cannot be lobbied. Article XVI articulates the obligation of the board to be independent and describes the duty of the board Chair to supervise the conduct of individual members that could threaten independence.

The Code contains express language about interactions between members of Council and adjudicative board members. Article XVI states,

Members of adjudicative boards operating at arm's-length from Council should refrain from seeking advice on their roles and responsibilities from Council members. In clarifying their roles and responsibilities, members should seek

advice from appropriate legal staff or expert staff where such advisors are not otherwise involved in the case.

The TLAB within the existing framework

City Council's early decisions and the Council debate about the implementation of the TLAB demonstrate Council's understanding of the need for the TLAB to operate free from political interference, independently, and at arms-length from City Council and City staff. Specifically, City Council has agreed to guiding principles that include the following:

Appointment - Members will be appointed using a **fair and impartial recruitment process** where the most qualified candidates are appointed by City Council.

Qualifications - Members will have adjudicative experience, familiarity with land use planning and planning law, ability to make sound, balanced decisions and be free of conflicts of interest.

Oversight and Accountability - The LAB will operate as an **independent decision-making body free from influence by outside parties**, and subject to appropriate legislation and policies.

[Emphasis added.]

City Council has made fundamental operational decisions consistent with the above guiding principles. Although the TLAB is similar to the City's existing adjudicative boards, there are several features that make it unique: some the result of operational choices by Council consistent with the guiding principles; and some required by statute. The TLAB:

- will be the **only City adjudicative board** in Toronto that hears **appeals** of decisions made by another adjudicative board, the Committee of Adjustment, that is supported by the City of Toronto Planning Division and consists of members appointed by City Council;
- is statutorily required to have members that are not: employees of the City; councillors; or, members of committees hearing planning matters (*City of Toronto Act, 2006*, section 115(4)), **which signals that its members must have independence from the City's land use planning decisions**;
- has final decision-making authority, reviewable only by a Court on an error of law;
- will be located outside of City Hall, supported by Court Services and able to access independent legal advice; and,
- has a unique appointment process designed to encourage merit-based appointments and limit political influence.

In addition, City Council will have the authority to direct the City Solicitor to appear before the TLAB to appeal decisions of the Committee of Adjustment.

In my view, the features of the TLAB required by the *City of Toronto Act, 2006*, and the governance structure designed by Council make it sufficiently unique to distinguish it from the City's other existing adjudicative boards and give rise to a heightened concern about its independence. The Supreme Court of Canada has stated, "the degree of independence required of a particular government decision-maker or tribunal is determined by its enabling statute" (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 20).

Guidance

My advice is rooted in the statements of principle and preamble to the [Code of Conduct for Members of Council](#). The Code of Conduct tells us that members of Council are duty bound to protect and maintain the City of Toronto's reputation and integrity. This means that members of Council should be mindful of how their actions impact on the reputation and integrity of the City as a whole and recognize that this includes the manner in which they interact with the TLAB. It also means that members of Council should be mindful of the duties imposed on members of the TLAB to carry out their work in an independent manner and ensure that their own actions do not interfere with a TLAB member's Code of Conduct obligations.

The advice that follows is intended to illuminate in specific terms how members of Council can enhance the ability of the TLAB to carry out its work independently.

Interacting with the LAB Nominating Panel and the Appointment Process

1. Members of Council and their staff should not request information from any person in the Office of the City Clerk with respect to the work of the LAB Nominating Panel.
2. Members of City Council and their staff should not have discussions with members of the LAB Nominating Panel while the Nominating Panel is constituted.
3. When provided with recommendations for nominees to the TLAB, City Council should either: adopt the recommendation(s); or, request that the Nominating Panel return with alternate recommendation(s). City Council should not substitute its own nominee(s) in place of the recommendations of the Nominating Panel.

City Council has maintained its ultimate authority to appoint members to the TLAB. However, it has also established a neutral, free-from-political-influence nominating panel. Members of Council have had input on the criteria used to select members of the TLAB. If members of Council choose to override the careful work of the nominating panel, one could reasonably question whether the selection process was neutral and free from political influence. By adhering to this advice, Council will reinforce that it wishes to establish a merit-based appointment process that is free from political interference.

Interacting with the TLAB

4. Members of City Council and their staff should not have any discussions with any member of the TLAB.

This advice is a reminder to members of Council about the obligations that TLAB members have in the *Code of Conduct for Members of Adjudicative Boards*, which stipulates:

Members of adjudicative boards operating at arm's-length from Council should **refrain from seeking advice on their roles and responsibilities from Council members**. In clarifying their roles and responsibilities, members should seek advice from appropriate legal staff or expert staff where such advisors are not otherwise involved in the case.

[Emphasis added.]

In order to assist TLAB members to adhere to the above obligation, members of Council should not initiate discussions with TLAB members.

5. Members of City Council and their staff should not appear before or make representations of any kind to the TLAB in relation to a specific matter.

This guidance is consistent with guidance in place for federal and provincial elected officials who have responsibility for establishing, and appointing members to, adjudicative boards. In consideration of the unique features of the TLAB set out above and, in particular, that City Council can direct the City Solicitor to appear at the TLAB, councillors should refrain from making any form of direct representation to the TLAB.

Should a member of Council believe that it is in the public interest to advance a particular position at the TLAB, the member will be able to bring a motion to City Council to direct the City Solicitor's attendance at the TLAB. Because Council has authority to direct the City Solicitor to appear before the TLAB and advocate a City position, community interest concerns can be articulated through Council motions and directions to staff.

Representing the public and advancing the well-being of the City with respect to TLAB matters

6. Members of City Council may represent the public and advance the well-being of the City as it relates to matters that come before the TLAB by participating in decisions about whether the City should take positions for or against matters at the TLAB.

7. Members of Council and their staff may provide information to the community about matters coming before the TLAB and about the TLAB's policies, procedures and processes. When communicating about the TLAB members of Council should use care to enhance the public's awareness that the TLAB is independent from City Council and the City Planning Division.

Application of this advice to other Adjudicative Boards

In 2010, former Integrity Commissioner Janet Leiper provided City Council with general advice applicable to all of the City's existing adjudicative boards, <http://www.toronto.ca/legdocs/mmis/2010/ex/bgrd/backgroundfile-30880.pdf>. The essence of the advice was that members of Council should limit their direct advocacy before the City's adjudicative boards but could do so in certain circumstances in a limited manner.

As it relates to the City's existing adjudicative tribunals, the 2010 advice remains sound; however, it does not (it could not have) take into account the unique features of the TLAB. For reasons set out above, it is my view that the TLAB calls for greater caution.

Having said that, an observer of the Council debate leading up to the creation of the TLAB could conclude that City Council has a deeper appreciation for the importance of independence of its adjudicative tribunals. Accordingly, City Council may also wish to consider whether it wishes to introduce any of the operational choices it has made with respect to the TLAB to the City's existing adjudicative boards. In my view, the appointment process developed for the TLAB could be of benefit in the context of the City's other adjudicative boards.

For my part, I intend to review the 2010 advice in consideration of the specific mandates of the existing adjudicative tribunals to determine whether refinements are required to address the specific legislative contexts in place for each of the City's adjudicative boards.

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SIGNATURE

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