

Submission Respecting the City of Hamilton's Proposed Draft By-Law to establish the Office of the Integrity Commissioner

by

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The rise of integrity commissioners as part of a broader integrity movement in Canadian government and administration has arisen only recently in the municipal sphere in Ontario. The *Municipal Act, 2001* as amended in 2006, contains provisions which allow municipalities to create various ethics regimes - among them an Integrity Commissioner system. Hamilton is availing itself of this opportunity by proposing an Integrity Commissioner for the City. This is a welcome development and represents an important step in the governance of this great Canadian city and in the development of municipal ethics law.

While a clearly important development there are some parts of the proposed draft bylaw which bear scrutiny and consideration. As well it is respectfully suggested that in some places there should be either amendment or transformation.

Among the areas commented upon in this submission are: the role of the proposed Commissioner, the importance of independence of the commissioner; confidentiality and freedom of information; and complaint handling. Because of time constraints, this brief commentary will not contain many references but if the committee reviewing this matter or Council wish I will provide more information

The Role of the Commissioner

a. General

The *Municipal Act* outlines a commissioner model which is typical of provincial integrity and conflict of interest commissioners in Canada. Broadly speaking that model includes a commissioner who oversees various matters of conduct to members of the legislative entity which appoints him or her, who provides advice to those members individually, and who provides education to members, to organizational staff and to the public as a whole. To carry out his or her mandate the Commissioner is usually empowered with strong powers of investigation and inquiry. Finally, in Canada, unlike the United States, the typical model makes the Commissioner a kind of specialty ombudsman¹ – that is s/he does not make decisions concerning sanctions against members who s/he believes are in violation of whatever code s/he supervises. Rather, typically, the Commissioner

¹ See G. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (Aurora: Canada Law Book, 2007), Ch. 2

investigates, inquires and then reports an opinion as well as his or her recommendations concerning sanctions if any misconduct was found.

The *Municipal Act* anticipates this kind of role. It is anticipated that the Commissioner would report to Council which would then impose a sanction if it accepted the Commissioner's opinion. Subsection 223.5 (5) states in part:

*(5) The **municipality may impose** either of the following penalties on a member of council or a local board **if the Commissioner reports** to the municipality that, **in his or her opinion**, the member has contravened the code of conduct.*(my emphasis)

Typically in Canada, this kind of Commissioner is a gatherer of facts, an opinion maker, a reporter – not an adjudicator, not an official who exercises a statutory power of decision.

b. The Proposed Hamilton Model

Hamilton's draft by-law does not follow the typical Canadian Commissioner model because it purports to delegate the power of sanction to the Commissioner. This is common in the United States where many ethics commissions are not specialty ombudsmen but rather are forms of administrative tribunals. There is one example in Canada. The federal Ethics and Conflict of Interest Commissioner has this power in certain instances². It is however uncommon in Canada³.

Irrespective of whether or not the delegation power in the *Municipal Act* is sufficient to allow for the creation of such a power for Hamilton's Commissioner⁴, the City of Hamilton should carefully consider the purpose and ramifications of this position before adopting it.

i. Pros and Cons of an Adjudicative Model

The adjudicative model has the potential to ensure that breaches of the Code are dealt with effectively and in a timely fashion. It also has the potential to depoliticize the sanction process by taking it away from Council and putting it in the hands of an expert.

The down side of this is that it does delegate away an important Council responsibility. Council has to act in a quasi-judicial capacity in other circumstances and it may be argued that a mature order of government, a form

² See *Conflict of Interest Act* embedded in the *Federal Accountability Act* SC 2006, c.9

³ It is worth noting that the giving of direct order or sanction power to an Integrity Commissioner was expressly rejected by Madame Justice Bellamy in her report on the Toronto Computer Leasing Inquiry. See Recommendation 48.

⁴ Proposed By-Law, s.21(1).

of legislature, ought to be able to and, philosophically, simply ought to police itself. The legislatures of all the provinces reserve the right to do this and, in the federal regime, the Commissioner does not police Parliamentarians in this way but rather focuses on Cabinet and senior public servants.

The adjudicative model also should attract appeal rights and these are not built into either the *Municipal Act* or the proposed bylaw. There also should be a clear hearing process which will allow the impugned member to know the case and to respond to it.

Having the Commissioner fulfill the role of advisor, investigator and adjudicator also carries with it the potential for institutional bias in the process. This is partially mitigated by allowing members to rely on Commissioner advice and hence 'escaping' sanction⁵. However there is a risk of bias at the adjudicative stage – the Commissioner investigates and builds the case and then judges it!

ii. Pros and Cons of a Specialty Ombudsman Model

The investigative and reporting model does not carry the same problems although clearly people under investigation clearly are entitled to fair process in some sense.

As well the absence of order or sanction power for the Commissioner puts responsibility on the Council. It treats Council as a mature order of government. It forces councilors to be involved in genuine peer review and to fair minded in their dealing with each other.

Having said this though, were Hamilton to revert to the common model it would be well advised to adopt a rule that says that whenever the Commissioner does report and suggests sanctions Council must either accept or reject the recommendations. This is the case in the provincial legislatures. Moreover the Toronto experience suggests that councils may sometimes choose to do nothing, that is just receive the reports. This is problematic and may bring the integrity system into disrepute.

In sum, Council should be very clear on its power to delegate the sanction power but as important it should realize the implications of both models. This is not to say that an adjudicative/sanction model is wrong but it has implications. Council should be absolutely certain that it wants to go down this road.

⁵ Proposed By-Law, s.26

Independence

a. General

To be effective an ethics officer must be independent and be seen to be independent. In administrative practice it is well understood that to achieve genuine independence there must be suitable conditions. Typically the literature deals with issues such as security of tenure, suitable salary, immunity from prosecution, protection from interference and challenge, positive indemnification and the like.

The *Municipal Act* unfortunately provides no guidance. Indeed all the statute says in reference to independence is that the Commissioner “is responsible for performing in an independent manner the functions assigned by the municipality.” This is simply ludicrous because it puts on the Commissioner a problem which should be assigned to those who create the position. There must be safeguards for the position. The only thing approaching a safeguard in the *Municipal Act* is that the Commissioner may not be compelled to give testimony in a civil proceeding⁶.

b. The Hamilton Proposal

The proposed by-law does not directly deal with this issue. This is left wide open by the by-law. The term is not fixed⁷. Salary is not fixed and indeed remuneration may be handled on a fee for service basis⁸. There is no reference at all to indemnification or insurance although the Commissioner may be hired as an employee⁹. There really is no structural protection for the independence of the Commissioner, and, with respect, there should be.

i. Term of Office

The term of office while in the beginning as the office gets established may be short term, ultimately should be for a term of office longer than the term of Council, that is, in the order of five years. This will help ensure that the Commissioner is not beholden to the Council which appoints him or her.

ii. Salary

Salary while not ultimately critical is reflective of the stature of the Commissioner. This should be fixed at level of very senior staff in the civic service at least.

⁶ *Municipal Act*, s. 223.7

⁷ Proposed by-law, s.2

⁸ *Ibid.*, ss. 3(b) and 4

⁹ *Ibid.*, s. 3 (a)

iii. Indemnification

Indemnification should be included in the bylaw and any contract for the Commissioner. The Commissioner should not be in a position where s/he may be sued for good faith action without some indemnification by the City of Hamilton.

iv. Insurance

Insurance generally should be provided. One senses that it will be very difficult for a Commissioner to actually get liability insurance. This may give the City pause and hence I should seriously consider making the Commissioner an employee with all of the protections that entails.

Confidentiality

a. General

Confidentiality is critical to the advice giving and investigative functions of this kind of office. This is one area where the *Municipal Act* provides protection. The Commissioner is required to maintain secrecy with respect to matters that come to his or her attention in the course of his or her duties¹⁰. Moreover the confidentiality section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*¹¹.

b. The Proposed By-law

It is unclear why s.11 of the proposed By-law refers to complaints being made available under the *Municipal Freedom of Information and Protection of Privacy Act*. Council may make a complaint presumably but then this would be public anyway presumably. This may speak to revamping the complaint process so nothing is routed through the Clerk's office. The Integrity Commissioner should be given a clear intake function and it should fall to no one else. This would help ensure confidentiality in the process.

Complaints

a. General

The ability to complain is an important part of accountability. Complaint processes should be made as simple as possible bearing in mind that in ethics cases complaints and allegations within them may have serious ramifications.

¹⁰ *Municipal Act*, s. 223.5(1)

¹¹ *Ibid.*, s. 223.5(3)

b. The Proposed By-law

i. General

The by-law should clearly differentiate between complaint intake and initial evaluation and the investigative and inquiry processes. Complaint intake should include evaluation of whether or not a complaint is frivolous or vexatious.

ii. Fees

The by-law requires a \$100 fee upon filing of a complaint¹². This is troublesome because it may deter meritorious complaints and because this kind of complaint is so important to the good governance of the City. As well the collecting of fees may compromise the confidentiality of the Commissioner's process.

It is suggested that the fee section be discarded. If this is not done then minimally there should be a fee waiver section which would allow the Commissioner to work with a complaint from someone who simply cannot afford the fee.

Conclusion

This brief submission has outlined some issues and ideas which hopefully will be of some interest and some use to the Council as it deliberates on this by-law and on the establishment of an Integrity Commissioner system.

Respectfully submitted by G.J. Levine on May 8, 2008

¹² Proposed by-law, s.13