

Memo to: Sherri Walsh  
Integrity Commissioner  
City of Winnipeg

From: Greg Levine  
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and Ethics Law Consultant

Date: August 24, 2017

**Re: Conflicts of Interest, Councillors and the Integrity Commissioner –  
Ostensible Conflicts and the Work of the Commissioner**

***Summary Statement:***

In the process leading up to the appointment of Winnipeg's first Integrity Commissioner four councillors declared conflicts of interest because of two main reasons – the Commissioner had contributed to the campaign of one of the councillors in two elections and the Commissioner's firm had provided legal services to the other three – two of them once and the third three times. The Commissioner had indicated she would not investigate complaints concerning the councillor to whose campaign she had contributed and would instead defer to a substitute Commissioner. The Commissioner had not contributed to the campaign of the Councillor while she was Commissioner nor had the Commissioner position even been established at the time of her contributions. The Commissioner's firm has never had an ongoing relationship such as a standing retainer with any of the council members. That the council members think highly of that firm is commendable but is not a ground to conclude that there is now or indeed ever was an ongoing relationship.

What follows is a brief exploration of whether or not any of the situations described above give rise to a genuine conflict of interest or an apparent conflict of interest, objectively understood. The ultimate answer though is that there is no conflict in either situation and that no reasonably well informed person could reasonably see these situations as giving rise to a conflict. It is understood that the council members acted on the basis of an abundance of caution but to accept that these situations constitute a conflict would create new law and would bind council in a wide array of situations which could render it inoperable. That a council member purchased a service at one time or even a few times from someone's firm who now happens to be working on behalf of council cannot, in the absence of an ongoing relationship, meaningfully give rise to an interest which could be seen to raise a conflict. As to the contribution to the campaign, in order to establish an interest, there must be some nexus between the contribution and some result sought by the contributor which the council member had or has agreed to provide. Nothing like this happened in this case.

In sum, there are no interests here to which conflict rules attach. The Commissioner should not be bound by an agreement not to investigate complaints against the council

member to whose campaign she had contributed in the past. The declarations of conflicts as described above ought not to be a bar to the Commissioner investigating any of the council members who so declared because their declarations were in error. Under these circumstances the council members ought not to be permitted to opt out of Code investigations by the Commissioner.

### ***Issues and Opinions***

#### **A. Questions re Integrity Commissioner (IC) Having Donated to a Political Campaign Prior to becoming IC?**

1. Conflict of Interest – a. Is it a real conflict of interest for a sitting IC to have contributed to a political campaign of a candidate who became a member of council before the IC became and even before the Integrity Commissioner position was itself created?

No. In the absence of any evidence of a quid pro quo or an arrangement whereby the council member would vote in a certain way in exchange for the contribution, merely having contributed to a campaign of a member of council did not create an interest sufficient to constitute a problematic relationship between the council member and the IC. Theoretically inasmuch as decisions made by the member may impact the position and work of the Integrity Commissioner one might argue that a potential conflict may arise but the circumstances of the contribution are critical as noted above. The mere exercise of a generally accepted democratic practice by a now sitting Integrity Commissioner in the circumstances of this case cannot be seen to create an interest or therefore a conflict of interest.

b. Is it an apparent conflict of interest?

No. It cannot reasonably be argued that a reasonably well informed person could reasonably believe that this situation gives rise to a conflict of interest given the circumstances of the contribution.

c. Does the timing of contributions, that is, if the contribution was given to a campaign prior to the campaign which led to the current election of the member of council matter?

Not retrospectively but hence forward were the IC to contribute to any campaign while holding the office of IC it would be problematic because it would raise serious questions of impartiality.

d. Does the amount of the donation matter?

Not philosophically but practically the election finances law at play in Winnipeg treats \$250 as a cut off for what might be termed significant contributions. Still, as courts have said there is no magical number which makes contributions raise a conflict but rather circumstances around it do.

2. Effects of having donated on the ability of the IC to carry out his or her duties – Should an IC be prohibited from investigating a member of council to whom s/he made a campaign donation prior to being appointed commissioner and/or from providing advice to such a member?

No. Again unless it can be shown that there was some exchange and that the contribution was not the exercise of a generally accepted democratic practice, the IC ought not to be restricted from fulfilling his/her duties as IC and ought to be allowed to proceed as she deems appropriate in complaint investigation and advice giving.

3. a. Does a conflict of interest arise for the member of council whose campaign received a donation such that the member cannot be involved in matters affecting the IC – e.g. appointment, voting on investigative reports?

No. The same argument as in 1.a above applies.

b. Does an ostensible conflict of interest as outlined in A.3.a allow a member to opt out of being investigated by an IC and, related to that, would a substitute or acting IC need to be appointed for complaints respecting that member?

No. The member cannot opt out and there is no need for a substitute for the commissioner.

## **B. Questions respecting “Potential Business Association Conflict”**

1. Conflict of Interest - a. Is there a real conflict of interest for the Integrity Commissioner if her firm had a business relationship with members of council or has had members of council as clients in the past?

Having received a service (and paid for it) in the past does not constitute a conflict of interest for the Commissioner or her firm going forward.

b. Do the relationships in B.1.a above constitute an apparent conflict of interest?

No. Again a reasonably well informed person could not reasonably argue that an appearance of conflict exists for the IC because the firm of the Commissioner provided services in the past - once for a few councillors and for a few times for one councillor. Had there been a continuing retainer the perception might legitimately be different.

c. Does how distant in the past a relationship (business or client based) was matter in determining whether or not there is any potential conflict?

Not really unless for some reason the solicitor client relationship extended into the current term of the Commissioner which it does not.

d. Does the amount of business or fee paid matter?

No, unless the amount of business signals that there is a continuing relationship which in this case there is not.

2. Effects of having had a business or client relationship on carrying out his or her duties – Should an IC be prohibited from investigating a member of council with whom s/he or her firm had a business or client relationship and/or from providing advice to such a member?

No.

3. a. Does a conflict of interest arise for the member of council who has had a business relationship with or has been a client of the IC or her law firm?

If the relationship is in the past it is not a problem, if it continues it is a problem.

b. Does an ostensible conflict of interest as outlined in B. 3.a allow a member to opt out of being investigated by an IC and, related to that, would a substitute or acting IC need to be appointed for complaints respecting that member?

No council member gets to pick and choose in this way. The IC is not prohibited from investigating and the members cannot opt out. There is no need for a substitute IC.

***Discussion:***

On February 22, 2017 Council accepted an Executive Policy Committee recommendation that Sherri Walsh of the firm Hill Sokalski Walsh Olson LLP be retained as Integrity Commissioner for the City of Winnipeg for a two year renewable term<sup>1</sup>. At the time Council accepted the recommendation four Councillors disclosed potential conflicts of interest – one disclosed a “potential pecuniary interest”<sup>2</sup> and each of the others disclosed a “potential business association interest”<sup>3</sup>.

In the appointment process prior to Council’s adoption of the recommendation to retain Ms Walsh she had acknowledged that she had contributed to the campaign of John Orlikow<sup>4</sup>. She also agreed to a process whereby she would not investigate conduct matters related to Councillor Orlikow and would arrange for a substitute Commissioner to do so<sup>5</sup>.

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<sup>1</sup> City of Winnipeg, Council, Minutes, Feb. 22, 2017, Minute 191

<sup>2</sup> Ibid., 187

<sup>3</sup> Ibid., 188 to 190

<sup>4</sup> The contributor details form held by the City indicates that Ms. Walsh contributed \$100 and \$50 to the Orlikow campaigns in 2010 and 2015 respectively.

<sup>5</sup> S.Walsh, Letter to Destiny Watt Senior Committee Clerk, Nov. 28, 2016. Note that the letter was a request for further information about how Ms Walsh would deal with the fact that she had contributed to Mr. Orlikow’s campaign(s). Note also that it was Ms Walsh herself who disclosed to the Committee looking at an appointment of a Commissioner that she had contributed to a Councillor’s campaign.

Councillor Orlikow on becoming aware that Ms Walsh had contributed to his campaign became cautious about participating in the appointment of an Integrity Commissioner given that she was a candidate for the position. Other Councillors (Eadie, Schreyer, Wyatt) became wary as well because they had retained the firm in which she was a partner. Feeling these relationships might amount to conflicts of interest or at least “potential” conflicts the councillors disclosed as noted above.

Whether or not actual or apparent conflicts exist and what the consequences of their existence or not is the focus of this memorandum. What follows is a consideration of the nature and law of conflict of interest and related law. As well, an analysis of that law in the context of the situation outlined above is presented.

Various sources and types of materials inform the opinion presented here. Facts and perspectives were gathered through interviews with each of the Councillors involved, the Commissioner and the City Clerk. Review of relevant statutory and by-law material including pertinent sections of The City of Winnipeg Charter Act, Manitoba’s Municipal Act and the City’s Campaign Expenses and Contributions By-Law No.10/2010 was carried out. Examination of City Council Minutes and civic documents such as the Expression of Interest in the Integrity Commissioner appointment process was performed. Similarly study and appraisal of case law including court cases, judicial inquiry reports and commissioners’ reports from other provinces and places was conducted. In addition, consultation with a few current and former Ontario Integrity Commissioners on various legal concepts discussed below was undertaken and is much appreciated although responsibility for the views expressed herein is the author’s alone.

### Conflict of Interest and Members of Council

In its most general sense, 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 interest at the expense of public duty and the public interest<sup>6</sup>. Conflict of interest raises the potential to do wrong but is not necessarily a wrong in itself. Having interests, that is, matters or things in which one has rights, entitlements, or more broadly, a stake, is to be expected but acting on those interests when one has a clashing public duty is problematic and leads to biased decision making at best and corruption at worst. Hence the rules around conflicts of interests are about disclosing conflicting interests and absencing oneself from situations which could lead to inappropriate actions such as voting on a matter in which one had an interest.

Conflict of interest at the municipal level in Canada focuses on pecuniary or financial interests. Manitoba’s Municipal Council Conflict of Interest Act illustrates this as its rules

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<sup>6</sup> G. Levine *The Law of Government Ethics: Federal, Ontario and British Columbia* (2<sup>nd</sup> Ed.), 2015, p. 9

focus on direct and indirect pecuniary interests<sup>7</sup>. Direct pecuniary interests are defined as including compensation for representing people in a matter<sup>8</sup>. This is not intended to be exhaustive as many other pecuniary interests are important – for example, owning land which a council is being asked to re-zone. Indirect pecuniary interests include ownership of shares of a certain value, being a director in a corporate entity and the like. Whether direct or indirect there must be a substantive interest at play. That interest must be an objective interest, objectively established by evidence<sup>9</sup>. Interests and assets are to be disclosed in an annual disclosure statement<sup>10</sup>.

When a councillor has a pecuniary interest in a matter before council, s/he must disclose it, withdraw from the meeting, not vote on the matter and not attempt to influence decisions in respect of the matter<sup>11</sup>. Violation of this rule leads to disqualification from office and vacancy of the seat held by the offending council member<sup>12</sup>.

Apparent conflict of interest is not included in the Municipal Council Conflict of Interest Act. However a variant of it does occur in the Code of Conduct for members of Council established by Winnipeg City Council in 1994<sup>13</sup>. That Code indicates that members must disclose “any business or interest which may give rise to a reasonable apprehension of conflict”<sup>14</sup>.

This mirrors concerns broadly about reasonable apprehension of bias but focuses on conflicts. The apparent conflict of interest standard forms a basis to evaluate the concern about apprehension of conflict in the Code. While there are various statements of the standard in reports on conflicts matters<sup>15</sup>, it is prudent to follow a legislative standard which has been operative for some time. British Columbia’s Members’ Conflict of Interest Act indicates that a member has

*an apparent conflict of interest if there is a reasonable perception, which a reasonably well informed person could properly have, that the member's ability to exercise an official power or perform an official duty or function must have been affected by his or her private interest.*

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<sup>7</sup> C.C.S.M. c.M255, ss. 1, 4(1) (hereafter MCCIA). For a fuller discussion of the concepts and rules in the Act see the discussion in Manitoba Law Reform Commission *Modernizing the Municipal Council Conflict of Interest Act: Accountability, Enforcement and Oversight* (2016), pp. 10- 15.

<sup>8</sup> MCCIA, s.1

<sup>9</sup> That an interest must be found is axiomatic to a finding of conflict of interest. Classic cases such as *Moll v Fisher* 1979 CarswellOnt 575 (Ont.S.C.J.- Div Ct) deal with objective interests whether they be direct or indirect. For an early review of this and other cases in the Manitoba context see *Arbez v Johnson* 1998 CarswellMan 234 (Man.C.A.), paras, 19 to 24

<sup>10</sup> MCCIA., s. 9(1)

<sup>11</sup> *Ibid.*, s. 5(1)

<sup>12</sup> *Ibid.*, s. 18(1)

<sup>13</sup> City of Winnipeg, Council, Minutes, File GC-2, Sept. 19, 1994

<sup>14</sup> This statement is said to be a principle in one part of the report but then appears to be a rule in the actual Code. Its form is one of being a rule rather than a guiding principle.

<sup>15</sup> E.g. see Mississauga Judicial Inquiry *Updating the Ethical Infrastructure* (2011) Report, Phase 2, p.148

While this standard deals with perception and appearance and what apparently exists, the interest which is perceived to be or appears to be affected must be objective<sup>16</sup>. The interest must be real in itself. This standard cannot rest on whimsy or conspiracy theories.

In terms of enforcement, the current Code for Winnipeg's councillors is hortatory. There is no operative enforcement mechanism or set of sanctions. Notwithstanding this gap in the current ethics system, the Code's exhortations to members to act in certain ways is an important behavioural guide.

### Case Law and Case Reports

It is abundantly clear from case law and investigative reports across the country that where serious or significant interests have been disregarded, members of council have been disqualified. For example, in Manitoba, where a mayor owned land across from a proposed development and participated in discussion about that development which was later unanimously approved by council, he was disqualified and his disqualification was upheld on appeal because his participation could not be excused<sup>17</sup>. As a corollary where no evidence can be shown that a mayor or council member has attempted to influence a decision in which s/he is interested no disqualification will occur<sup>18</sup>.

It is also clear that there are many situations which constitute conflicts of interest and inappropriate actions have been taken but council members are not removed from office because of exemptions or exclusions based in conflicts legislation. Council members are found to have acted inadvertently, have had interests in common with other electors or residents of the municipality, have had interests which were remote or insignificant, have acted through a genuine or bona fide error in judgement or have acted in a variety of other enumerated instances<sup>19</sup>. There are examples in Manitoba case law. For example, where a reeve was unaware that he had a conflict in a matter before council, the decision to have his seat vacated was overturned<sup>20</sup>.

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<sup>16</sup> E.g. see Conflict of Interest Commissioner (B.C.) Inquiry Pursuant to s. 21 of the Members Conflict of Interest Act into Whether The Hon. Glen Clark has been in Breach of Any of the Sections of the Members Conflict of Interest Act in connection with the Granting or Approval-in-Principle of a Gaming Licence for the North Burnaby Inn/545738 BC Ltd (2001) pp. 37 to 47

<sup>17</sup> *Cornwallis (Municipality) v. Selent* 1998 CarswellMan 397 (Man.C.A.) – an appeal on the grounds of an inadvertent breach of the Act was soundly rejected as the member of council was fully cognizant of his interests in this case as well as his obligations under the conflict legislation. See also *Arbez v Johnson* 1998 CarswellMan 234 (Man.C.A.) in which a councillor voted on a land sale which involved land adjacent to his own property. The council member was removed from office.

<sup>18</sup> *Chan v. Katz* 2013 CarswellMan 521 (Man.C.A.)

<sup>19</sup> For an analysis conflict of interest generally and of such saving provisions in Ontario see G Rust'D'Eye and R O'Connor *Ontario's Municipal Conflict of Interest Act – A Handbook* (2017); for a general overview of conflict of interest in Canada see also I.M. Rogers, *The Law of Canadian Municipal Corporations* (updated to 2017), §34.42 generally and in particular see subsections (9) and (10). The pertinent MCCIA sections are 4(2),(3),(5) to (8) and 22.

<sup>20</sup> *Clanwilliam (Rural Municipality) v. Tiller* 2000 CarswellMan 293 (Man.C.A.). See also *Lovatt v Glenwood (Rural Municipality)* 2004 CarswellMan 40 (Man.C.A.) in which a councillor inadvertently participated in preliminary meetings which could be seen to involve his interests.

## Conflict and Contributions to an Election Campaign

As noted above a council member declared a conflict of interest in a meeting involving the appointment of the Integrity Commissioner because the Commissioner had contributed to his campaign in past elections. The Commissioner had contributed \$100 in 2010 and \$50 in 2015<sup>21</sup>. The Commissioner while a candidate for the IC position had indicated that she had made a contribution to the council member's campaign. He had been unaware of the contribution but on becoming aware of it declared a conflict when the appointment matter arose. As also noted above, the IC also offered not to investigate matters related to the councillor and to make provision for a substitute investigator should complaints arise about that council member.

There is a dearth of case law at the local level concerning contributions and conflicts at the local level. Extant case law from British Columbia is persuasive and leads to a conclusion that there is no real interest here which should give rise to a conflict. Even if one were to accept that there was some sort of interest, other case law from across Canada indicates that the contributions would be seen as a remote or insignificant.

Several British Columbia cases involve council members and contributions to their campaigns. A council member whose husband was a captain in a fire department and who received a substantial contribution (\$1000) from the firefighters' union was found not to be in a conflict when she participated in consideration of criteria and standards for selection of a new fire chief<sup>22</sup>. A council member received a campaign contribution of \$1000 from a developer and participated in a vote on lands being developed by that developer and the Court of Appeal overturned a decision by the council to oust that member because there was no evidence of a pecuniary interest in the impugned vote<sup>23</sup>. In a case involving a vote on a rezoning for a golf course, council members were found not to have had interests based on the fact that they had received campaign contributions from a development corporation<sup>24</sup>. These cases stand for the principle that there must be something beyond simply contributing to a campaign to establish a interest (direct or indirect) which would give rise to a conflict situation. The circumstances of the case and whether there is some quid pro quo in the contribution and subsequent decision of the council matter<sup>25</sup>.

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<sup>21</sup> City of Winnipeg, Contributor Details Statement

<sup>22</sup> *Fearnley v Sharp* 1999 CarswelBC 2525 (B.C.S.C.) – the court noted that her husband was neither interested in or eligible for the position of fire chief.

<sup>23</sup> *King v. Nanaimo (City)* 2001 CarswellBC 2203 (B.C.C.A.) – at paragraph 13 of the decision, the Court states that the mere fact of having contributed to a campaign is not sufficient to establish an indirect pecuniary interest in a matter.

<sup>24</sup> *Highlands Preservation Society v Highlands (District)* 2005 CarswellBC 3019 (B.C.S.C.) in which at paragraphs 56 and 57 the Court indicates that there must be something beyond contributions alone to establish indirect pecuniary interests.

<sup>25</sup> For a fuller discussion of these cases see M. Maniago "Trustee Election Contributions and Disqualifying Conflicts of Interest" (2014)



In light of the facts of the case the contributions to Council member Orlikow's campaign by Commissioner Walsh do not in themselves constitute an interest which gave rise to a conflict of interest in the appointment process and will not give rise to any future conflict. There is no nexus between the contribution which is involvement in a basic democratic process in which all electors can participate and any subsequent action by the council member. Unless a nexus can be shown then there is no issue.

Even if one accepted that some kind of interest was established by the mere fact of making a contribution it would almost certainly be seen to be insignificant and thus not giving rise to a situation where the disclosure and non-participation rules of the MCCIA would be applicable. In a B.C. case which involved contributions by developers ranging from \$500 to \$2000 the court found the interest of the mayor and council members to have had in the success of a rezoning application was remote or insignificant<sup>26</sup>.

Coupling the foregoing with the legitimate action of an individual exercising a common democratic practice<sup>27</sup> and the fact that Winnipeg's Campaign Expenses and Contributions By-law indicates that more information about an individual is to be reported where contributions are greater than \$250 (ie a level of significance)<sup>28</sup>, the circumstances here do not seem to warrant any conclusion that the interest, if it exists, is anything other than remote or insignificant.

In concluding this section on the conflict and contribution question, that fact that no interest exists or, if it does, it is remote and insignificant, there can be no reasonably held view that an apparent conflict of interests exists.

### Conflicts, Legal Services and the Commissioner's Firm

Three of the council members declared conflicts in the appointment matter because they had used the services of the firm in which the Commissioner is a partner. Two of the council members used the firm on one occasion and the other a couple of times. None of the files were worked on by the Commissioner. None of the work pertained to the appointment of the Commissioner.

The members declared a "potential" conflict on the basis of a "business association". Is using the services of a firm a "business association"? One could see that if the members somehow owned part of the law firm or had loaned it money or had some sort of business venture with the firm that one might speak of business association. Association minimally implies joining together to engage in a common activity or

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<sup>26</sup> *Guimond v Vancouver (City)* 1999 CarswellBC 2544 (B.C.S.C.) – see paragraphs 105 to 107. The Court simply follows the legislation which indicates that no conflict will be found where an interest is remote or insignificant. There is simply nothing to indicate that the contribution influenced the Council decision.

<sup>27</sup> Note that election law in Winnipeg allows for employees to participate in elections and only excludes statutory officers – e.g. see City of Winnipeg Charter Act S.M. 2002, c. 39, ss. 24 (3) and (3). The IC may become one if Manitoba law is changed but is not one as of this date. The election law thus far allows for a broad range of participation for employees and thus encourages democratic participation broadly.

<sup>28</sup> City of Winnipeg Campaign Expenses and Contributions By-Law No.10/2010, s. 11(2)

promote a common cause. Purchasing a service from someone or some entity surely does not constitute an association of any sort – if it did, council members would likely have to be constantly declaring conflicts every day, having purchased services of various sorts throughout the city. There is no part of the MCCIA which deals with this because, it is submitted, that to do so would be far too sweeping in its effects – conflicts would arise everywhere. To be sure, if one were indebted to a law firm or one used its services on ongoing basis such that the Commissioner would be advising members while her firm would be representing them there would be a problem. But this is not the case here. The council members received legal services from the Commissioner's firm a few times before she was appointed. The firm has indicated it will no longer take council members of the City or anyone else as clients in respect to matters related to the work of the Commissioner.

Although her firm did legal work for a few councillors, the Integrity Commissioner herself did not advise any member of council. She was most certainly not in the past, is not now and will not be in her time as Commissioner in any form of "business association" with members of Council.

It is truly difficult to see that, as the facts are understood at this time, there is any genuine business association which gives rise to an interest which can be seen to raise a conflict of interest. Similarly it is difficult to see that any objective interest exists such that an apparent conflict of interest arises.

#### Reasonable Apprehension of Bias

Could one argue that, while a conflict cannot be found in this situation, when the Commissioner does investigate and report on a complaint about one of the councillors, it may give rise to a reasonable apprehension of bias more generally? One might argue that the Commissioner has a tendency to think well of the council member to whom she contributed in the past and similarly to look favourably upon those who have used her firm albeit not receiving legal services from her directly.

The test for reasonable apprehension of bias is similar to the test for apparent conflict of interest. It is as follows:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal the test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude."<sup>29</sup>

Again, though, there must be some nexus between the decision maker and the matter to be decided. Having some relation to the problem is not sufficient to give rise to a reasonable apprehension. In the original case from which the test is derived the

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<sup>29</sup> *Committee for Justice and Liberty v. Canada (National Energy Board)* 1976 CarswellNat 434F (S.C.C.) para 40. In the municipal context it is important to note that the case

impugned member of the National Energy Board had had considerable involvement in analysis of pipelines and even in early stages of consideration of the pipeline involved and the majority of the Court ultimately found there was a reasonable apprehension of bias. The degree of involvement in that case was considerable, unlike anything articulated in this case in respect to the council members and there is nothing yet raised which would generally taint investigations or reports by the Commissioner. As well, it is important to note that, even if one could show a predisposition, that is not sufficient to give rise to a reasonable apprehension of bias<sup>30</sup>.

### Presumption of Impartiality

Adjudicators and commissioners have a past. They have been involved in the areas over which they have expertise. When they assume office as a board member or an integrity commissioner or a similar position it is reasonable and even necessary to presume that they will act with impartiality and neutrality and the courts make this presumption.

Presuming a bias because of a prior connection or even a prior retainer is unacceptable. There must be a nexus or a “factual matrix” which links the decision maker to the case before them to assert bias over against the presumption of impartiality<sup>31</sup>. The concept was developed in the context of judicial decision making but is also applicable to the administrative tribunal context<sup>32</sup> and, it is submitted, to analogous administrative and quasi-adjudicative contexts such as the work of an integrity commissioner.

There is simply no reason in the case at hand to rebut the presumption of impartiality or to assert some generic apprehension of bias. On the contrary the City satisfied itself through an Expression of Interest process which required the demonstration of impartiality that the Commissioner would act impartially<sup>33</sup>.

### Conclusion

Everyone who acted in this matter has acted out of an abundance of caution – the councillors disclosed “potential” conflicts and the Commissioner offered not to be involved in investigation of potential breaches of the Code of Conduct by one of the councillors. It is appropriate now however to move beyond this initial caution. There are no real conflicts in the situation outlined at the beginning of this memo and there are no reasonably held apparent conflicts either. Moreover trying to apply some generic notion of apprehension of bias is inappropriate as well. In the absence of

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<sup>30</sup> *Old St. Boniface Residents Assn v. Winnipeg (City)* 1990 CarswellMan. 235 (S.C.C.)

<sup>31</sup> *Terceira v LIUNA* 2014 CarswellOnt 16542 (Ont.C.A.)

<sup>32</sup> *Law Society (Manitoba) v. Ritchot* 2010 CarswellMan 35 (Man.C.A.) – note that para 38 follows the Federal Court analysis in *Zundel v Citron* 2000 CarswellNat 247 (F.C.A.), para. 36

<sup>33</sup> City of Winnipeg Expression of Interest 454-2016 – section 6 required that the candidate show she is not a partisan (s.6.1) and that the candidate provide relevant background information which shows impartiality where she could.

anything concrete which might show interests or biases, the Integrity Commissioner is entitled to a presumption of impartiality.

That presumption should be a starting point for the tenure of Winnipeg's new Commissioner. All council members are subject to the current Code and will be subject to the new Code and all should anticipate that, where appropriate, the Integrity Commissioner will investigate complaints about breaches of the Code and will do so for ALL council members. For council members to attempt to opt out of investigations on unproven and largely incorrect views of "potential" conflicts is unacceptable and anathema to a working ethics system. This should be strenuously resisted by Council as a whole. Further, while the Integrity Commissioner offered a solution to an alleged conflict situation where she would opt out of investigating, this option should not be taken in the instance described in this memo. While some sort of opt out may be a necessary option at some other time and in some other case, it is neither necessary nor desirable in the current conjuncture. Council should resist using this option in this case although should hold in reserve the process described by the Integrity Commissioner for a future more problematic case involving the current or a future commissioner.

In sum, it is time to move on. The City and the Commissioner are entering an exciting new phase of the development of Winnipeg's ethics system. They should do so unburdened by the disclosures of "potential" conflicts which this report has discussed.