



**City of Hamilton
HAMILTON LICENSING TRIBUNAL
AGENDA**

Established under the Municipal Act, 2001 and the Business Licensing By-law No. 07-170

Meeting #: 23-001
Date: April 17, 2023
Time: 9:30 a.m.
Location: Council Chambers
Hamilton City Hall
71 Main Street West

Loren Kolar, Committee Secretary (905) 546-2424 ext. 2604

1. **APPOINTMENT OF CHAIR AND VICE CHAIR**
2. **APPROVAL OF AGENDA**
(Added Items, if applicable, will be noted with *)
3. **CONFLICTS OF INTEREST**
4. **APPROVAL OF MINUTES OF PREVIOUS MEETING**
 - 4.1 November 7, 2022
5. **HEARINGS**
6. **OTHER BUSINESS**
 - 6.1 Hamilton Licensing Tribunal Orientation
7. **ADJOURNMENT**



CITY OF HAMILTON MINUTES

22-004

HAMILTON LICENSING TRIBUNAL

Monday, November 7, 2022

10:00 a.m.

**Council Chambers, 2nd Floor
City Hall**

Present: Councillor B. Clark (Chair)
Councillors, R. Powers and B. Johnson

**Absent with
Regrets:** Councillor T. Whitehead – Personal; Councillor N. Nann – City
Business

FOR INFORMATION:

The meeting was called to order.

(a) CHANGES TO THE AGENDA (Item 1)

The Secretary advised the Tribunal that there were no changes to the agenda.

(Johnson/Powers)

That the agenda for the November 7, 2022 meeting of the Hamilton Licensing Tribunal be approved, as presented.

CARRIED

(b) CONFLICTS OF INTEREST (Item 2)

There were none declared.

(c) APPROVAL OF MINUTES OF PREVIOUS MEETING (Item 3)

(i) August 30, 2022 (Item 3.1)

(Johnson/Powers)

That the Minutes of the August 30, 2022 meeting of the Hamilton Licensing Tribunal, be approved, as presented.

CARRIED

(d) HEARING (Item 4)

(i) APPEAL HEARING FOR NOTICE OF REFUSAL: to Rob Morris, Titan Recycling Inc. City of Hamilton Establishment Licence - Salvage Yard (1V) (Item 4.1)

City Prosecutor J. Rutherford addressed the Tribunal respecting an Appeal Hearing for Notice of Refusal to: Rob Morris, Titan Recycling Inc. City of Hamilton Establishment Licence - Salvage Yard (1V).

(Johnson/Powers)

That the Hamilton Licensing Tribunal recess at 10:22 a.m., until 10:45 a.m., to allow City Prosecutor and Counsel to discuss issues relating to the proposed joint submission.

CARRIED

(Powers/Johnson)

That as of November 7, 2022, Titan Recycling Inc. ("Titan") be issued a six-month conditional Salvage Yard Licence.

CARRIED

For further disposition of this matter, refer to the Decision document.

(e) ADJOURNMENT (Item 6)

(Johnson/Clark)

That the meeting of the Hamilton Licensing Tribunal be adjourned at 10:55 a.m.

CARRIED

Loren Kolar
Secretary
Hamilton Licensing Tribunal
City Clerk's Office

CITY OF HAMILTON LICENSING TRIBUNAL ORIENTATION

INTRODUCTION

The *Municipal Act, 2001* authorizes Council to pass by-laws respecting the licensing, regulation and governance of businesses operating in the City of Hamilton. Pursuant to this authority, Council has passed the Licensing By-law (By-law No. 07-170, as amended).

The Licensing By-law creates the position of the Director (the “**Director**”). The Director is authorized to issue and renew business licences on behalf of the City of Hamilton if the requirements of the Licensing By-law are met. These requirements include submitting a completed application form and paying the applicable licence fee. If the Director refuses to issue or renew a licence, the person or corporation who has applied for the licence may appeal the refusal to the Licensing Tribunal. In addition, the Director may recommend the suspension or revocation of a license or can impose conditions on the license of a business that is being operated in contravention of the Licensing By-law or other applicable law. (*Section 12, General Provisions, Licensing By-law*)

Section 3 of the Licensing By-law (Administration) establishes the Licensing Tribunal, which is to be composed of not fewer than 3 members of Council. The Licensing Tribunal conducts hearings concerning the Director’s refusal to issue or to renew a license, or a recommendation from the Director to suspend, revoke or impose conditions on the continuation, granting or renewal of a license.¹ When conducting a hearing, the members of the Licensing Tribunal act as an administrative tribunal. This is different from their usual role, most notably in that it requires that they perform a judicial rather than a legislative function. After holding a hearing, the Licensing Tribunal may decide that a business licence be granted or refused, suspended, revoked or reinstated, and may impose conditions. After the Licensing Tribunal has made a decision, notice of that decision is sent to the applicant or licensee by personal delivery or by registered mail to the last known address on file with the City. (*Subsection 18(1), General Provisions, Licensing By-law*)

¹ The Licensing Tribunal also conducts hearings concerning licences under the Lottery Licensing By-law. The comments in this document also apply to these proceedings, with the exception that the Licensing Tribunal makes recommendations to Council which makes the final decision.

PROCEDURES

The Licensing Tribunal follows the procedures set out in the Council Procedure By-law and the *Statutory Powers Procedure Act*. The Council Procedure By-law applies to Council and, with necessary modifications, to all Committees/Tribunals of Council. The *Statutory Powers Procedure Act* applies to all quasi-judicial bodies in Ontario that exercise a statutory power of decision such as a refusal, revocation or suspension of a business licence.

First Meeting

At its first meeting the Licensing Tribunal must appoint a Chair (Subsection 3(2), Administration,) and a Vice Chair. The Chair presides over the Licensing Tribunal and, in his or her absence, the Vice Chair does so.

BEFORE THE HEARING

1. Parties

The Director is one of the adversarial parties before the Licensing Tribunal. He or she may be represented by a designate from the City's Licensing & By-law Services Division, by a Municipal Prosecutor or by one of the City's Solicitors. The applicant/licensee is the other adversarial party before the Licensing Tribunal. He or she may self-represented or choose to be represented by a lawyer or a licensed paralegal providing representation in accordance with the Law Society Act and its regulations. (Section 10, *Statutory Powers Procedure Act*)

The Tribunal must be satisfied that the applicant/licensee, their representative, if any, and their witnesses, if any, understand the proceedings and can communicate their evidence to the Tribunal. If they are not satisfied, they should act to remedy this, for example by adjourning the proceedings and directing the Secretary to arrange for an interpreter when the proceedings resume. An interpreter request is not uncommon, and the applicant/licensee is asked prior to the hearing if an interpreter is required.

2. Notice

Subsection 6(1) of the *Statutory Powers Procedure Act* requires that the parties to a proceeding be given reasonable notice of the hearing. Generally, delivery of notice two weeks before the hearing will be reasonable, however, more time may be required for more complex matters.

Subsections 6(2) and (3) require that the notice include a reference to the statutory authority under which the hearing will be held and state the time, place and purpose of the hearing. The notice must also state that if a party does not appear, the Licensing Tribunal may proceed in his or her absence. The Licensing By-law requires that notice be delivered personally or sent by facsimile or regular or registered mail. If a notice fails to meet any of the requirements contained in the *Statutory Powers Procedure Act* or the Licensing By-law and the applicant/licensee does not appear, the Licensing Tribunal should order that a new notice be delivered. If the applicant/licensee does appear, the Licensing Tribunal should consider whether or not the failure to meet any requirement has prejudiced the applicant/licensee and, if it has, how to remedy the prejudice, for example, by acceding to a reasonable request for adjournment.

3. Allegations of Bad Character, Impropriety of Conduct and Incompetence

Matters before the Licensing Tribunal will often deal with allegations of bad character, impropriety of conduct and incompetence on the part of a Licensee. Section 8 of the *Statutory Powers Procedure Act* requires that a party be furnished with reasonable information of any such allegations prior to the hearing. The grounds listed on the notice of the hearing are intended to fulfil this requirement. If the Licensing Tribunal is convinced at a hearing that reasonable information has not been furnished, then it may adjourn the hearing to a future date and direct the Director to provide additional information to the applicant/licensee.

THE HEARING

In accordance with the Tribunal's Policy Respecting the Recording and Livestream Broadcasting of Hearings, all Tribunal hearings are broadcast via the City's website or YouTube platform. A party to the hearing may ask the Tribunal to order that a hearing not be broadcast. The Policy sets out the factors to be considered on such a request, including the disclosure of sensitive, proprietary or confidential materials or if there are ongoing criminal or regulatory hearings that could be prejudiced. A request not to livestream must be made to the Tribunal at the outset of the hearing.

1. Disclosure

The parties are required to exchange all documents upon which they intend to rely in advance of a hearing.

2. Conflict of Interest

As members of Council, the members of the Licensing Tribunal are subject to municipal conflict of interest requirements under the *Municipal Conflict of Interest Act*. The members also must be mindful of any actual or perceived conflict of interest or bias as members of the Licensing Tribunal.

Many administrative tribunals adopt Codes of Professional Conduct that state, amongst other things, that their members must strive at all times to make their decisions independently, fairly, objectively, impartially and without bias. The Hamilton Licensing Tribunal Code of Conduct adopted by the Licensing Tribunal is attached as Appendix A. A tribunal member's duty goes beyond ensuring that there is no actual bias; he or she must conduct himself or herself in a manner that will not give rise to an appearance of unfairness, partiality or bias. Each member presiding over a matter must decide whether they have a conflict of interest or whether their past or present activities, associations, or interests may rise an apprehension of bias.

The test applied by the courts has been "*would an informed person, viewing the matter realistically and practically... conclude that it is more likely or not that the decision-maker, whether consciously or unconsciously, would not decide fairly.*"

If a Licensing Tribunal member feels that he or she should not be hearing a particular matter, the member may inform the Licensing Tribunal that he or she will not participate, giving a general or specific reason why not.

An alternative, particularly when the conflict of interest is less obvious, is for the Licensing Tribunal member to explain his or her concern to the parties, hear what their comments are and then make his or her decision. For example, a councillor who was approached by a licensee at a public event the weekend before that licensee's hearing explained he could not speak to the licensee about the hearing. The councillor then disclosed the conversation at the outset of the hearing. The hearing went forward with the councillor continuing to sit. The matter went to judicial review, but there was never any question raised about the councillor having a conflict of interest.

The courts have applied a different test for disqualifying bias for councillors sitting as members of an administrative tribunal who have previously commented, in their role as councillors, on a matter before them. The test is whether or not the councillor has an open mind such that they are capable of giving a fair hearing and a fairly decided decision. Members of the Licensing Tribunal should refrain from publicly commenting on a matter while it is before them. The courts have further found that it is the duty of a councillor to disqualify themselves if they are not open to being able to be persuaded in favour of the appellant.

3. Maintenance of Order at Hearings

Subsection 9(2) of the *Statutory Powers Procedure Act* gives the Licensing Tribunal authority to maintain order at a hearing. If any person disobeys or fails to comply with an order made by the Licensing Tribunal, the Chair or another member may call upon a peace officer to enforce this order.

4. Adjournments

Adjournments may be requested by either party before, at the start of or during a hearing. The Licensing Tribunal may grant or refuse an adjournment request in light of a number of considerations including: the legitimate inability of the applicant/licensee, their counsel or a witness to attend; or, the necessity for time to prepare before a hearing or to respond to new and unexpected issues or allegations arising in the course of a hearing. The courts are reluctant to interfere with an administrative tribunal's exercise of discretion to refuse an adjournment, but will do so if they find that the refusal was unreasonable.

If both parties are in agreement that an appeal be adjourned, then the Licensing Tribunal should normally exercise its discretion to do so.

5. Open and Closed Proceedings / Deliberations

All proceedings are to be open to the public and the parties unless one of the exceptions under the *Statutory Powers Procedure Act* or the *Municipal Act, 2001* applies.

Section 9(1) of the *Statutory Powers Procedure Act* provides that a hearing may be closed to the public if (a) a matter involving public security may be disclosed or (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public.

- If the Licensing Tribunal believes that such matters could be disclosed, it should ask the each of the parties if this is the case.
- If one or both answer “yes”, the Licensing Tribunal should further ask the party or parties answering “yes”, to explain, without providing details, what harm would result from disclosure.
- If the Licensing Tribunal is convinced that the harm outweighs the desirability of the hearing being open to the public, the hearing may be closed to the public.
- When a hearing is closed to the public under the *Statutory Powers Procedure Act*, only the parties and their representatives remain in attendance.

The Licensing Tribunal may also rely on the authority under section 239 of the *Municipal Act, 2001* in closing proceedings to the public or the public and the parties - for example, if it wishes to receive advice subject to solicitor-client privilege

In addition, records containing personal information, such as medical reports, before the Licensing Tribunal may be protected from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act*.

The Licensing Tribunal may retire to deliberate in the absence of the public and the parties.² Deliberations occur when the Licensing Tribunal considers the evidence and submissions in arriving at a decision. The decision itself is announced in the presence of the public and the parties. The authority for retiring to deliberate is found at common law and is referred to as the “confidentiality principle” or the “rule on deliberative secrecy”. As explained in one court decision: “*The purpose of the rule on deliberative secrecy is to preserve adjudicative independence so that adjudication occurs with circumspection, reflection and in freedom.*” On occasion, deliberations may be subject to judicial review, however, “secrecy remains the rule” and is lifted only “when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.”

² *Ontario Ombudsman v. Hamilton (City)*, 2018 ONCA 502.

6. Agreed Upon Statements of Fact and Joint Submissions

From time to time the parties may submit an agreed upon statement of facts which means that they will inform the Licensing Tribunal that some or all of the facts relevant to the hearing are not in dispute. Agreed upon facts need not be proven and should be accepted by the Licensing Tribunal.

The parties may go beyond an agreed upon statement of facts to make a joint submission, asking for a final decision that is acceptable to both. The Licensing Tribunal must give serious consideration to a joint submission and must not reject it without good cause. While the Licensing Tribunal may reject all or part of a joint submission, if this is being considered, both parties must be given the opportunity to make representations before the final decision is made.

7. Witnesses

The parties may call witnesses. (Section 10.1, *Statutory Powers Procedure Act*) At the request of a party or on its own initiative, the Licensing Tribunal may require the attendance of a witness to give evidence by issuing a summons. The summons is signed by the Chair, or, if he or she is unavailable, another member of the Licensing Tribunal, who should be satisfied that the summoned evidence is relevant to the subject matter of the proceeding and admissible at the hearing. The summons must be served personally. The witness is entitled to a fee, to be paid by the party who requested the summons be issued, or by the Licensing Tribunal if it summoned the witness. (Section 12, *Statutory Powers Procedure Act*)

A witness who is summoned to testify before the Licensing Tribunal cannot refuse to answer a proper and relevant question. Section 13 of the *Canadian Charter of Rights and Freedoms* and Section 14 of the *Statutory Powers Procedure Act* both protect witnesses from the consequences of being compelled to evidence against himself or herself, providing that any such evidence may not be used against the witness in any other proceeding, except in a prosecution for perjury.

If a person has been summoned and fails to attend, the Licensing Tribunal may decide to proceed without the witness or adjourn the hearing to provide a further opportunity for the witness to attend.³

³ There is authority under Section 12 of the *Statutory Powers Procedure Act*, exercised only rarely, pursuant to which the Licensing Tribunal or the parties may apply to a judge of the Superior Court of Justice for a warrant requiring that the person be apprehended anywhere in Ontario and brought before the Licensing Tribunal. There is further authority under Section 13 of the *Statutory Powers Procedure Act*, also rarely exercised, pursuant to which the Divisional Court, on a motion of the Licensing Tribunal or the parties, may find the person in contempt.

Occasionally, a third party (ie., someone other than the Director or the Licensee) may express an interest in being heard at a hearing. Such individuals should first be referred to the Director for him/her to decide whether or not to call the individual as a witness. The Director would have to be satisfied that the testimony of the individual would be relevant to his/her case and that sufficient disclosure would be provided to the applicant/licensee (a will-say, preferably in advance to avoid the risk, at least, of delaying the hearing to give the applicant/licensee time to review the will-say).

It is open to the Tribunal to call its own witnesses. Like the Director, the Tribunal would have to be satisfied as to the relevance of the witness's testimony (and would have to consider the submissions of the parties in this regard) and that sufficient disclosure would be provided. For example, the Tribunal could ask to hear from a Health Inspector because it wanted more technical information than had been provided by the parties' witnesses. However, under most circumstances the Tribunal should be hearing only the relevant evidence of the parties' witnesses.

A summary of common objections to the testimony of witnesses is attached as Appendix B. As indicated in the summary, generally objections are made by one of the parties about the manner in which the other party is presenting their case. Only in rare instances, for example if the Tribunal felt the fairness of the hearing were in jeopardy, should the Tribunal make an objection.

8. Evidence

Administrative tribunals are given much more latitude than courts with respect to the evidence which they may receive and consider in arriving at a decision. Accordingly, the Licensing Tribunal may receive hearsay evidence and unsworn evidence. (Section 15, *Statutory Powers Procedure Act*) The fundamental test with respect to the admissibility of evidence is that it must be relevant to the issues which are involved in the hearing. When the Licensing Tribunal is confronted with an objection to the admissibility of a relevant piece of evidence, the evidence should generally be admitted. The Licensing Tribunal should consider the objection with respect to the weight it gives to that particular evidence when arriving at its decision. The general principle is that indirect evidence (hearsay) should be given less weight than direct evidence such as a witness's own observations, unless there is a valid reason to conclude that the direct evidence is not credible.

The Licensing Tribunal may make a finding of credibility in considering the testimony of a witness – giving little or no weight to testimony it does not find credible. In doing so, the members should consider the following factors: ability to recall (e.g. poor or good); appearance and demeanour (e.g. responsive or evasive); ability to observe (e.g. focussed or distracted); motivation (e.g. anything to gain or lose); probability (e.g. reasonable or unreasonable); external consistency (e.g. with other testimony, documentary evidence, etc.); internal consistency (e.g. answers during examination in chief vs. answers during cross examination). An administrative tribunal may find it very difficult to indicate in a decision that a witness was not credible. It is advisable for the administrative tribunal to fully and clearly explain itself, for example, by stating X's testimony was not relied upon because he or she admitted to a direct financial interest in the outcome of the hearing and because his or her answers were influenced by this.

Although unaffirmed evidence is admissible, testimony to the Licensing Tribunal should be given under affirmation. Each witness should be affirmed immediately before giving his or her testimony. The unrepresented applicant/licensee is acting in two capacities, both as his or her own representative and as a witness. When he or she is acting as a witness – for example, telling the Licensing Tribunal what did or did not happen – he or she should be under affirmation. The affirmation may be administered by any member of the Licensing Tribunal or delegated to be administered by the Secretary.

The parties may examine their own witnesses and cross-examine other witnesses. (Section 10.1, *Statutory Powers Procedure Act*) The Licensing Tribunal may also question witnesses. Generally, this should be done after the parties have finished questioning the witness. The Chair or Vice Chair presiding should allow each party to ask any further questions of the witness they may have arising from questions posed by a member of the Licensing Tribunal.

In tribunal proceedings, the standard of proof is the balance of probabilities. This requires that the decision-maker be more convinced of the existence of a fact than not. The onus of meeting this standard of proof in a show cause hearing is on the applicant/licensee. For any other hearing, onus is on the Director.

9. Note-taking

Courts and tribunals have recognized that judges and members of administrative tribunals "must have total freedom in terms of recording what [they] find noteworthy during the ongoing hearing". Adjudicative independence requires that adjudicators be able to reach their decisions without interference and this includes making notes which are not subsequently subject to scrutiny. (It also includes the ability to retire

and reach decisions in the absence of the public and the parties.) As a result, courts and tribunals have refused to order the disclosure of notes when asked to do so. An exception may be made if there is "sufficient evidentiary basis for alleging a breach of the rules of natural justice and procedural fairness, such as improper consultations". It is because of this possible exception that notes should be kept for a reasonable period of time, enough time for whatever appeal right there may be to be exercised.

A problem arises when protection of privacy and freedom of information legislation applies. In the case of the *Municipal Freedom of Information and Protection of Privacy Act*, there is no exception made for the notes of members sitting on a municipal tribunal such as the Hamilton Licensing Tribunal. As a consequence, if the City, in this case Clerks, has custody or control of the notes, these notes may be subject to disclosure under MFIPPA. (In addition, the notes arguably would be subject to the Records Retention By-law and could only be destroyed in accordance with that By-law.) Consequently, to ensure that adjudicative independence can be maintained, it is recommended that if a Tribunal member chooses to take notes, they:

- do so for the purposes of helping (i) them to remember and understand what occurred during a hearing; and (ii) to make a decision in respect of a hearing;
- keep their notes confidential, not allowing any other person to see, read or use the notes for any purpose;
- maintain responsibility for the care and safe-keeping of their notes;
- store their notes at their office or home; and
- destroy their notes after some reasonable period of time such as one year.

10. Decisions

The Licensing Tribunal makes two types of decisions: procedural decisions such as adjourning a hearing to another date; and final decisions concerning a refusal to issue or to renew, a recommendation to suspend or revoke a business licence or the imposition of conditions. The procedural decision or final decision of the majority of the members of the Licensing Tribunal is the procedural decision or final decision of the Licensing Tribunal, allowing for a vote with dissent. However, it is recommended that the Licensing Tribunal operate on a consensual basis.

As indicated above, the Licensing Tribunal may retire to deliberate in the absence of the public and the parties. At the conclusion of its deliberations, the Licensing Tribunal gives its procedural decision or final

decision on the matter in the presence of the parties and the public. The Licensing Tribunal is not required to give reasons for a procedural decision that is made with the consent of the parties. Otherwise, the Licensing Tribunal must give oral and/or written reasons for a procedural decision. The Licensing Tribunal may make a decision orally in the presence of the parties and the public and must make its decision in writing to the Appellant and/or their Legal Counsel or agent within a reasonable time subsequent to the completion of the proceedings. (Subsection 18(1), Issuance of Licenses) The decision should summarize the facts and arguments presented by the parties, the findings of fact made by the Licensing Tribunal and include its decision with reasons. The jurisprudence indicates that reasons must be more than “merely a recital of allegations followed by bald conclusions.” The Tribunal’s decision must explain the relationship between the evidence and its conclusions, including why evidence was rejected or given little credibility.

Licensing Tribunal members should refrain from expressing opinions on the merits or strength of a case until after all of the evidence and submissions have been heard and they are giving their decision. They must avoid commenting to the media or to other members of the public about a case, particularly while it is before the Tribunal. The Federal Court, in considering the conduct of Mr. Justice John Gomery when conducting the inquiry into the federal sponsorship scandal, found that “the media is not an appropriate forum in which a decision-maker is to become engaged while presiding over a commission of inquiry, a trial, or any other type of hearing or proceeding.”

There is an old legal maxim that he or she who hears must decide. In other words, the Licensing Tribunal cannot abdicate its responsibility to make a decision, or delegate this responsibility to staff. Accordingly, every member of the Licensing Tribunal must be present throughout the presentation of all evidence and submissions during a hearing unless the parties agree that the absence of a member during part of the hearing will not invalidate the Licensing Tribunal’s decision. Nevertheless, the Licensing Tribunal must ensure that at all times it has a quorum.

In addition to being present, Tribunal members must take care to listen to the presentation of all evidence and submissions during the hearing. They must avoid talking amongst themselves. All cell phones, tablets or other communication devices should be turned off. This applies not only to Tribunal members but to all those in attendance at a hearing. A recess should be requested for any matter requiring a Tribunal member’s immediate attention such as responding to a phone call in respect of a family emergency.

Prepared by S. Chisholm, Solicitor, City of Hamilton
April 2023

One of the City's Solicitors is available to provide legal and procedural advice to the Licensing Tribunal during a hearing and deliberations. This practice is permissible provided that the Solicitor does not take part in making findings of fact or in making the ultimate decision on the matter.

It is important that the Licensing Tribunal provides clear instructions to the Secretary about the decisions it makes, however, it is acceptable for the Secretary to prepare a draft decision for approval by the Licensing Tribunal.

The decisions of the Licensing Tribunal may be subject to judicial review by Superior/Divisional Court.

APPENDIX A

HAMILTON LICENSING TRIBUNAL CODE OF CONDUCT

The Hamilton Licensing Tribunal has adopted this Code of Conduct for the guidance of its Members and to assist Members in performing their duties in a manner which will promote the public's confidence in the Hamilton Licensing Tribunal's fairness, integrity and independence.

It is recognized that the Code of Conduct cannot anticipate all possible fact situations in which Members may be called upon to exercise judgement as to the appropriate standard of conduct. When this occurs, Members are to ensure that their decisions maintain the Hamilton Licensing Tribunal's fairness, integrity and independence.

Failure to comply with this Code of Conduct may result in the Hamilton Licensing Tribunal:

- (1) requesting an apology from the Member; and/or
- (2) removing the Member from the Hamilton Licensing Tribunal for a portion or all of their term.

1. FAIRNESS

Members shall act in an impartial, lawful and just manner following all relevant legislation including by-laws and common-law.

2. GOOD CONDUCT

Members shall act with honesty and integrity including:

- acting in a manner that contributes to the public's confidence in the Hamilton Licensing Tribunal;
- not expressing personal views on matters before the Hamilton Licensing Tribunal where this is likely to impair public confidence in the Hamilton Licensing Tribunal; and
- not engaging in conduct that may, or may appear to, constitute an abuse of their position as a Member.

3. PROCEEDINGS

Members shall maintain proper control over proceedings to ensure that parties have an equal and fair opportunity to present their case including:

- making all reasonable efforts to conduct proceedings in a manner that is understandable by all parties, whether or not they are represented; and
- demonstrating respect for everyone who is involved in a proceeding.

4. COLLEGIALITY

Members shall respect and co-operate with other Members and Hamilton Licensing Tribunal staff.

5. BIAS AND CONFLICT OF INTEREST

Members shall avoid situations of real or apparent bias or conflict of interest:

- approaching every proceeding and every issue in a proceeding with an open mind and avoiding doing or saying anything to cause any person to think otherwise;

- basing decisions on an application of the relevant law to the evidence presented in each case and not on irrelevant considerations;
- not participating in a proceeding when the Member (or another person with whom the Member has close personal or professional relationship) has a financial or other private interest that may be affected by the proceeding or its outcome;
- not accepting a gift or benefit that may appear as being offered because they are a Member; and
- not appearing before the Hamilton Licensing Tribunal on their own behalf or as a representative on behalf of any party; and

6. CONFIDENTIAL INFORMATION

Members shall not disclose to any member of the public any confidential information acquired by virtue of their position.

Confidential information includes Hamilton Licensing Tribunal discussion when it reserves its decision.

7. MEDIA COMMUNICATION

Except for the Chair, who may accurately communicate a decision, Members shall not comment to the media.

Should the media contact a Member directly, the Member shall refer the media to the Chair or, in the absence of the Chair, to the Vice Chair.

APPENDIX B

Common Objections to Testimony⁴

Generally objections are made by one of the parties about the manner in which the other party is presenting their case. In most instances, an objection will be made when a party is questioning a witness, although it may also occur during submissions: for example, if a party misstates evidence while summing up. When an objection is made, the tribunal is called upon to do one of three things:

- (a) Allow the party to continue, “overruling” the objection. For example, deciding, contrary to an objection, that a question is relevant and may be asked.
- (b) Allow the party to continue, but instructing them to adjust. For example, instructing a questioner to rephrase a leading question.
- (c) Require the party to stop, agreeing with the objection. For example, agreeing with an objection that a question has been asked and answered and instructing the questioner to move on.

The tribunal may, if it is of the opinion that something objectionable is happening, act as set out in (b) and (c) above on its own initiative. Care should be taken not to pre-empt either of the parties and to ensure that members of the tribunal are in agreement.

1. Irrelevant Question

- A tribunal may admit evidence of dubious relevance.
- A tribunal may ask for an explanation of the relevance of a question and, if the explanation is plausible, should allow the question. If the explanation is not plausible, the tribunal may ask the questioner to move on.

2. Privilege

- Under s. 15(2) of the *Statutory Powers Procedure Act* a tribunal cannot hear privileged evidence, e.g. evidence subject to solicitor/client, litigation, husband/wife, priest/penitent or settlement discussion privilege.

3. Hearsay

- Hearsay is evidence of an unsworn, out-of-court statement offered as proof of the truth of its contents.
- A tribunal usually admits hearsay evidence, deciding what weight to give it once it has been admitted. However, hearsay evidence of no value should not be admitted.
- In respect of both the admission and weighing of hearsay evidence, a tribunal considers reliability, reasonableness, unfairness and prejudice.

⁴ Adapted from a paper entitled “Evidence in Administrative Proceedings: A Practical Primer” by Andrew K. Lokan given at the Canadian Institute’s “Fundamentals of Administrative Law & Practice”, April 28 & 29, 2008.

4. Leading the Witness in Chief

- A leading question is any question whose contents suggest the answer. It is only an issue in respect of contentious matter: for example, suggesting in a question to a municipal law enforcement officer that they are employed by the City of Hamilton is not an issue.
- A tribunal should try to ensure that the evidence is contained in the witness's answers, not in the questions being asked.
- Leading can normally be cured by a tribunal asking the questioner to rephrase the question so that the answer is not contained in the question.
- Leading is permissible in cross-examination.

5. Calls for Opinion from an Unqualified Witness

- Expert opinions may only be given by expert witnesses. All witnesses may give opinions on matters of general knowledge: for example, any witness may estimate height or distance.
- In making its ruling, a tribunal needs to consider whether or not the opinion being asked for is an expert opinion.

6. Calls for Legal Argument

- While testimony, particularly testimony from an enforcement officer, may explain how a law was applied, it should not include legal argument. Submissions, however, may and often do contain legal argument, for example an explanation of how a law is to be interpreted.
- A tribunal may ask for parties to address a legal argument in their submissions rather than during the testimony of witnesses.

7. Question Misstating Previous Evidence

- Questioners should accurately recount previous evidence when asking subsequent questions.
- A tribunal should ensure that previous evidence is accurately recounted, either in questions or in submissions.

8. Repetitious Questions

- This may occur either in chief, to bolster the case by having the witness repeat the "right" answer, or in cross, to badger the witness.
- A tribunal may require that a questioner asking repetitious questions move on.

9. Interrupting the Witness

- While a tribunal should not allow a questioner to interrupt a witness's answer, the questioner is entitled to have their question answered.