

Conflict of Interest

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Conflict of Interest

- Municipal Councils frequently consider matters that could affect the financial interests of council members
- The Conflict of Interest Act* sets forth the obligations of councillors in these circumstances, and the consequences for failing to meet those obligations
- Requirements not always clear from reading the Act alone, so case law is used to assist in interpreting or understanding requirements

Conflict of Interest Act

Purpose of Legislation:

- Legal maxim that anyone who acts on behalf of another (a fiduciary) must act exclusively for the benefit of that other person
- Courts have held that “no man can be a judge in his own cause”
- Conflict of Interest Act* applies only to direct or indirect pecuniary interest, not other factors that may result in bias

Conflict of Interest Act

- The Act does not care whether or not the member is actually biased. Bias is conclusively presumed where a direct or indirect pecuniary interest exists.
- Member can't vote if conflict exists, no matter what the motive for voting may be.
- Can't remove a conflict by voting against your own interest

When does Duty to Disclose Arise

Applies to “Member”

- Member defined in Act to include council member or a member of a committee or board of council
- If member has interest in a matter before a committee of council of which he or she is not a member, can make representations if committee does not report to council as a whole. If reports to council, then member will be in conflict.

Direct or Indirect Pecuniary Interest

- Courts have defined “direct pecuniary interest” as “something that could monetarily affect real or personal property of a member, giving either an advantage or disadvantage to the member in terms of financial impact”: *Edmonton v. Purves*

- Examples of Direct Pecuniary Interest
 - Contract with member
 - Rezoning of member’s land
 - Expropriation of member’s land

Direct or Indirect Pecuniary Interest

Indirect Interest

- An indirect interest will arise where the decision before council does not affect the member's property directly, but results in an indirect impact on the member's property
- Section 1(3)(a) deems the member to have an indirect interest in any matter involving a corporation in which he or she is shareholder, officer, or director
 - Excludes holders of a single share
 - Excludes nominal directors
 - Doesn't matter if actual pecuniary interest exists

Indirect Pecuniary Interest

- Examples of indirect interest
 - Member's corporation being a subcontractor on a tender being considered by council (*Minto v. Darcey*)
 - Rezoning property over which the member holds a mortgage, as the value of the security may be increased or reduced as a result (*Lukas v. Pedden*)
 - Payment for architectural plans prepared by member more likely if rezoning proceeds (*McCaghren and Lindsay*)
 - Increasing value of land mortgaged with the member's land (thereby increasing security and reducing member's own financial exposure) (*Toney*)
 - Member being a member of curling club purchasing curling rink from municipality

Deemed Interests

- Family Members**

- Section 2(3) of the Act deems the interest of a dependant or relative of a member residing with the member in the same home to be the interest of the member, if the interest is known to the member.
- Act does not deem the member to have the same interests as family members who do not live with the member.

Deemed Interests

Family Interests (Continued)

- *In Moll and Fisher*, two members of a school board voted on a collective agreement. Their spouses were teachers, but in a different union, governed by a different collective agreement. The Court ruled that the conclusion of the first contract would result in a similar raise in their spouses' union contracts. As a result, the members had an interest in the first contract since their spouses would likely enjoy the same increase voted in the first contract.

Deemed Interests

- In *Crowsnest Pass (Municipality) v. Prince*, a member's wife appeared at a council meeting to protest an account. The Council member participated in the discussion and referred the matter to committee. The Court found a conflict, and disqualified the member since the member had the same interest in the issue that his wife had.

Deemed Interests

- Section 1(3)(b) deems the member to have an indirect pecuniary interest if the employer or partner of the member has an interest in the matter
- In *Levy v Knight*, the member was an employee of C company. The member participated in a decision involving C company. The member was found to be in violation of the Act for failing to declare the conflict.
- Because the indirect pecuniary interest is deemed to exist, it is not necessary to prove any actual interest nor can the member claim no such interest exists.

Examples where no Interest Found

- Contingent Interest
 - Interest must exist at the time the matter is under consideration and cannot be contingent upon a number of factors that may or may not occur
 - Increase in value of father’s land not an interest for member as no evidence the member would inherit the land at some future date (*Holtz v Evans*)
 - In *Edmonton v. Purves*, council approved form of annexation agreement, then mayor purchased lands in annexation area. A recreational facility was to be built in the annexation area, but the site was not yet determined. The Court ruled that since the annexation was public knowledge and the location of the recreational facility was not established, any pecuniary interest of the member was contingent upon too many factors.

No Interest Found

Campaign Contributions

- In *King v. Nanaimo*, BC's Court of Appeal overturned the trial judge, and ruled that a campaign contribution, without more, did not create an interest that would prohibit the member from participating in the rezoning issue before council.

No Interest Found

- Remote or Insignificant Interests
 - Unlike Ontario, we don't have a general exemption for inconsequential interests
 - Sections 1(3)(a) and 1(3)(b) require interest to be "reasonably likely to be affected"
 - Section 2(1)(b) also says interest in proposed contract must be "reasonably likely to be affected"
 - No reported cases from NWT on this issue
 - Argument that inconsequential or remote interests would be excluded under these sections
 - No similar qualification in 2(1)(a) or 2(1)(c), but there may be common law defence of *de minimus*
 - Risky given lack of case law on this point.

Interest relates to issue under consideration

- The interest must relate to “a contract or proposed contract”
 - Contract can be made directly with municipality [2(1)(a)]
 - Can be a contract between people other than the municipality, if it is reasonably likely to be affected by a decision of the municipality [2(1)(b)].
 - Not necessary that the contract be reduced to writing
- ... or “any other matter”
 - Not limited only to contracts
 - Will apply to bylaws or other decisions of council

Applicable Exemptions

- Some statutory exemptions apply to exclude certain interests from disclosure requirements (Section 2(4)):
 - User of a service in common with public
 - Member entitled to receive service on terms common to other people
 - Member owning debenture issued by municipality
 - Member having made a deposit returnable to the member on the same terms as other people
 - By reason of belonging to a co-operative association

Community of Interest

- Common law exemption that applies if the member's interest is the same in kind, but not necessarily in degree, to the rest of the community or that portion of the community affected by the decision

- The exemption will not apply if the member's interest is different in kind from that of other members of the public

Community of Interest

Examples:

- Member voted on motion to make all houses on member's street subject to local improvement charge. Member held to have community of interest -*Elliot v. St. Catharines*
- Member lived in an area of the City that would be subject to a development plan. The member voted in favour of the plan. The Court found the plan would increase all land in the area, not just the member's. The Court followed the *Elliot* decision, ruling that not all of the community has to be affected by a decision for the community of interest to apply: *Blustein*.

Community of Interest

- In *Casson*, the Court found a community of interest, but stated it was the responsibility of the member to prove the community of interest exists.
- In *Re Jackson*, the member lived on a street that would be affected by a traffic artery. However, since another street in the area would be adversely affected, the court refused to find a community of interest.

Community of Interest

- In *Guimond v Sornberger*, the members were employers of the largest employer in the community. Even though many people in the community worked for the same employer, this was not sufficient to establish community of interest with fellow employees or the community at large.

- In *Stubbs v Greenough*, the Court would not find community of interest since the member's lands would benefit by the bylaw, but others in the area would be adversely affected.

Community of Interest

- In *Stewart v. Yorkton*, members were business managers and voted on business closing bylaw. The court found they had the same community of interest as other retailers in the community.
- In *Canada Safeway v. R.*, the member voted in favour of a bylaw restricting business hours. Since the member's business was exempt, he did not have the same community of interest with all retailers.

Community of Interest

- In *Re Graham*, the Mayor owned land in a development area. The mayor participated in a decision to approve development in one of 7 areas. The approved area included the mayor's land. Since the mayor received a benefit that was not given to others in the immediate area, she did not have a community of interest.
- In *Jafine v. Mortson*, the Mayor voted in favour of a proposed highway that would pass by property he owned. His land was nearest to a proposed interchange and would have the greatest increase in value. The Court found the impact on the Mayor's land was different than other properties, so no community of interest existed.

Community of Interest

- In *Murphy v. Foster*, the member owned land in a subdivision near a proposed subdivision. He voted in favour of a resolution to set minimum lot sizes in the new subdivision and to change the zoning to make development more difficult. The Court ruled that the member had the same community of interest as others in his subdivision, so a community of interest was established.

Requirements of Disclosure

If the member has, or is deemed to have a direct or indirect pecuniary interest, he or she must disclose the interest in accordance with the Act.

- Must disclose each time the issue is discussed.
 - In *Harper v. Hellwig*, an NWT case, the member declared an interest at a Committee Meeting, but did not declare a conflict at the council meeting hearing the Committee's report. The Court ruled this was a breach of the Act, but did not disqualify the member as the failure to re-declare the conflict was inadvertent.

Disclosure Requirements

- Disclosure must be recorded in the record
 - The obligation to record is on the keeper of council minutes.

- Must disclose full nature and extent of interest
 - Kazowski v Rexe* - member declared a conflict as the nephew of the owner of a company. However, he did not disclose that he was also a consultant to the company who would be paid based on the value of the property. This additional interest was undisclosed, so the member was disqualified.

Disclosure Requirements

- Must refrain from Discussion, Consideration or Influence
 - In *Stubbs*, the member wanted a policy changed that would affect the servicing of property he owned. Although he declared a conflict, he contacted other councillors before the meeting to ask them to support the policy change. The court ruled this was an illegal attempt to influence the voting.
 - In *Forbes v. Trask*, the member declared a conflict, but sat in the public area. He made comments from the public area and later asked that the comments be referred to in the record. The Court found this to be a violation of the Act.

Requirements of Disclosure

- The obligation for a member to refrain from discussing the issue has been held not to violate the freedom of expression provisions of the Charter (*Brisebois v. Chabot*)

Quorum

- Section 3 of the Act provides that if one or more members are unable to vote due to conflicts, quorum will be the remaining members provided at least 2 remain eligible to vote
- In *Township of Tuckersmith*, the court authorized a council to proceed to deal with an issue even though all councillors had to declare a conflict.

Contravention by Member

Sections 4 and 5 of the Act allow a voter to apply to the Court for a ruling on whether a member has violated the disclosure requirements of the Act.

The action can only be brought against a member [section 5(3)].

A member can be removed for a violation that occurred before the last election – an election doesn't wipe out prior violations.

Contravention by Member

- If a violation occurs, the Court :
 - Shall vacate the member's seat;
 - May disqualify member from elected office for up to five years; and
 - Impose a fine.
- If Court finds violation is due to inadvertence or a *bona fide* error in judgment, the court shall not impose a penalty (See, for example, *Harper v. Hellwig*). However, the court still has discretion to require the member to pay the applicant's court costs.

Contravention by Member

Grounds for relieving Member from Penalties:

- “Inadvertence” requires an unintentional or negligent act or omission.
 - In *Holstine*, the member had purchased shares in a hockey club as a fund raiser. She then voted on a lease involving the same hockey club. The Court found the member failed to disclose the interest due to negligence rather than a deliberate effort to conceal.
 - It should be noted that ignorance of the law will not be a defence.

Contravention by Member

- A “*bona fide*” error in judgement requires the member to have acted in good faith and honestly, without any effort to avoid liability or deceive
- *In McCaghren*, the court declined to find a bona fide error since the member had not disclosed the full nature of his interest. This selective disclosure precluded a *bona fide* error.
- A member cannot claim a bona fide error if he has been wilfully blind, i.e. he has refused to make reasonable inquiries as to his obligations under the Act: *Begin v. McInnis*

Contravention by Member

Reliance upon Legal Opinions:

- A number of cases have referred to the fact the member obtained a legal opinion advising no conflict existed as evidence of good faith: *Edwards*.
- If there has not been full disclosure of relevant facts, a legal opinion will have little value.
