

# ***Conflict of Interest Issues for Municipal Councils***



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## Introduction

- Review rules regarding conflict of interest for municipal councilors
- Rules exist to prohibit conduct that would undermine public confidence in municipal governments
- Rules set out in *Conflict of Interests Act*, RSNWT 1988 c. 16
- Members disclose private interest and depart meetings when conflict arises



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## *Introduction*

1. History of Conflict of Interest
2. Select Issues Under the Act
3. Case Studies
4. Conclusion



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## History

- What is a conflict of interest
  - Two categories: conflict of interest and pecuniary interest
    - Courts really considering pecuniary interest
  - Pecuniary interest – monetary interest that will affect councilor or close relatives
  - Once a pecuniary interest exists, a presumption of bias is mandatory
  - Simply put, you cannot be your own judge



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## History

- Extent of Interests
  - Generally the extent of interest not part of court inquiry
  - At common law, the conflict exists no matter the extent
  - Common law conflict of interest rules modified by statute
- Origins in Common law
  - Case law developed definitions before statutes drafted
    - *Re L'Abbe and the Corp. of Blind River* [1904] O.J. No 130 (Ont. High Court of Justice)
  - Community interest not a conflict when held by fellow members or public generally



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## Conflict of Interest in Statute

- Definition under the Act is pecuniary interest
  - Pecuniary interest = financial gain
  - Other interests such as political or moral not strictly addressed by parameters of the Act
- Act deals specifically with members of municipal councils or boards
  - S. 1 (1)



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## Direct Pecuniary Interest

- A member of council (or board) has a direct personal financial interest that will be touched upon by matter council may consider
  - Advantage or disadvantage
- Ex: deciding on a contract between municipality and member directly



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## Indirect Pecuniary Interest

- Definition
  - Not direct, but still an effect on member
  - Where a contract, or proposed contract that is reasonably likely to be affected by council decision, or any other council matter involves a private corporation in which member is shareholder, director, officer, has a controlling interest or is director or senior officer of a public corporation that offers its securities to the public.
  - Controlling interest = more than 10% of voting shares (s. 1(2))
  - Familial relationships also indirect pecuniary interest
    - Dependent, spouse, son, daughter or other relative who has the same home as a member
    - Member must be aware of the interest of familial relation
- Family
  - Indirect extends to members who may be partners or employees of persons with direct interest



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## Exemptions

- Summarized in s 2 (4)
  - Members who are users of public utility supplied by municipality in same manner as public
  - Member entitled to receive service, commodity, subsidy, loan or other benefit in same manner as public
  - Member owns debenture issued by municipality
  - Member made a deposit with the municipality or board which is returnable on same terms as other ratepayers
  - Member belongs to a cooperative organization
  - Employees of Government of Northwest Territories



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## Community of Interest

- Common law exemption still applies
- If member interest is same as rest of community that may be impacted by council decision then no conflict
- If interest is distinct from general public, exemption does not apply



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## Disclosure Rules

- Set out in s 2 of the Act
- Conflict must be raised every time the issue involving the interest arises
- At every meeting, committee or council, member with conflict must follow rules of s 2



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## Disclosure Rules

- If present when a matter in which member has pecuniary interest is raised, member must:
  - Disclose the nature and extent of the pecuniary interest as soon as practical after the commencement of the meeting;
  - abstain from voting on any question relating to the matter;
  - abstain from taking part in any consideration or discussion of the matter;
  - abstain from attempting in any way whether before, during or after the meeting to influence the voting on the matter.



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## Disclosure Rules

- S. 2(2) states that if member with pecuniary interest is absent from the meeting when matter is considered, or if the interest arises subsequently, it must be disclosed at the first opportunity.
- S 2(5) requires that disclosures of pecuniary interest be recorded in the minutes of the meeting by the senior administrator officer.
- Ensure disclosure is recorded in the minutes and that council member who disclosed has left the meeting



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## Voidable Contracts

- S 2(6) sets out that matter is voidable at the instance of the municipality for up to two years from time of decision made by council.
  - Failure to disclose does not mean that matter/contract is invalidated
  - Council has two years from expiration of original decision to take steps to void any contract/matter/agreement



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## Quorum

- If declaration of a pecuniary interest depletes the numbers on council below what would normally constitute quorum for a decision, s 3 provides that remaining members are a quorum, so long as there is not less than two remaining members



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## Contravention and Consequences

- Determination of whether failure to disclose pecuniary interest is a contravention of Act is the purview of the Supreme Court
- Section 5 of the Act allows a voter to apply to the court for a ruling on whether or not there was a contravention.



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## Contravention and Consequences

- A voter/Commissioner application is subject to the following conditions:
  1. Application must be made within 3 months after the fact comes to his/her knowledge of a violation of the disclosure requirements (s5(1));
  2. The Originating Notice for the Application must state the grounds for finding a contravention of the disclosure requirements (s5(2));
  3. The application can only be brought against a sitting member of council at the time the application is brought. It cannot be brought against a former member of council. (s5(3)).
- An application can be brought for a violation that occurred in a previous term, subject to the above conditions.



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## Punishment

- Section 6 of the Act sets out the punishment should a court find that a member contravened the disclosure requirements.
- Section 6(1) of the Act mandates that where contravention is found, the seat of the member shall be declared vacant.
- The Court also has the discretion to:
  - Disqualify the member from being a member of any Council and/or any Board during a period not exceeding 5 years after the declaration; and
  - Impose a fine not exceeding \$5,000.



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## Bond Fide Error

- Section 6(2) states that where a contravention of disclosure is done through inadvertence or bona fide error in judgment, section 6(1) penalties do not apply to members



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## Case Studies

- **Casson v Reed (1975) 60 DLR (3d) 455**
  - A municipal councillor in the County of Strathcona owned land adjacent to municipal lands which Council proposed to turn into a recreational area. This development would benefit the community as a whole and would enhance the value of the councillor's land and the lands of other adjacent owners. The councillor participated actively in the proceedings leading to the creation of the recreational area.
  - the councillor in question commenced subdividing and selling his land almost immediately after the vote in Council. The Court held that he forfeited his "community of interest" exemption to which he would have otherwise been entitled.



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## Case Studies

- **Wanamaker v. Patterson (1973) AJ No. 46 (Alberta Court of Appeal)**
  - Patterson, the Mayor of the Town of Claresholm, owned a coin operated laundry at a shopping centre located in the Town. The Province constructed a provincial highway within the Town, consisting of a median separating the north-bound lanes from the south-bound lanes. There was no convenient cut through the median to provide access to the shopping centre. Patterson actively supported negotiations with the Minister of Highways to obtain permission to make a cut in the median strip.
  - At trial, the Judge held that Patterson's actions involved voting on a question in which he had a pecuniary interest and therefore disqualified him to be a member of Council. Decision was upheld on appeal
  - It did not matter that the extent of pecuniary interest was small or that motives of member were not suspect.



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## Case Studies

- Strathmore (Town) v. Mitzner (1989) AJ No. 790 (Alberta Court of Queen's Bench)
  - Councillor Mitzner, through her participation as a councillor and Development Committee Member was privy to confidential information regarding a proposed development at Eagle Lake. Subsequent to receiving this information, Councillor Mitzner purchased land located adjacent to Eagle Lake and within the community study area.
  - Councillor was not disqualified because of error in judgment



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## Case Studies

- Re Guimond and Sornberger (1980) AJ No. 650 (Alberta Court of Appeal)
  - Three members of Council of the Town of Hinton were employed by the Town's major employer. They, in common with the other members of Council, voted to reject two proposed bylaws dealing with Town planning. Their employer, at a public meeting, objected to the proposed bylaws as adversely affecting its interests. The employer did not put pressure on the employees to vote against the proposal.
  - Where a municipal councillor votes on a matter which his employer opposes, the councillor has an indirect pecuniary interest in the matter. Once it has been found that the councillor has such an interest, an irrebuttable presumption of bias is raised
  - The fact that employer did not pressure employees on how to vote did not matter.



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## Case Studies

- Harper v. Hellwig [1997] NWTJ No. 16 (NWT SC)
  - This case demonstrates that council members must disclose pecuniary interest each time and also discusses honest mistake.
  - Councillor declared pecuniary interest but not when the matter was brought to council as a whole at a later date, though he did not vote at council he did participate in discussions broadly.
  - The Court did find that the council member was in contravention of the disclosure rules under the Conflict of Interest Act by failing to immediately disclose his pecuniary interest and by taking part in the discussion or consideration of the contract relating to the promotional event.
  - Though the councillor raised the conflict at the committee meeting, he failed to raise it again promptly at the council meeting.
  - The Court also found that the councillor was trying to help the discussion and made a bona fide error in judgment in participating in the discussion.



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## Case Studies

- Evans v. Jakubowski (1992) 106 Sask. R. 53 (Sask QB)
  - At issue was a bill for \$938.93 for services rendered to the municipality by a trucking company of which the council member was a partner. The councillor had moved a motion to approve payment of some thirty nine (39) accounts for services rendered by various businesses to the municipality, including, among the others, the bill from his business.
  - The Court found that although the councillor had contravened the law by failing to disclose his pecuniary interest and leave the council meeting when his account was considered, the contravention did not result in any personal financial gain and was the result of inadvertence.



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## Case Studies

- **Stewart v. City of Yorkton (1982) 16 Sask R. 258 (Sask QB)**
  - In 1981, Yorkton's City Council passed a bylaw to regulate store hours. The Mayor was the manager of an Eaton's department store and the alderman was part owner of a local shoe store. The issue for the Court to decide was whether or not the occupations of the Mayor and alderman fell within the exception to pecuniary interest provided by community of interest.
  - The Court held that the Mayor and alderman's interests were interests which they held in common with other electors, even though it was a restricted segment of electors (those involved in retail business). As such, no conflict of interest was found.



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## Case Studies

- **Re Township of Tuckersmith [1986] O.J. No 2946 (Ont. Dist. Court)**
  - The council for the Township were considering the establishment of a landfill within the municipal boundaries. However, all council members had to declare a pecuniary interest as the value of all of their lands would potentially have been affected by the decision.
  - the statute also contemplated a situation where all members of council were in a conflict and allowed for an application to the Court for a declaration that the disclosure and withdrawal from considering the matter by members with a pecuniary interest did not apply.
  - In considering the complexity of the issue regarding the landfill and associated studies and regulations the Court felt that unless it granted an order allowing the council to proceed to consider the matter that a great deal of time and money would have been wasted.



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## Case Studies

- **Lac La Biche (County) v Bochkarev 2009 ABQB 400**
  - A councillor was the sole shareholder of a company on the County’s “day labour list”. The councillor was present and participated in a special council meeting where tenders for road work were rejected, and the County instead decided to proceed through the use of day labour. The councillor’s company subsequently provided some of the day labour services for this work
  - There was no evidence the councillor was or was not aware of the conflict, and there was no evidence of the councillor acting in the face of a patent and obvious conflict. As a result, disqualification was too harsh a remedy despite the contravention, and the Court used its equitable discretion under the MGA to allow the councillor to remain a member despite the contravention.



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## Case Studies

- **Lorello v Meffe 2010 ONSC 1967**
  - This case illustrates what constitutes an indirect pecuniary interest in the context of a corporation in which the municipal councillor is a shareholder, officer and director. It also examines when a potential pecuniary interest is too contingent or hypothetical.
  - Voting on development approvals where the councillor’s corporation may later be invited to enter into a competitive bidding process with other subcontractors is too contingent and hypothetical to qualify as a pecuniary interest at the time of the vote.



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## Case Studies

- **Kruse v Santer 2015 SKQB 376**
  - This case illustrates an example where pecuniary conflicts were avoided when the council members took steps (including leaving the room) to avoid the conflicts.
  - residents argued that the one councillor received payments for working at the village's recycling bins and improperly voted to approve those payments, that a second councillor's husband was appointed operator of sewage works, and that the mayor was awarded a snow removal contract. Accordingly, the residents sought to have the mayor and councillors disqualified.
  - While it was uncertain (and unlikely) that the mayor or the second councillor ever formally declared their pecuniary interests, the Court found that the other members would certainly have known about the interest, and combined with leaving the room and not voting, this was considered an adequate declaration of the pecuniary interests.



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## Conclusion

- A high degree of vigilance is required by a councillor to ensure that there are no lurking conflicts on fairly mundane issues.
- As a council member, if you believe that you may be in a conflict of interest the safest course of action is to act as though you are in a conflict of interest position.
- Most conflict of interest problems can be avoided if councillors are attuned to the provisions of the Act.



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## Conclusion

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## QUESTIONS?

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