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Viewpoint 42-2: Elected Municipal Officials Must Be Careful About Conflicts of Interest

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Introduction

At the time we are writing this, the province of Alberta is in election campaign mode for all of its municipal leaders known as mayors, councilors and reeves. At the same time, the federal Minister of Finance is under the ethical spotlight for how he continues to hold his personal wealth while legislating in the economic and taxation realm and proposing reforms from which he might obtain personal advantage.

Ethics in Canadian political offices has largely been reduced to dealing with personal actual or perceived conflicts of interest in the carrying out of public responsibilities. These concerns arise when legislators could obtain disproportionate personal benefit from their decisions or actions. Federally, the regulation of legislators' conflicts of interest is generally left to the Ethics Commissioner who is an Officer of Parliament.

> The legislation that specifically governs conflicts of interest for elected municipal officials in Canada is strict, at least on paper.

While there may be ethics advisors, commissioners and officers in the largest municipalities, provincial legislation strictly regulates elected municipal officials. They are prohibited from proposing, discussing or voting on any matter in which they may have a pecuniary interest. This is a first line of defence against corruption. It seeks to ensure that actions by government officials are made for the public benefit. Overall, it is a cornerstone of effective democratic governance.

Legislation

The Alberta *Municipal Government Act* (sections 169 through 179), and similar legislation in other provinces, guards against municipal councillors' conflicts of interest. It is the primary source of law for councillors' actions and can be broken into the following three analytical categories.

What constitutes an interest?

This is the first step in the analysis that must be established. A conflict of interest exists when a councillor, a councillor's family member, or a corporation for which a councillor is a director or an officer stands to monetarily benefit from a decision made by the municipal council.

For example, a councillor discussing and voting on a decision to award a public contract to a business one owns would be a clear conflict. The councillor would personally benefit monetarily from the profit such a contract would earn the business and the councillor. Foremost, the councillor must act in the best interests of the public, not one's own best interest. When one stands to gain personally, it is impossible to be properly focused on the best interests of one's constituents.

Identifying one's own potential conflict of interest is a very important step.

What must a councillor do when facing a potential conflict of interest?

Provincial legislation permits Municipal Affairs ministers to remove elected officials from office for reasons beyond conflicts of interest. These other reasons – unrelated to conflicts of interest – include incompetence, incessant bickering on council and ineffectiveness.

A councillor must do two things when facing a conflict of interest. First, the councillor must disclose the personal interest before the matter is discussed. Second, one must leave the room until the discussion and voting on the matter has concluded. This ensures that the interested councilor does not discuss or influence anyone in any way, and does not vote on the matter.

There are some exceptions, but this is the general procedure that a councillor must follow. The purpose is to ensure the councillor's interest in the matter does not become a factor in the decision making process.

What happens when a councillor has acted in a conflict of interest?

Sometimes elected officials make errors in judgment out of ignorance, inadvertence or in good faith. Regardless of the motivation, if one fails to disclose one's interest in a matter at the outset and goes on to participate in the decision making, the *Act* stipulates that such a councillor must immediately resign.

If the non-compliant councillor refuses to resign, the council or any voter may apply to the Court for an order declaring the councillor to be disqualified and that seat on council to be deemed vacant. The rule is strict.

However, the judge deciding the matter possesses considerable discretion under the Act for these applications. If the judge believes that the conflict of interest process was violated inadvertently, or some other reason exists to excuse the councillor's misfeasance, the councillor might be allowed to remain in office. Courts will often be inclined to respect and support the democratic process even when a clear conflict of interest exists. The strict rule does not always lead to a councillor being removed. But who needs the grief of testing the rule in court?

The following three cases are instructive of this conflict of interest legislation as it applies to elected municipal officials.

Case Studies

Wainwright (Municipal District No. 61) v. Willerton

Willerton, a long time councillor in Wainwright, owned a business that supplied sporting goods. In 1999, the council voted to acquire golf carts for the municipal golf courses from Willerton's business. Willerton himself also participated in discussion and voted on this matter. It seemed to be a clear case of a conflict of interest.

The Alberta Court of Queen's Bench did *not* disqualify Willerton or vacate his council seat for several reasons. All those present at the meeting were aware that Willerton was one of the owners of the business supplying the golf carts. Willerton agreed that a legal opinion should be obtained regarding his participation in the meeting. Willerton did not acquire, much less use, any special information available to him as a councillor that gave his business any advantage in the tendering process. Finally, his business supplied the golf carts to the municipality at cost. There was no profit made on the contract.

On the disqualification application brought by the council, the Court held that Willerton's conflict of interest arose inadvertently and, despite technically being a conflict of interest, any benefit to Willerton was so insignificant as to be unworthy of justifying his disqualification. Willerton kept his seat and the council was ordered to fully indemnify him for his legal costs of the application.

Crowsnest Pass (Municipality of) v. Prince

John Prince was a councillor for the municipality of Crowsnest Pass. His wife, Diane Prince, rented out a hall owned by the municipality in order to hold a weekend market. The rent for the nine-day market totaled $1,650 plus a $250 damage deposit. John provided the damage deposit cheque. The rental fees were reduced to $850 because Diane cleaned the hall after the market.

But Diane refused to pay the rental fee. When municipality attempted to cash the $250 damage deposit cheque, it was denied due to insufficient funds. Diane demanded to appear before the council to state her case. Since John was a councillor, he was obligated to disclose that his wife was speaking, and abstain from discussing or voting on the matter. He should have left the room. Despite acknowledging that he should not have been speaking, he one of the most vocal councillors in the discussion. He actively advocated on behalf of Diane.

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This was another clear case of a councillor who should have been disqualified. His interest was not remote or insignificant. Nor did it arise inadvertently. It was material and his involvement was deliberate. Yet the Court, exercising its discretion, allowed him to keep his council seat. His term as councillor had nearly expired. The Court thought it more appropriate to let the voting public decide whether he should continue as councillor in the upcoming election. Each side had to bear their own legal costs of this application.

Magder v. Ford

Since he was elected Toronto mayor in 2010, Rob Ford attracted controversy and notoriety. He used his public position to do some private fund-raising for his football charity. The municipal Integrity Commissioner found this to be a breach of the *Code of Conduct*. The council ordered him to reimburse the donors the $3,150 raised, but he refused to do so.

Then in February 2012, Ford participated in the discussion. He voted on a motion to rescind council's adoption of the Integrity Commissioner's report which found he had violated the *Code of Conduct* and which had recommended Ford make the reimbursement. The motion he debated and voted on was successful.

At issue was not Ford's private fund-raising, but his participation and voting on a matter in which he had a pecuniary interest. His pecuniary interest was not a personal benefit from a commercial matter before the council, because he did not monetarily benefit from donations to his football charity. Rather the issue was the financial sanctions that arose from his breach of the *Code of Conduct* and in his efforts to avoid reimbursing the monies raised.

On application by a voter for Ford's removal from his public office (now mayor), the Ontario Superior Court of Justice found Ford had contravened section 5(1) of Ontario's *Municipal Conflict of Interest Act*. The judge ordered Ford disqualified and his seat on the council vacant. Ford's speaking and voting on the matter was not inadvertent nor mere oversight. It was a deliberate choice.

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While the *Act* contemplates forgiveness for honest errors made in good faith and insignificant amounts of money, the Court was not prepared to give Ford the benefit of the doubt in this case. At the same time, the Court was critical of the all or nothing approach in the *Act*. There should be lesser penalties for minor infractions. Ford's breach of the *Code of Conduct* involved a modest amount of money raised for a legitimate charity.

Given this surprising and disruptive outcome, Ford returned to court and obtained a stay of the disqualification decision, pending his appeal. Two months later, the appellate court overruled the lower decision. The Integrity Commissioner had no jurisdiction under the *Code of Conduct* to impose the financial sanction of reimbursement. Accordingly, it should not have been put before council at all and the mayor would never have been in a position of conflict. Ford was restored to his position as Toronto mayor.

This had been a hard fought political skirmish involving a crowd of lawyers and the legal fees were . . . well, not charitable. Because he was successful in fending off the application, Ford asked for *partial* indemnity of his legal costs in the amount of over $116,000 (compare this to the original reimbursement request of $3,150) for the four court appearances. The court eventually ordered Ford to bear all of his own legal costs.

A further application for leave to appeal to the Supreme Court of Canada was dismissed in June 2013. This brought the matter to a legal end after sixteen months and hundreds of thousands of dollars of wrangling over $3,150 as well as politics and pride. Ford stepped down as mayor of Toronto a year later and died some sixteen months after that, prior to his 47th birthday.

Conclusion

Provincial legislation permits Municipal Affairs ministers to remove elected officials from office for reasons beyond conflicts of interest. These other reasons – unrelated to conflicts of interest – include incompetence, incessant bickering on council and ineffectiveness. The elected officials may apply for judicial review of these ministerial decisions on the basis of procedural fairness and councillors have occasionally been judicially reinstated.

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The legislation that specifically governs conflicts of interest for elected municipal officials in Canada is strict, at least on paper. Elected officials will be expected to show diligence in the form of some effort to understand and appreciate their obligations as public, elected officials. Outright ignorance of the law will not suffice, nor will willful blindness.

However, as all three *Willerton*, *Prince* and *Ford* judicial decisions demonstrate, the courts are reluctant to disqualify democratically elected councillors who have been guilty of minor lapses of judgment and inadvertence where the financial stakes are nominal. Defending the disqualification application, and enduring the legal cost and emotional toll of it, will be the most significant risk of transgressing the technical conflict of interest rules.

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Authors:

Peter Bowal

Peter Bowal is a Professor of Law at the Haskayne School of Business, University of Calgary in Calgary, Alberta.

Kyle Meema

Kyle Meema is a law instructor at the Southern Alberta Institute of Technology (SAIT).