Risk Management Considerations for Municipal Councillors and Conflicts of Interest

Municipal councillors are public trustees or, in legal terms, fiduciaries. As a public trustee, a municipal councillor owes a duty of utmost good faith to the citizens of his or her community. In all municipal affairs, a councillor must typify this very high standard of conduct.

Conduct not in keeping with this standard is sometimes referred to as a conflict of interest. The rules in place to prevent conflicts of interest are safeguards designed to prevent abuse but, especially, to maintain the public's trust in its public trustees.

The duty to act in utmost good faith consists of two related concepts.

The Profit Rule

The first concept is the "profit rule" which states that a councillor cannot have a financial interest in a decision of council or derive a profit from his or her position. The rule is absolute.

Courts have struggled with defining "financial interest". Broadly defined, a financial interest includes any matter that can affect a councillor's assets or income.

For instance, in *Russell v. Toney* (1982), 137 D.L.R. (3d) 202, the Alberta Court of Appeal held that a councillor was in a conflict of interest concerning the creation of a municipal access road to land owned by his son. The councillor was a co-mortgagor of the land. The Alberta Court of Appeal did not hesitate in finding that the councillor had a financial interest in the land, which would be improved by the construction of the road and, therefore, a conflict of interest.

Other situations are less obvious. In *Cornwallis (Municipality) v. Selent* (1998), 47 M.P.L.R. (2d) 277, the Manitoba Court of Appeal determined that a councillor was in a conflict of interest when he considered and voted on an application to approve construction of a recreational establishment. The councillor owned a business located next to the potential venue and, it could be expected, he would obtain significant financial benefit from approving the application. He was thereafter disqualified from acting as a councillor.

One question that is often posed is whether political contributions create a sort of financial interest. This was addressed by the British Columbia Court of Appeal in *King v. Nanaimo (City)* (1999), 50 M.P.L.R. (2d) 134, where it was determined that they are not. The Court rejected a claim that a political contribution to a councillor's re-election campaign did not in and of itself create a financial interest. However, the Court went on to note that a political contribution and a municipal decision could be so closely linked to justify a finding of a conflict of interest.

The strictness of the profit rule and its harsh consequences are relaxed in each province by virtue of municipal legislation or conflict of interest statutes (as in Ontario). This legislation replaces the profit rule and automatic disqualification with an approach based on disclosure. In New Brunswick a councillor may have a conflict of interest and obtain financial benefit from the community they serve, so long as he or she discloses the interest and does not participate in the decision-making process. Certainly, a councillor cannot vote on the matter.

Applied to the cases of *Russell v. Toney* and *Cornwallis (Municipality) v. Selent*, above, if the councillors had disclosed their real and potential financial interests in the projects, neither would have faced the embarrassment of public prosecution.

It is essential that a councillor in any municipality in New Brunswick be very familiar with the conflict of interest disclosure rules set out in the *Municipalities Act* in addition to his or her community's practices. New Brunswick's legislation contains two simple procedures: 1) once elected, the councillor must file a form disclosing any potential conflicts, and 2) file a form whenever a conflict arises. Forms must be kept by the Clerk for public viewing. The councillor must then abstain from discussing the disclosed matters and do not vote on them.

Publicizing a conflict of interest and abstaining from deliberations replaces the disqualification mandated by the profit rule as a check on conflicts of interests. This approach is workable for both councillors and the citizens of his or her community. Minor or narrow interests, if properly disclosed, will not disable a member from the whole range of duties entrusted to him or her by virtue of public office. It is very common for councillors to serve while holding private employment and business interests. This approach permits a deeper pool of potential councillors, which is considered in the best interest of a municipality.

In addition to the disclosure-based approach to conflicts, the legislation extends the reach of the so-called "profit rule". In New Brunswick, for example, a councillor must disclose and forego participating in any matter where his or her spouse, child, brother or sister has a real or potential financial interest. A councillor who is a member of a trade union negotiating a new collective agreement with the municipality also creates a conflict of interest.

There are also specific rules relating to private companies and publicly traded ones. Generally, a councillor does not have to disclose that he or she owns shares in the financial institutions that arrange municipal borrowing or the consulting group that provides a new waste water management report. This is not a conflict. Disclosure will generally be required if a councillor is a shareholder in a private company that may do business with the municipality.

- Conflicts of interest related to a councillor's spouse are of particular concern. There a surprising number of decisions across Canada where it is clear that a municipal councillor failed to grasp the reach of conflict rules pertaining to spouses.

In *DeVita v. Coburn* (1977), 15 O.R. (2d) 769 (Co. Ct.), the municipality was responsible for administering local schools. A councillor's husband was a high school teacher. She did not participate in negotiations for a new contract between the municipality and the teachers' union. However, the conflict was not disclosed before she voted in favour of the municipal budget which included the teachers' new salaries. The trial judge noted that the salaries were determined before the budget meeting and held that the failure to disclose was a minor technical breach not resulting in disqualification. (It has been suggested that the trial judge was misguided. How can a complete failure to abide by the disclosure rules be considered a "minor technical breach"?)

New Brunswick's *Municipalities Act* also limits the boundaries of conflicts of interest with a "common interest exception". As we know, a councillor is disqualified from voting if he or she has a personal interest distinct from that of the community's residents. Conversely, a councillor need not disclose and abstain from discussions if he or she shares a particular interest with the general public. If a project is of great community interest, it can override any coincidental interest of an individual councillor.

For instance, in the case of *Re. Ennismore (Township)* (1996), 31 M.P.L.R. (2d) 1, an Ontario councillor owned property that was in an area that was the subject of a study and possible construction of a new communal water system. The municipality asked the Court to determine whether he had a conflict of interest. The Court determined that he did not. While he would receive a financial benefit from the construction of the water system, it was no different from the interest of any other resident in the study area.

The Rule Against Bias

The second concept related to the duty of utmost good faith is the rule against bias. The rule against bias is analogous to the profit rule in that an expectation of profit creates an actual bias. The disclosure rules encompass this sort of bias.

A more troublesome and less straightforward concept is the rule against "a reasonable apprehension of bias". The classic English expression of this rule still rings true: "Not only must Justice be done; it must also be seen to be done." A process must be fair to all parties and unblemished by suspected interests or influences. The public's confidence demands no less.

But what is "reasonable"? In this context, reasonable means that an informed person viewing the matter realistically would conclude that it was more likely than not that a municipal decision-maker would not be able to remain impartial when adjudicating on the issuance of the certificate.

In New Brunswick, the zoning process often gives rise to allegations of a reasonable apprehension of bias.

An excellent example is the recent decision of the New Brunswick Assessment and Planning Appeal Board in *Kingston and LaBillois v. Planning Advisory Committee (Saint John) et al*. In this case, a councillor served on

the local Parking Commission, the City's Planning Advisory Committee ("PAC") and, obviously, on Council. The Parking Commission agreed to sell a vacant parking lot to a developer. Before the sale was finalized, the Parking Commission sought from the PAC certain variances. The sale might not go ahead without the variances. The PAC approved the variances and Council agreed.

Opponents to the development argued that the councillor's role in the decisions of all three bodies created a reasonable apprehension of bias. The Planning Appeal Board disagreed. A review of the organization and authority of each of the three bodies revealed that the overriding concern of each body was to act in the best interests of the citizens of the municipality. In this way, a reasonably informed person would not maintain an apprehension of bias. The councillor's interests were perfectly aligned. There could be no conflict or bias.

The leading New Brunswick decision in this area is *Rothesay Residents Association Inc. v. Rothesay Heritage Preservation & Review Board et al.*, 2006 NBCA 61. In this case, a heritage preservation and review board granted to a church corporation a "certificate of appropriateness" to permit the construction of a senior citizens' home on church property. Two of the board's members had active and continuing personal ties to the parish. Indeed, one member was also the church's solicitor who set up the church corporation. The New Brunswick Court of Appeal was unanimous that this created a reasonable apprehension of bias. The bias of one board member will infect the entire tribunal so as to render its decision invalid. The certificate of appropriateness was revoked.

The requirements related to conflicts of interest are but one part of the greater duties a councillor owes to the citizens he or she serves. But they are essential. Conflicts of interest not properly disclosed limits the public's confidence and trust in the administrators of his or her community and tax dollars. This ability to undermine the close-knit democracy of a local government is what makes conflicts of interest so dangerous and the rules to safeguard against them imperative. In addition, the failure to abide by conflict of interest rules can lead to substantial fines, criminal sanction and potentially imprisonment.

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