

CONFLICT OF INTEREST

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I. INTRODUCTION

It is the summer of 1893, Judge Walkem of the British Columbia Supreme Court has ordered that the City of Victoria be prohibited from carrying out a contract for the construction of a surface drain, because a City alderman had a contract to supply bricks to the successful contractor [*Coughlan & Mayo v. Victoria (City)*, 1893 2 B.C.R. 57].

Fast forward to July 2014: On the eve of the local government election season (the official one, that is), Chief Justice Hinkson of the BC Supreme Court has dismissed a petition seeking to remove the Mayor of Vancouver from office because the Mayor supported a lease of City land to a company that had provided the Mayor with assistance during his election campaign [*Chernen v. Robertson*, 2014 BCSC 2358].

Both of these cases applied legislative provisions, however, in the intervening years the applicable legislation was dramatically expanded. In 1893, a single provision of the *Municipal Act* addressed conflict of interest, prohibiting an alderman from having an interest in contracts with the municipality. Today, the *Community Charter* and the *Vancouver Charter* each contain a multitude of detailed provisions addressing circumstances where a council member has a personal interest in a matter before council, including a prohibition on attempting to influence council decisions on a matter in which a council member has a personal interest, a prohibition on the use of a council member's office to attempt to influence another person or body on a matter in respect of which the council member has an interest, restrictions on accepting gifts and a prohibition on using 'insider information' for personal benefit.

In addition, since 1893, there have been hundreds of Canadian court decisions on allegations of conflict of interest. Notwithstanding the volume of cases, it is difficult to draw many general conclusions from these cases, other than that a court's assessment of conflict is highly dependent on the particular facts and circumstances. Furthermore, a court's assessment of the council member's personal integrity and reputation is often a highly relevant factor in determining both whether the council member's personal interest in a matter is problematic and whether to go so far as to disqualify the member as a result of a conflict.

This paper reviews the *Community Charter* provisions in relation to conflict of interest and some cases of note in relation to various recurring themes. While assessing potential conflicts is highly fact dependant, the cases do provide some guidance with respect to how courts will assess conflicts and how council members should approach potential conflicts.

Please note that while this paper refers to council members and municipalities, pursuant to section 787.1 of the *Local Government Act*, the conflict of interest and disqualification provisions of Divisions 6 and 7 of Part 4 of the *Community Charter* also apply to regional districts and their board members.

II. PURPOSE & COMMON LAW TEST

In the *Coughlan & Mayo v. Victoria (City)* decision, the Court readily found that the alderman was “manifestly interested in a pecuniary way in the success of the two contracts in question. As a member of the Council board, he could assist them in obtaining payments, perhaps under adverse circumstances, and, naturally, he would be tempted to do so, knowing that some of the money would find its way into his hands”. As commentary on the conflict of interest provisions in the *Municipal Act* as it stood at the time, the Court stated, “The provisions I have quoted are designed, not so much as to enforce honesty on the part of alderman, as to prevent temptation being placed in their way.”

Over time, the commentary has moved away from ‘protecting council members from themselves’, to trying to assure the integrity of council decision making for the benefit of the public:

It sustains the right of an elector in the even-handed, independent consideration of his elected representatives on questions before Council, unaffected by any influence that could potentially flow from a direct or indirect pecuniary interest.

Guimond v. Sornberger, (1980) 13 M.P.L.R. 134 (Alta C.A.)

In *Old St. Boniface v. Winnipeg*, [1989] S.C.C.A. No. 196, the Supreme Court of Canada elaborated:

I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example that some degree of prejudgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

[emphasis added]

Accordingly, conflict of interest law is about appearances, and is aimed at avoiding the potential for a councillor to be influenced by personal interest. A court will ask whether a reasonably well-informed person would conclude that the council member’s personal interest in a matter

might influence the councillor in the exercise of his or her duty as a council member. It is critical that council member's approach potential conflicts from this perspective. It does not matter whether the council member believes that he or she can remain impartial. Nor does it matter whether the council member is not in fact influenced by their personal interest. Conflict of interest law is about preserving the integrity of council and its decision making processes.

III. THE COMMUNITY CHARTER PROVISIONS

A. Declaration of Conflicts

Sections 100(2) & (3) of the *Charter* provide:

(2) If a council member attending a meeting considers that he or she is not entitled to participate in the discussion of a matter, or to vote on a question in respect of a matter, because the member has

- (a) a direct or indirect pecuniary interest in the matter, or
- (b) another interest in the matter that constitutes a conflict of interest,

the member must declare this and state in general terms the reason why the member considers this to be the case.

(3) After making a declaration under subsection (2), the council member must not do anything referred to in section 101(2).

(4) As an exception to subsection (3), if a council member has made a declaration under subsection (2) and, after receiving legal advice on the issue, determines that he or she was wrong respecting his or her entitlement to participate in respect of the matter, the member may

- (a) return to the meeting or attend another meeting of the same body,
- (b) withdraw the declaration by stating in general terms the basis on which the member has determined that he or she is entitled to participate, and
- (c) after this, participate and vote in relation to the matter.

These provisions call for a council member to make a declaration if the council member considers that he or she has an interest in a matter before council. They do not define when a personal interest is problematic, leaving it to the council member to “consider” whether their personal interest is such that he or she should not participate with respect to the matter. Once a declaration is made, the council member must not attend any meeting on the matter, vote on the matter or participate in any discussion on the matter.

Furthermore, if a council member wishes to ‘withdraw’ a declaration for some reason, before doing so the council member must first obtain legal advice, presumably to the effect that the council member does not have a conflict of interest.

Importantly, except for financial interests under section 101 as discussed below, the *Charter* does not provide for any specific consequences for a council member who does not comply with section 100.

B. Financial Conflicts

Section 101 provides:

- (1) This section applies if a council member has a direct or indirect pecuniary interest in a matter, whether or not the member has made a declaration under section 100.
- (2) The council member must not
 - (a) remain or attend at any part of a meeting referred to in section 100 (1) during which the matter is under consideration,
 - (b) participate in any discussion of the matter at such a meeting,
 - (c) vote on a question in respect of the matter at such a meeting, or
 - (d) attempt in any way, whether before, during or after such a meeting, to influence the voting on any question in respect of the matter.
- (3) A person who contravenes this section is disqualified from holding office as described in section 108.1 [*disqualification for contravening conflict rules*] unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Under these provisions, if a council member has a 'pecuniary' interest in a matter before council, the council member must not attend any meeting on the matter, participate in any discussion on the matter, vote on the matter or attempt to influence the voting on the matter. Most critically, if the council member has a pecuniary interest and violates any of the prohibitions under subsection (2), then the council member is subject to disqualification from office.

These restrictions and the potential for disqualification apply regardless of whether the council member considers that he or she is entitled to participate in meetings in relation to the matter and regardless of whether the council member has made a declaration under section 100.

C. Other Personal Interest Provisions

Sections 102 and 103 and sections 105 through 108 of the *Charter* contain other provisions addressing the potential for conflict between a councillor's personal interest and his or her duties on council, including a prohibition on the use of a council member's office to attempt to influence another person or body on a matter in respect of which the council member has an interest, restrictions on accepting gifts and a prohibition on using 'insider information' for personal benefit.

D. Exceptions

Section 104 of the *Charter* sets out various exceptions to the conflict of interest provisions:

- (1) Sections 100 to 103 do not apply if one or more of the following circumstances applies:
 - (a) the pecuniary interest of the council member is a pecuniary interest in common with electors of the municipality generally;
 - (b) in the case of a matter that relates to a local service, the pecuniary interest of the council member is in common with other persons who are or would be liable for the local service tax;
 - (c) the matter relates to remuneration, expenses or benefits payable to one or more council members in relation to their duties as council members;
 - (d) the pecuniary interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the member in relation to the matter;
 - (e) the pecuniary interest is of a nature prescribed by regulation.

- (2) Despite sections 100 to 103, if a council member
- (a) has a legal right to be heard in respect of a matter or to make representations to council, and
 - (b) is restricted by one or more of those sections from exercising that right in relation to the matter,

the council member may appoint another person as a representative to exercise the member's right on his or her behalf.

IV. PECUNIARY INTEREST

Below are some of the common circumstances where pecuniary (financial) interests may arise, with summaries of some cases of note.

A. Business Interests

The following are some cases of note on conflict allegations involving a council member's business interests.

Retail Store Owner - Council members who owned or were associated with businesses located in the downtown business district voted against proposals for a large shopping mall on the outskirts of the town. The Court found that they had an indirect pecuniary conflict in avoiding the potential competition from the mall. The councillors were saved from disqualification from office by reason of having an (erroneous) legal opinion on which they had relied in participating and voting, the Court finding a bona fide error made in good faith [*Edwards v. Wilson*, (1980) 14 M.P.L.R. 128].

Real Estate Agent - A council member who was a real estate agent and was listing agent for a property that was for sale, was found to have a conflict when he voted in favour of the property owner's application to council for permission to remove topsoil from the property. The Court found he had a money related connection to the property and that the "Reasonable elector would inevitably fear that a councillor's discretion concerning almost any public matter involving land would be fettered by a conflicting interest if that councillor was at the same time the selling agent for that land". The Court did not, however, disqualify the council member, finding that he had made an error in judgement made in good faith [*Campbell v. Dowdall* (1992), 12 M.P.L.R. (2d) 27 (Ont. Ct. of Justice)].

Real estate agent - A council member, who was also a real estate agent, was disqualified from office on the basis that he had a financial conflict of interest arising from his participation in various council matters affecting properties in which a client of his had an interest [*Godfrey v. Bird*, 2005 BCSC 626].

Accountant - A council member, who was also a chartered accountant, was found to have a conflict in relation to an application for an official plan amendment made by certain of his client's companies, where the amendment was "obviously potentially financially advantageous to the companies" and it was "obvious that the chartered accountant for a company that prospers would financially benefit both directly and indirectly from the success achieved" [*Begin v. McInnis* (1991), 4 M.P.L.R. (2d) 315, Ont. Ct. of Justice].

B. Land Interests

It is of no surprise that there are many cases relating to the interests of council members in property and several of the other cases summarized in this deal with land interests.

In *Casson v. Reed*, [1975] 6 W.W.R. 431 Alta. C.A., a council member voted to approve the use of certain county owned land as a site for a large recreation complex. The site was located adjacent to land owned by the councillor. Appraisal evidence was presented to the Court as to the effect of the proposed development on other lands, indicating a strong likelihood that the councillor's "land will become more attractive to prospective purchasers and likely enhanced in value". The Court disqualified the councillor after considering whether the 'community of interest' exception applied. The Court did agree that the councillor had a "community of interest in the development of a recreational complex which in the end would have the effect of enhancing the value of lands in the community in varying degrees". However, the Court went on to hold:

But the case does not end there. Throughout the relevant period, and afterwards, he was actively engaged in subdividing the quarter section and in selling the resulting lots at a very substantial profit...But Reed actively embarked on a course to realize the value of the lands in which he was interested as vendor, and as shareholder of the purchasing company which stood to make a huge profit on the sale of lots.

C. Family Interests

There are many cases involving allegations of conflict of interest based on the involvement of a council member's family members in a matter before council. The Courts in BC have been clear that a conflict will not be presumed to arise based on family connection and there needs to be at least some evidence that the council member's financial interests are linked to those of the particular family member.

Land of Father and Brothers – The Court was willing to infer that the extension of a water line to lands owned by a council member's father and brothers would increase the value of such lands. However, in the absence of specific evidence, the Court was unwilling to infer that the council member had an indirect interest solely based on the father-son or brother-brother relationship. [*Holt v. Evans* (1982), 19 M.P.L.R. 284 (A.C.A.)].

Son's Land – The reeve participated in negotiations, deliberations and voting with respect to the provision of an access road affecting lands owned by the reeve's son. The reeve had mortgaged his nearby property in order to provide security to assist his son with the purchase of his property. The Court found that the road access would increase the value of the son's land and, therefore, that the reeve had an indirect financial conflict of interest based on the father-son relationship and the fact that the increase in value of the son's lands made it less likely that the reeve's land would be sold to pay the amount outstanding in the event of default and that, in the event of such a forced sale, the increased value to the son's land would result in greater equity remaining in the proceeds of any forced sale of the reeve's mortgaged lands [*Russel v. Toney*, [1982] A.J. No. 676 (Alta. C.A.)]

Husband – A council member, whose husband was a City firefighter, had voted on motions setting criteria and standards for the hiring of a new fire chief. The Court found that there was no financial interest, as the council member had not voted on who should be hired as fire chief and the evidence was clear that her husband was not eligible or interested in the position. The Court found that to suggest that her husband might be assisted by whoever became chief was "beyond a remote possibility" [*Fearnley v. Sharp*, [1999] B.C.J. No 2709 S.C.].

Son – A council member's indirect financial interest in the adoption of an official plan for lands owned by a developer that had retained the council member's son was found to be "so remote or insignificant in its nature that it cannot be reasonably be regarded as likely to influence the councillor". In reaching this conclusion, the Court considered the councillor's "many years of faithful services to the municipality", that he was acting in good faith and not motivated by financial interest, that he had historically been extremely vigilant and conscientious in declaring conflicts, including when his son's firm was retained on a matter, that the official plan was of major public interest, that the councillor received no benefit from the son's compensation and that the son's employment and compensation did not depend on the outcome of the matter [*Ferri v. Ontario (Attorney General)*, 2015 ONCA 683].

Granddaughter – Several residents challenged a Village decision to enter a contract for the "Pillage the Village" music festival. The concert promoter was also the mother of the mayor's granddaughter and the mayor had voted in favour of the contract. It was alleged that the mayor had a conflict by virtue of her interest in the welfare and well-being of her granddaughter. The Court held that it was not enough to conclude that the mayor had an indirect interest in the festival contract simply because the mayor's granddaughter was the daughter of the promoter [*Conibear v. Tahsis (Mayor)*, 2010 BCSC 985].

Sons – Thirty-two electors sought to have the Mayor of Spallumcheen disqualified because he participated in meetings and voted on an OCP amendment that would have permitted zoning amendments that, in turn, would have allowed owners of affected property to subdivide. The Mayor's two sons each owned lands that would benefit. The Court of Appeal decision refers to the following trial judge statement:

... the petitioners argue that the court must assume that because he is their father, this mayor must be taken to desire financial advancement for his sons, and further that because of that father and son relationship, improvement of the sons' affairs will necessarily equate to an improvement of the mayor's estate. In my view the law has not yet come so far as to permit such inferences to be drawn, at least not without there being some evidence to support them.

The Court of Appeal held that the trial judge's conclusions were sound [*Fairbrass v. Hansma*, 2010 BCCA 319].

D. Employment

In some circumstances, a council member who is an employee of a business may have a conflict with respect to matters before council that might affect that business. Again, whether a conflict will arise is highly fact dependant, both in relation to the employer's interest in the matter before council and the council member's employment relationship with their employer. The two cases below highlight the relevance of factual circumstances.

In *Guimond v. Sornberger* (1980), 13 M.P.L.R. 134 (Alta. C.A.), three council members were disqualified on the basis that they had an indirect financial interest in certain bylaws before council, because they were employees of a logging company which opposed the bylaws. The bylaws were to rezone certain areas to allow for a new shopping centre development. The logging company employer had expressed concern at the public hearing that the development could affect access to its logging operations. The relevant council members voted against the bylaws. The Court held:

The interests of an employee in a matter affecting his employer will, in the normal course of the relationship, be supportive of those of his employer not only by reason of his general obligations to his employer but also by his selfish interest in maintaining and improving the relationship itself. Such matters are dependent in large measure on the goodwill of the employer: promotion, salary increases, even continuation of employment should reduction of staff be contemplated. Those are the considerations inherent in relationship...The facts upon which the inference rests are (a) that an employer-employee relationship existed and (b) that [the company] made clear that it had a direct and adverse interest in the question of the bylaws.

Conversely, in *Whiteley v. Schnurr* (1999), 4 M.P.L.R. (3d) 309 (Ont. S.C.), the Court considered an application for disqualification of a councillor where the councillor was an employee of the University of Guelph which had applied for an amendment to the City of Guelph's official community plan. The Court held that the council member's status as an employee was of such a nature that his vote on the plan amendment could not be reasonably regarded as being influenced by his status as an employee. The Court distinguished *Guimond v. Sornberger* on the basis that the council member was a member of a collective bargaining unit of 5,000 full time employees and that "due to the nature of his work, his pay, benefits and employment advancement and prospects are generally governed by a collective bargaining agreement".

E. Council Members as Directors of Other Organizations

Council members are often very involved in their communities and frequently sit as directors on boards of other organizations. It is also common for a council to wish to have council representation on boards of certain organizations having an ongoing relationship with the municipality. These circumstances have always created the potential for conflicts of interest of a non-financial nature. However, a recent BC Court of Appeal decision has held that a financial conflict can arise in relation to money matters, creating a risk of disqualification from office.

In the earlier decision of *Starr v. City of Calgary* (1965), 52 D.L.R. (2d) 726 (Alta. S.C.), two aldermen were prohibited from voting on a lease of land from the City to Calgary Exhibition and Stampede Limited, as they were also directors of that company. The applicable legislation specifically prohibited council members from voting on questions affecting a company with respect to which he or she was a director. The Court found that this provision was sufficient to support the injunction application, but went on to consider the common law in relation to bias. The Court stated, "If the plaintiffs are not prohibited from voting, the citizens of Calgary may feel that aldermen who have a bias in favour of the Stampede Company due to their interest as directors of the Stampede Company, have coloured their views against the city. Even a suspicion that this would take place will not be permitted". This case did not address whether the council members had financial interests, as this was not necessary to the decision.

More recently, in *Schlenker v. Torgrimson*, 2013 BCCA 9, the BC Court of Appeal went one step further and held that two trustees for the Salt Spring Island Local Trust Committee had indirect financial interests in resolutions to provide funding to two non-profit societies, as the two trustees were also directors of the societies. Under the BC *Society Act*, society directors are under a statutory obligation to "act honestly and in good faith and in the best interests of the society". The Court held:

As directors of the Societies, the [trustees] were under a fiduciary duty to put the Society's interests first. Directors of societies, by virtue of their position, have an indirect interest in any contract a society is awarded. When the [trustees] moved and voted in favour of resolutions that benefitted their

Societies through the granting of contracts, arguably contracts the Societies might not have been awarded had the councillors not also been directors, their duties as directors to put the Society's interests first were in direct conflict with their duties as councillors to put the public's interests first.

This statement is, as far as it goes, consistent with the comments in *Starr v. City of Calgary* and previous thinking that, while such a conflict certainly exists, it would be non-financial in nature and would not result in disqualification. However, the Court also stated that "so long as the "matter" involves the expenditures of public funds and the respondents have "an interest" in the matter which a well-informed elector would conclude conflicts with their duty as councillors; it makes no difference that they put no money into their own pockets". Accordingly, the Court held that the trustees had financial conflicts of interest, even though they would not gain financially from a personal perspective.

It remains to be seen whether the courts will apply the reasoning in *Schlenker* in other circumstances where a councillor has an interest in a financial matter before council, but the councillor does not stand to be personally affected in a financial manner. For instance, will this reasoning mean that courts will more readily infer financial conflicts of interests in relation to family members in cases where there is no evidence of a financial connection between the council member and their family member?

Regardless, as a result of *Schlenker*, council members need to carefully consider whether they should sit as directors for organizations that have matters before council from time to time. If they do sit, then they should declare a conflict in relation to matters before council involving the organization. In cases where council wishes to have a council member represent the council on a not-for-profit board, it may be more practical for the council member to attend board meetings as a council representative, but not as a director, given that council will likely want that council member to participate in council meetings in respect of the organization.

F. Council Members as Members of Societies

Where a council member is also a member of a society, the issues are somewhat different from where the council member sits as a society director. As a member of a society, a council member does not have a statutory duty to act in the best interests of the society. As such, whether such membership could lead to a conflict of interest will depend on the circumstances.

In *Watson v. Burnaby (City)*, (1994) 22 M.P.L.R. (2d) (B.C.S.C), a council member who was a mason, was found not to have a financial or non-financial interest in a council resolution approving a request by the Gavel Historical Society to construct a replica of a 1914 Masonic Lodge on City lands. The council member was not a member of the Society and there was no evidence of pecuniary interest. More generally, the Court found, "The project is essentially historical in nature, not religious. The replica building, as part of the Burnaby Village Museum, will be for the benefit of all residents of Burnaby. There are no personal ends to be gained by Councillor Young over and above the benefits to his fellow citizens in Burnaby".

Conversely, in *Smith v. Lapointe*, [2001] O.J. No. 1988, a council member, who was a member of the curling club, was found to have a financial conflict when he attended a council meeting where council passed a bylaw to transfer land to the curling club for \$1.00. The Court stated that “While the respondent did not receive anything directly, presumably his dues as a member of the club were affected by the decisions ... In my opinion it cannot be said that his interest was so remote or insignificant as to fall within s.4(k). The financial interests of the township and those of the curling club were, at least to some extent, at odds in that any steps taken to benefit the club were at the expense of the township”. The Court did not disqualify the councillor, finding that he had made an error in judgement.

G. Election Campaign Contributors

On occasion, conflict allegations have tried to link council members to their campaign contributors.

In *King v. Nanaimo*, 2001 BCCA 610, council passed a resolution declaring a council member’s office vacant on the basis that he had voted in favour of matters benefitting his largest campaign donor. He appealed the Supreme Court’s decision upholding the disqualification. The Court of Appeal allowed the appeal, finding that:

Nothing in the facts established in this proceeding could justify the conclusion that Mr. King had a pecuniary interest, direct or indirect, in any of those matters. The mere fact that Northridge made campaign contributions could not, in and of itself, establish any such interest. There could, of course, be circumstances in which the contribution and the “matter” could be so linked as to justify a conclusion that the contribution created a pecuniary interest in the matter. Indeed, the learned chambers judge took note of an example of such a situation when he said in his reasons:

There is no evidence of a direct pecuniary interest in the sense that he agreed to vote for these projects in return for their campaign contributions of \$1,000.00

... It is enough to say that the mere fact of the applicant having made a campaign contribution is not enough.

More recently, several electors brought a petition seeking to disqualify the Mayor of Vancouver and a fellow councillor. As part of the 2014 election campaign, the council member had attended a meeting of union Local 1004 and stated that the Mayor “has again recommitted to not expand contracting out to make sure that wherever we can bring in new processes that members of 1004 will be there delivering those services in your areas and jurisdictions, fighting to keep things at the PNE functioning well, dealing with free collective bargaining...”. Local 1004 contributed a total of \$34,300 to the campaign. The Court made swift work of dismissing the petition, stating that “there is no evidence of matters concerning Local 1004 having come up for consideration by Vancouver after the election”.

These cases reinforce that conflicts will not generally be presumed, that is, there must be evidence of a council member's personal interest in a matter before council.

V. INTEREST IN COMMON

Some personal interests are held in common with other electors. In such a case, a Court may find that no conflict of interest exists.

With respect to business people, in *Campbell v. Dowdall*, the Court noted, in dealing with the assertion that a council member, who was also a real estate agent, should not participate in any matter whatsoever involving land use or development:

Indeed, lawyers, insurance agents, contractors, builders, merchants and virtually every kind of commercial or business endeavour has the potential to benefit in a pecuniary sense as a result of development in the municipality. Subdividing, home building, industrial development or other higher land use all leads to potential business for those in business. Unless the business of a municipal council is to be left to those who are not otherwise involved in business or commerce, it seems to me that the applicant's broad proposition is too broad. It is unrealistic to expect competent municipal government and at the same time exclude the business community from a large portion of the necessary business of the council ... In order to find a pecuniary interest on the part of a real estate agent in a matter before council involving land development or use, I think there would have to be something to connect the individual to the particular matter beyond the mere potential for future business which potential can be seen to apply broadly to business people in the area. Just what that connection might consist of goes well beyond a commercial contractual interest in the land in question, and should not be confined by any attempt on my part in the circumstances of this particular case to catalogue.

(emphasis added)

With respect to a zoning bylaw amendment, in *Re Hoepfner*, [1976] 4 W.W.R. 481 (B.C.S.C.), the Court considered circumstances where a City of Vancouver alderman suggested, reported on and recommended to council that a "... reduction in the lot size requirement for town house development be allowed, while at the same time being the owner of a house covered by such zoning bylaw and for which site he had previously applied for and been refused a permit to demolish such house and build town houses, and for which he would receive financial gain".

The Court noted that a large number of property owners would be favourably affected by the amendment to the zoning bylaw because the amendments were applicable to all properties zoned RT2 throughout the whole of the City. The Court held:

If the evidence indicates that the advantages obtained are not purely personal but are the same advantages as those obtained by the public at large, the allegations of bad faith and illegality must fail. The distinction seems to be that even though an elected official may be personally interested in the enactment of a bylaw, if the advantage obtained by him is one enjoyed in common with the public generally, then it cannot be said that the advantage sought by him is a personal advantage. A simple example of this principle is that an elected official does not act or appear to act in bad faith when he votes to reduce the tax burden falling on real property...It follows that as [the alderman] did not stand to gain any purely financial advantage but only an advantage shared by a significant segment of the public, it cannot be said that there is any evidence of bad faith or appearance of bad faith on his part.

(emphasis added)

VI. ERROR IN JUDGMENT MADE IN GOOD FAITH

In accordance with the statute, a court will not disqualify a council member, if the court finds that the council member made an error in judgment made in good faith. In this respect, the court's assessment of the council member's integrity, both generally as a council member and in dealing with potential conflicts over time, and specifically in relation to the council member's conduct in relation to the specific matter at hand, is critical.

Furthermore, obtaining legal advice will be prudent if a council member is concerned with a potential conflict but still wishes to participate in relation to the matter. If the council member obtains legal advice to the effect that there is no conflict, a court is likely to excuse the council member from disqualification if the legal advice turns out to be incorrect (see above comments on *Edwards v. Wilson*).

In *Begin v. McInnis*, the case involving the council member/accountant who had voted on matters affecting a client, the Court refused to excuse the council member's conduct, after considering the fact that the council member was a professional person and had not obtained legal advice. The Court stated:

A chartered accountant is subjected to a long, thorough and difficult training process before he is certified and becomes a member of his profession. When he sits on council and deals with a matter which benefits his client and is challenged by members of the public and the community, the very least he should do is to obtain legal advice ... At the very least, the respondent, in not seeking legal advice, was deliberately and willfully blind.

Furthermore, a court will expect the legal advice to be based on full disclosure to the lawyer of the facts and circumstances giving rise to a potential conflict. In *Godfrey v. Bird*, the council member obtained a series of legal opinions on potential conflicts arising out of his position as a real estate agent. However, in disqualifying the council member the Court noted that the council member “continued to participate at the meetings despite the valid questions raised and without requisitioning legal opinions based on the actual facts in existence ... I find that Mr. Bird could not have reasonably relied on legal opinions available to him to come to the conclusion that he did not have a continuing conflict”.

VII. DISQUALIFICATION

Under section 111, if it appears that a person is disqualified under any of the conflict of interest provisions, the municipality or 10 or more electors may apply to the Supreme Court for an order that the person is disqualified.

Importantly, for a municipality to initiate such a court application, the application must be approved by a resolution adopted by a vote of at least 2/3 of all council members and, further, section 111(3) provides that the person who is the subject of the vote may participate and vote on the matter, even though they have a personal interest in the outcome. This makes it more difficult to achieve an affirmative vote, assuming the subject council member votes against the resolution (with a 5 person council, all 4 of the other councillors would have to vote in favour of the resolution and with a 7 person council, 5 of the 6 other councillors would have to vote in favour). This represents a significant change from that which existed before the *Community Charter*. Under the previous *Local Government Act*, a council could disqualify a council member due to conflict of interest by simply passing a resolution. It was then left for the disqualified council member to apply to court for a declaration that they did not have a disqualifying interest.

Of further importance, such a court application must be made within 45 days after the alleged basis of the disqualification comes to the attention of a council member or an elector, as the case may be.

Section 113 of the *Charter* addresses how court costs are to be dealt with under such a challenge and provides generally that costs are in the discretion of the court. However, where a group of electors successfully obtains an order that a council member be disqualified, the municipality “must promptly pay the electors’ costs within the meaning of the Supreme Court Rules” and the court may order that the municipality may then recover such costs from the disqualified council member in the same manner as a judgment of the Supreme Court.

In one Ontario case, an unsuccessful petitioner was ordered to pay half of the Mayor’s legal costs of \$394,529 [*Hazineh v. McCallion*, 2013 ONSC 6619].

VIII. FINANCIAL DISGORGEMENT

Under section 109 of the *Charter*, where a council member violates the conflict of interest provisions of the *Charter* and realizes financial gain, the municipality or an elector may apply to the Supreme Court for an order that the councillor repay the municipality all or part of such financial gain.

IX. IMPACT ON LOCAL GOVERNMENT DECISION MAKING

A. Loss of Quorum

Where one or more council members do in fact declare conflicts, obvious difficulties can arise in achieving quorum for meetings with respect to a matter. Section 129 of the *Charter* permits the municipality to apply to the Supreme Court where the number of council members who may discuss and vote on a matter falls below quorum (or such other number as may be required to adopt the applicable bylaw or resolution). On such an application, the court may order that a council member may participate and vote even though they have made a declaration under s.100 or have a pecuniary interest under s.101.

Recently, the Village of Port Clements was successful in applying to court for a declaration that the Mayor and two council members could attend, participate in and vote at meetings on a zoning amendment bylaw to permit the construction of a barge facility, even though they had indirect financial interests in the construction of the barge facility [*Re: Port Clements (Village)*, 2015 BCSC 1675].

B. Challenge to Validity of Council Decisions

Aside from the potential for disqualification, municipalities need to be concerned about the potential impact that conflicts of interest can have on municipal decisions. Where a council member violates the conflict of interest rules, an interested person may be able to apply to court to have council's decision in relation to the matter set aside. This risk exists both in relation to financial conflicts and in relation to other, non-financial conflicts

The old *Coughlan & Mayo v. Victoria (City)* case is an example of such a case, as the Court ordered that the City be prohibited from carrying out the impugned contract.

A court is likely to be reluctant to set aside a council decision without good reason. Furthermore, section 261 of the *Local Government Act* provides that "A bylaw, contract or other proceeding of a council must not be set aside or declared invalid if the only reason for doing so is that (a) a person sitting or voting as a council member was not qualified to be a

council member at or before the time of the proceeding...” On this point, in *Boss v. Broadmead Farms* (1979), 11 M.P.L.R. 212, the BC Court of Appeal overturned the quashing of a District of Saanich bylaw, stating:

The only reason for quashing the by-law advanced by the respondents was the disqualification of Alderman Paterson. Counsel for the respondents expressly disclaimed any suggestion of express bias on the part of Alderman Paterson. Thus it is “by reason only” of the fact that Alderman Paterson has become disqualified that the by-law is attacked for illegality. If in addition to the disqualification of a member of council, other grounds of illegality were established by the evidence, the s.174 could not be invoked to save the by-law. But here, no other grounds were specified or proved.

Accordingly, it appears that something more than a finding that a council member participated in a matter despite a conflict is required before a court will set aside a council decision on the matter.

NOTES