

**SAUCE FOR THE GANDER:
CONFLICT OF INTEREST FOR ELECTED OFFICIALS AND EMPLOYEES**

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I. INTRODUCTION

Most local government elected officials and employees are aware that the *Community Charter* contains a comprehensive set of rules with respect to the management of officials' conflicts of interest. While these provisions undoubtedly serve to improve public confidence in the administration of local government, the phrase "conflict of interest" often bears an undeserved stigma. Officials sometimes seem reluctant to address conflicts, perhaps due to confusion about the statutory regime and the consequences of failing to comply with it.

In this paper, we provide a general overview of the conflict of interest provisions of the *Community Charter* applicable to municipal councillors and regional district board members. We review elected officials' disclosure requirements and the resulting list of activities that are prohibited if an official has a conflict of interest, including participation in local government meetings and votes, inside and outside influence, and the use of confidential information.

Of course, elected officials are not the only local government actors who may find themselves in situations involving conflicting loyalties. In the second portion of this paper we highlight the duties of employees that generally mirror those provisions of the *Community Charter* applicable to similar misconduct by elected officials. Evidently, what is sauce for the goose is sauce for the gander.

Last, we discuss some specific conflict of interest rules found in the *Society Act*, the *Business Corporations Act* and the *Criminal Code*, which apply to both local government elected officials and employees.

II. CONFLICT OF INTEREST AND THE LOCAL GOVERNMENT ELECTED OFFICIAL

A. Introduction to Conflict of Interest: The Legislative Framework

The rules in Division 6 of Part 4 of the *Community Charter* provide a procedure for elected officials to declare both pecuniary and non-pecuniary conflicts to the council or the board, leave the meeting, and refrain from attempting to influence the voting on the question. There is a disqualification penalty for officials who fail to declare a pecuniary interest in a matter. In the case of a non-pecuniary conflict, the statute provides no individual consequences for the member but the decision of the council or the board may be vulnerable, particularly where the member casts a deciding vote. Division 6 of Part 4 of the *Charter* also applies to regional districts (see section 787.1(1) of the *Local Government Act*).

Rather unfortunately, the conflict of interest provisions of the *Charter* are often viewed by elected officials as punitive provisions designed to stigmatize those who find themselves in

conflict of interest situations. This perception has led some elected officials to avoid making a conflict of interest declaration when one is clearly required, in order to avoid the stigma associated with making a declaration. In fact, the conflict of interest provisions are procedural rules designed to acknowledge that elected officials who have been actively engaged in their communities in a range of capacities will inevitably encounter conflict of interest situations, through which they require clear statutory procedures to navigate.

B. Disclosure of Conflict of Interest

Subsection 100(2) of the *Community Charter* generally prohibits an official from participating in matters in which he or she has either a pecuniary or “another” conflict of interest:

100(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.

The *Charter* does not actually define conflict of interest situations, merely requiring that officials who find themselves in such situations conduct themselves in a prescribed way. Subsection 100(2) applies to both direct and indirect pecuniary interests and to non-pecuniary interests.

Pecuniary Conflict of Interest

A pecuniary interest is a financial interest. A direct pecuniary interest would include, for example, the interest of an official in a business licence application for a business of which she is the owner. An indirect pecuniary interest would include, for example, the interest of an official in a business licence application for a business of which her financially dependent son is the owner.

In determining whether a pecuniary interest exists, the court will construe sections 100 to 102 of the *Charter* “in a manner which is consistent with the apparent intent of the Legislature to hold councillors to a high level [of] objectivity free of pecuniary interest” (*Godfrey v. Bird*, 2005 BCSC 626).

Non-Pecuniary Conflict of Interest

Non-pecuniary interests exist at common law where a member of the public with knowledge of the relevant facts would conclude that the personal interest of an official is capable of influencing his or her vote one way or another. The general language in subsection 100(2)(b) has been broadly interpreted by courts to uphold the key principle of natural justice that no person should be a judge in his or her own case. The common law test for a disqualifying non-pecuniary conflict of interest is found in the Supreme Court of Canada's decision in *Old St. Boniface v. Winnipeg* (1990), 75 D.L.R. (4th) 385. Discussing the impact of an elected official's personal interest, the Court held:

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 the other citizens in the municipality. Where such an interest is found, both by common law and by statute, a member of Council 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.

It is important to note that the above test is not whether the interest "would" influence the official. Rather, the test is whether a reasonable person would think that the interest "might" influence the official. The test turns on the appearance of bias, not whether there is evidence of actual bias. If an informed, reasonable person could view that official's personal interest as capable of affecting his or her judgment, then the personal interest test is met and there is an apprehension of bias sufficient to constitute "another" conflict of interest. It is irrelevant that an official feels he or she can be open-minded and fair.

When looking at whether a reasonable person would conclude that the interest might influence the elected official, a Court is likely to consider how substantial the outside interest is, how unique it is to the official (i.e. does the rest of the community hold the same interest) and how directly connected it is to the subject matter before the council or board for consideration. These three variables were articulated by the B.C. Supreme Court in *Watson v. Burnaby* (1994), 22 M.P.L.R. (2d) 136, where the Court found a councillor who was also a Mason did not have a disqualifying conflict of interest when a historical society requested City approval to construct a replica Masonic lodge on City-owned lands. The Court noted that the councillor was not a member of the historical society, the building was more connected to City history than to Masonic history, and that the building would be beneficial to all residents of the City regardless of their religious or other affiliations.

C. Restrictions on Participation

The *Community Charter* requires an elected official attending at a meeting who 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 due to a conflict, to declare the conflict and to state “in general terms” the reason that he or she considers a conflict exists. The minutes of the meeting must record the statement, including the reason, as well as the time of the member’s departure from and return to the meeting. The member must then leave the meeting and must not do anything referred to in subsection 101(2):

101(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.

Thus, the member must leave the meeting and must not participate in any way or attempt to influence the voting on the matter. These rules prevent the member from remaining in the meeting room during the discussion of the matter in any capacity, although he or she may remain in the building. The mayor or chair or other person presiding at the meeting has a duty to ensure that the member is not present during the discussion of the matter in question.

It is significant to note that the restrictions on participation apply regardless of whether or not the official has made the required declaration under section 100(2).

Section 101(3) provides that a person who contravenes the restrictions contained in subsection (2) and participates in council or board business with respect to a matter in which he or she has a pecuniary conflict of interest is subject to disqualification from office. An official who participates in council or board business in which he or she has a non-pecuniary conflict of interest (“another” interest) is not subject to disqualification but his or her vote may be discounted and therefore any decision on the matter could be rendered void.

An elected official who declares a conflict of interest and subsequently receives legal advice to the effect that he or she does not in fact have a conflict of interest may withdraw a declaration made under subsection 100(2) and resume participation. This provision permits an official to participate when the matter comes up again at a subsequent meeting, and seems designed to encourage officials to err on the side of caution in their initial assessments of whether they have a conflict of interest, as the declaration is ultimately revocable.

D. Restrictions on Inside and Outside Influence

The *Charter* prohibits attempts by elected officials to influence decisions, recommendations, or other actions by an officer or employee or a delegate of the council or board, on a matter in which he or she has a direct or indirect pecuniary interest. Section 102 reads:

102(1) A council member must not use his or her office to attempt to influence in any way a decision, recommendation or other action to be made or taken

- (a) at a meeting referred to in section 100(1) *[disclosure of conflict]*,
- (b) by an officer or an employee of the municipality, or
- (c) by a delegate under section 154 *[delegation of council authority]*,

if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates.

Elected officials are also prohibited from using their office to influence decisions made by persons outside the local government organization. Section 103 provides that a member must not use his or her office to attempt to influence in any way a decision, recommendation or action to be made or taken by any other person or body, if the member has a direct or indirect pecuniary interest in the matter to which the decision, recommendation or other action relates. The typical example of using one's office inappropriately in such matters is lobbying an external decision-maker in a letter written on the local government's letterhead, or sending one's local government business card with a letter written on personal letterhead. The scope of the prohibition is very broad and includes making representations to any governmental or non-governmental decision-maker in a matter in which one has a financial interest.

Both sections 102 and 103 go on to provide that a person who contravenes that section is disqualified from holding office, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

E. Exceptions To Conflict Restrictions

According to section 104 of the *Charter*, the conflict of interest rules found in sections 100 to 103 do not apply if certain circumstances apply, meaning that the obligation to disclose a conflict, the restrictions on participation, and the prohibitions on inside and outside influence do not apply in prescribed circumstances:

104(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.

As per subsection (a), the conflict of interest rules do not apply in the case of a pecuniary interest that an elected official has in common with electors of the local government generally, and an equivalent exception may be applied in relation to common law conflicts. This exception is often called the “community of interest” exception, and is described as a “matter of practical necessity as well as communal democracy” (*Guimond v. Sornberger*, [1980] A.J. No. 650). The standard example of this exception is the adoption of the annual property tax bylaw under section 197 of the *Charter*, a matter in which every official who owns real property within the local government has a direct pecuniary interest.

Although the courts have not defined precisely what will constitute a sufficient community of interest so as to excuse a pecuniary conflict, the decision in *Godfrey v. Bird*, 2005 BCSC 626 does provide some helpful parameters for consideration. The case concerned a council member (Mr. Bird) who worked as a real estate agent and had numerous business associations with a developer. One of the council matters in which Mr. Bird participated was a zoning amendment

application affecting 48 properties, including one that Mr. Bird planned to sell to the developer. The municipality had received a legal opinion that, in general, if there are fewer than 100 parcels in an affected area, council members who had an interest in that area should not assume that there is a sufficient community of interest such that subsection 104(1)(a) would apply to them. Mr. Bird participated in the discussion of and voting on the application and, in proceedings commenced by a group of electors to declare his Council seat vacant, attempted to rely on the “community of interest” exception. The Court concluded:

Similarly, I can not reach the conclusion that Mr. Bird was correct in concluding that he could participate because he had an interest which was “in common with the electors of the municipality generally”. Sections 100 through 103 of the Act do not apply if there is a finding that a councillor has a pecuniary interest and if the Court can also conclude that the pecuniary interest is “in common with the electors of the municipality generally”. I find that, if Mr. Bird did have direct or indirect pecuniary interest, then that pecuniary interest was not “in common with the electors of the municipality generally”. Mr. Bird knew throughout that it was the opinion of the solicitors for the District that, in order for a councillor to have a pecuniary interest in common with the electors of the District generally, it would be necessary for the pecuniary interest to relate to in excess of 100 properties. To the knowledge of Mr. Bird, the Ardmore Property was one of less than 50 properties within the District that were being considered by the Committee and Council. Without assuming that less than 100 properties in any municipality will mark the boundary between an interest “in common with the electors of the municipality generally” and an interest which is not “in common”, I am satisfied that the solicitors for the District were correct in concluding that 100 properties would be the appropriate “boundary” for this District.

The Court’s qualification on the application of a “100 properties” guideline for the community of interest exception is likely an acknowledgment that the guideline may vary with the population of the community. North Saanich, the community in question in *Godfrey*, had a population of approximately 11,000.

As per subsection (d), the conflict of interest rules do not apply in respect of a pecuniary interest if it is so remote or insignificant that it cannot reasonably be regarded as likely to influence the official on the matter in question. The “insignificance” exception is also based on the common law and may be difficult to apply, as the courts have found that surprisingly small amounts of money are not insignificant in the context of municipal conflict of interest law.

Subsection 104(2) goes on to provide that, if an official has a legal right to make representations to the council or board in his or her private capacity and is prohibited by the conflict of interest rules from exercising that right, the member may appoint another person to make representations on that member's behalf.

F. Disclosure of Gifts

Related to the restrictions on participating in certain matters where an elected official has a pecuniary conflict of interest, section 105 of the *Charter* provides a general prohibition on accepting a fee, gift or personal benefit that is connected with a member's performance of his or her official duties. Subject to certain exceptions, the receipt of such fees, gifts, or benefits results in disqualification from office, unless the contravention was done inadvertently or because of an error in judgment made in good faith. According to subsection 105(2), the prohibition on accepting gifts does not apply to:

- (a) a gift or personal benefit that is received as an incident of the protocol or social obligations that normally accompany the responsibilities of office;
- (b) compensation authorized by law; or
- (c) a lawful contribution made to a member who is a candidate for election to a local government.

However, according to section 106, if an official receives a gift or personal benefit of a type permitted by subsection 105(2) that exceeds \$250 in value, or the total of such gifts and benefits received from one source in any 12 month period exceeds \$250, the official must file with the corporate officer a disclosure statement indicating the nature of the gift or benefit, its source, when it was received, and the circumstances under which it was given and accepted. A failure to properly disclose such gifts and benefits results in disqualification from office, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

G. Disclosure of Contracts

Under section 107 of the *Charter* current and former elected officials have a duty to report to the local government any contracts with the local government in which they have a direct or indirect pecuniary interest. The local government then has a duty to report the existence of such a contract as soon as reasonably practicable at a council or board meeting that is open to the public.

If an official fails to report the existence of a contract, he or she is disqualified from holding office, unless the contravention was done inadvertently or because of an error in judgment made in good faith. However, even if an officer does fail to report, the local government is still

responsible for reporting the contract under subsection 107(1). Thus the local government is responsible for knowing, when it enters into the contract, what persons have a direct or indirect pecuniary interest in the contract.

H. Restrictions on Use of Insider Information

Current and former elected officials, regardless of how much time has elapsed since the end of their terms of office, are prohibited from using information that was obtained in the performance of their official duties and that is not available to the general public, to gain or further a direct or indirect pecuniary interest.

The consequence for officials presently in office is disqualification, unless the contravention was done inadvertently or because of an error in judgment made in good faith.

Another consequence, which applies to both current and former officials, is found in section 109 of the *Charter*. Section 109 provides for a Supreme Court order that an official who has contravened Division 6 of Part 4 of the *Community Charter* and who has realized financial gain in relation to that contravention must pay to the local government all or part of that financial gain. Either the corporation or an elector may apply for such an order. If an elector makes the application and is successful, the local government must pay the elector's costs in the Rules of Court scale of costs, although the Court may order another party, including the current or former official, to reimburse the local government.

III. CONFLICT OF INTEREST AND THE LOCAL GOVERNMENT EMPLOYEE

We are often asked by local government employees whether the *Community Charter* conflict of interest provisions apply to their conduct. The short answer is no, they do not. While employees are not covered by Part 4, Divisions 6 and 7 of the *Community Charter*, they do have similar codes of conduct regulating their relationships with their local government employers. These codes originate in employees' implied duty of loyalty to their employers and their express duties under their employment contracts and applicable workplace and other professional regulatory statutes.

A. Implied Duty of Loyalty

Courts consistently find that employees (both unionized and non-unionized) owe their employers a comprehensive and broadly defined duty of loyalty. As vestiges of feudal master-servant law, this duty has been characterized in many different ways, including the duty of fidelity or the duty to act in good faith. This duty has been described as:

[...] the implied duty of fidelity provides the courts with a convenient 'catch-all' instrument for protecting the employer's trading and business interests against what is considered, in the circumstances of each case, to be improper and unduly damaging

conduct on the part of the employee. The law in the area can be uncertain and fluid, as the courts seek to strike a balance of proportionality between protecting the interests of the employer, the employee and the general public. (England, G., *Employment Law in Canada*, 4th Ed., Vol. 2, s.11.122)

In short, the duty is to advance the employer's business interests. By extension, an employee cannot advance his or her personal interest to the detriment of the employer's interest. An employee's discharge of this duty is called into question when his or her ability to further the employer's objectives and goals is jeopardized by the existence of a personal relationship or other employment or volunteer activities, by the acceptance of some improper benefit, or by the misuse of the employer's resources, including its confidential information.

Inappropriate Relationships

A review of the municipal conflict of interest cases suggests that elected officials' participation in council or board matters is often challenged on the basis that the official has a conflict of interest because of his or her family or personal relationships. These conflicts can be both pecuniary and non-pecuniary. In the employment context, many conflict of interest policies address these relationships as well. Again, the overriding concern is that employees ought not to be in a position where they might—or a reasonable person thinks they might—advance the interests of a family member or friend rather than those of the employer. Like elected officials, employees are also under disclosure obligations and must promptly and fully inform their supervisors of any conflict situations in which they may find themselves.

For example, in *Toronto* (2002), 107 L.A.C. (4th) (Davie) the City terminated a clerk in its community welfare department for breaches of the City's conflict of interest policy. The City alleged that the clerk, who processed welfare applications, breached that policy by helping her son secure welfare benefits and then by accepting rent from him while he was in receipt of those benefits. The evidence suggested that she misrepresented financial information on her mortgage application, her son's car loan application, and various other financial transactions. The employee said that she had repeatedly disclosed to her supervisors that her son was receiving welfare. The labour arbitrator noted that the employee's alleged partial disclosure, even if it really occurred, still failed to satisfy her duty to fully and frankly disclose all relevant information about a conflict of interest or perceived conflict to her supervisors, which in this case required disclosure of the fact that her son was living with her and paying her rent:

The grievor's response that her supervisors "didn't ask" about these matters does not absolve the grievor's conduct. The fact that a Supervisor did not ask a particular question does not excuse or explain the grievor's failure to be full and frank in her disclosure of the conflict of interest. The requirement to disclose a conflict lies with the employee who has all the facts. In declaring a conflict

of interest an employee cannot be selective about disclosing all the facts, and cannot pick and choose to disclose only that information which the employee thinks is necessary. (para. 72)

A clandestine three year office romance between a manager and someone he supervised led to the manager's employment being terminated with cause in *Carroll v. Emco Corp.*, 2006 BCSC 861, aff'd 2007 BCCA 186. During their romance, Mr. Carroll conducted his girlfriend's performance reviews, awarded her pay increases, imposed discipline on her, and promoted her within the branch. He also repeatedly denied the affair when asked about it by his superiors. The trial judge and the Court of Appeal agreed that his conduct in failing to appropriately address the conflict of interest that arose when he engaged in a personal relationship with a subordinate violated his common law duty of fidelity to the employer.

Conflicting Jobs or Volunteer Activities

Many employees' conflict of interest predicaments arise because of second jobs or volunteer activities, the pursuit of which is at odds with their duty to advance their employers' interests. These cases are often difficult to resolve because courts and arbitrators tend to take a narrow view of an employer's right to discipline or impose other employment sanctions in respect of an employee's off-duty conduct.

In *Ontario* (2006), 153 L.A.C. (4th) 385 (Petryshen), a senior Ministry of Health employee was terminated because of his active involvement in a community foundation he established to voice his concerns about ageism in the delivery of health care services. He persisted with his prominent involvement in the foundation despite repeated demands from the Deputy Minister that he cease such volunteer work because of the Deputy Minister's concerns that it gave rise to a perceived conflict of interest. The employee argued strenuously that the Deputy Minister's demands infringed his rights under the *Charter of Rights and Freedoms*. The arbitrator ultimately concluded that the Ministry's conflict of interest code did violate the employee's *Charter* rights but the policy was a reasonable limit on those rights in the circumstances. The arbitrator was careful to describe the concern as one of a perceived conflict of interest, using language similar to that used by courts when considering allegations of conflict of interest for elected officials:

Although there is no indication that Mr. Globerman's views on how the health care system treats the elderly has an impact on how he performs his duties as a senior financial consultant, a reasonable perception is that the recommendations he makes to senior management in the Ministry might be influenced by his private advocacy role with the Foundation. [...]

The identification of Mr. Globerman as a public servant with the Ministry creates a reasonable prospect that people would believe that the Foundation has an advantage over other charities

because he has access to information and individuals which others outside of Government do not. Whatever his reason for identifying himself as a public servant with the Ministry, a reasonable perception is that the Foundation, his private interest, benefits from such a connection. (paras. 63-64)

Presumably the fact that the employee also lied to the Deputy Minister by stating that he had withdrawn from the foundation when in fact he had not, did little to help his cause. The arbitrator upheld the Ministry's decision to terminate Mr. Globerman.

In *New Westminster* (1991), 18 LAC (4th) 396, the City denied one of its firefighters a promotion based on his ownership of a fire protection supply firm, which the City's hiring panel considered to be in conflict with the duties of the Chief responsible for the department's fire prevention division. Interestingly, the City was fully aware of the side business as the employee had been operating it for several years while working as a firefighter in the City's fire suppression division, but had not developed any express conflict of interest policy during that time. Further, the employee offered to divest himself of all his interests in the company if he was awarded the position. The arbitrator found that no express conflict of interest rule or policy was necessary, and that the employee's late-in-the-day offer to sell his interest in the company would not be enough to resolve the continuing perceived conflict of interest.

In a more recent labour arbitration decision, two public works foremen were terminated when the City learned that they instructed labourers under their supervision to perform work, while on duty, for a client of the foremen's private business (*City of Regina* (2008), 176 L.A.C. (4th) 359 (Stevenson)). The arbitration panel found their conduct constituted time theft and the misappropriation of City resources and materials, all of which were contraventions of the City's code of conduct. However, the arbitration panel found that the City failed to establish evidence of a "widespread problem associated with improper conduct or abuse of the trust relationship". The Panel also concluded that the City had not taken sufficient steps to notify its employees, including the two foremen, of its emphasis on public accountability. The panel reinstated the two employees and substituted six-month suspensions.

In *Rupert v. Greater Victoria School District No. 61*, 2001 BCSC 700, aff'd 2003 BCCA, the court considered whether Mr. Rupert gave the School District just cause to terminate his employment by operating a private company and passing it off as affiliated with or sanctioned by the School District. Mr. Rupert was responsible for all aspects of the School District's international student program. While the Court characterized several things Mr. Roper did in the course of his employment as "clear examples of bad judgment", it was his operation of a private holiday program for participants in the School District's international student program that the Court found gave the School District cause to terminate his employment. He used School District letterhead and documents to help sell these holidays, giving the impression they were School District programs. He also misled his colleagues into thinking the holiday program was part of the School District's international student program so that he could rent facilities

from the School District at reduced rental rates. His acts of misappropriating School District supplies and misleading its students, all the while misrepresenting the nature of the holiday program to his colleagues, constituted serious breaches of his duty of fidelity to his employer. Mr. Rupert's wrongful dismissal claim was dismissed, and the School District's counterclaim for \$45,000 in damages, being the amount of profit Mr. Rupert made from his holiday business, was allowed.

Gifts

In *New Brunswick (Department of Public Safety)* (2008), 172 L.A.C. (4th) 266 (McEvoy), a commercial vehicle inspector and part-time investigative coroner who accepted cash payments from the funeral homes with whom he interacted in the course of his job was disciplined for breaching his duty of loyalty and fidelity. In upholding a relatively minor suspension, the arbitrator noted that the total amount received (\$120, paid \$20 at a time) was minimal and that the employee did not solicit the payments. The employee testified that these occasional payments did not result in him treating the funeral home any differently than he normally would in the execution of his coroner duties. He also stated that the situation was quite unlike the more explicit—and expensive—bribes he was offered, but refused, in the course of his other duties as a commercial vehicle inspector and apparently this was a wide-spread practice amongst the coroners' service. He noted that he had not been charged with any criminal offences arising from the misconduct whereas some of his coworkers had. In light of all of these factors, the arbitrator concluded that the employee's misconduct was not so egregious as to give the employer just cause to terminate his employment.

In the non-union setting, a manager in General Motors' paint shop with 25 years of service was dismissed with cause for accepting a private loan from a client during a time of personal financial distress (*Connolly v. General Motors of Canada*, [1993] O.J. No. 2811 (Ont. Ct. GD)). The trial court dismissed his wrongful dismissal action, finding that his acceptance of the loan violated the plant's extensive conflict of interest policy, which contained an express prohibition on accepting loans from clients or customers. The court noted the following:

1. the fact that the employee did not realize his actions were problematic was, at best, a mitigating factor—the conduct should be viewed objectively;
2. the fact that the customer supplying the loan did not receive any benefit, and the employer did not suffer any quantifiable loss, was irrelevant; and
3. the existence or non-existence of any actual conflict of interest is irrelevant—a possible conflict, or even an appearance of conflict, is equally problematic.

Inside Influence

Employees who exercise discretion in the conduct of their job duties ought not to be involved with processing or adjudicating matters in which they have a direct pecuniary or non-pecuniary interest. For example, a municipal parking control officer was found to have acted improperly in “disposing” of three parking tickets issued to him by his own municipality (*Ottawa* (1993), 34 L.A.C. (4th) 177 (Fraser)). The arbitration panel noted:

We find that the position of parking control officer, and clearly that of a senior officer who may do prosecutions, involves a position of trust. The removal of tickets by the grievor for his own benefit unquestionably constitutes a breach of that trust and, as a consequence, he would no longer be suitable as someone trusted to issue tickets. He is also quite unsuitable to perform any prosecuting function, which is part of a quasi-criminal process requiring not only trust but also an impartial use of the discretion that is normally found in such functions. [...] (para. 13)

In a similar vein, the property assessor who decreased his own property’s assessment and that of his step-mother’s property, decreased his girlfriend’s property assessment, and tampered with his ex-wife’s property assessment by changing the age of the home, eliminating an exemption code and increasing the assessed value, was found to have acted contrary to his implied duty of loyalty and the employer’s code of conduct (*Municipal Property Assessment Corp.* (2008), 170 L.A.C. (4th) 259 (Tacon)). The employee argued that he was just adjusting the property values to preserve “data integrity”. The arbitrator found that even if there was a legitimate error in the properties’ assessments, it was inappropriate and contrary to the conflict of interest policy or code for him to make those adjustments:

[...] the conflict of interest provisions preclude an individual implementing such reassessments even if accurate. The information is to be passed on to an appropriate assessor or manager. To do otherwise is to create a perceived conflict of interest: to an objective viewer, the involvement of an employee in changing data for properties in which he/she has an interest or in which a relative has an interest undermines MPAC’s reputation for impartiality, a core value of the corporation. (para. 68)

Accessing/Disclosing Confidential Information

As discussed above, the *Community Charter* prohibits elected officials from misusing confidential information they receive in the course of their duties as elected officials (ss. 108, 117). Employees are under a similar duty, and violating the duty to maintain an employer’s confidences is often characterized by courts and labour arbitrators as a serious act of

dishonesty that can frustrate the employment relationship, thus giving rise to just cause for discipline and termination.

A municipal employee working in the police detachment learned the hard way that a workplace policy prohibiting unauthorized access to information on the Canadian Police Information Centre (CPIC) database was not to be taken lightly. Contrary to the policy, the employee in *Cape Breton (Regional Municipality)* (2001), 105 L.A.C. (4th) 169 used a police officer's name to run a search on her new boyfriend to see if he had a criminal record. Although the arbitrator overturned the municipality's decision to terminate her employment, a one year suspension was substituted in its place.

An executive assistant working for the ministry responsible for administering a spousal and child support payment enforcement program similarly crossed the line when she ruined a provincial political candidate's campaign by leaking confidential information revealing that he owed substantial support payments. An arbitration panel upheld her dismissal in *Alberta (Department of Justice)* (2006), 154 L.A.C. (4th) 183 (Sims).

A municipal employee in *West Grey Police Services Board* (2005), 146 L.A.C. (4th) 111 (Kirkwood) was terminated for disclosing confidential schematics and other proprietary information she received from one proponent to another in the process of managing a competitive procurement process. She also purposefully slanted her report to the board making the final procurement decision, all apparently with the goal of persuading the board to select the proponent she thought most capable of doing the job. Finding "the legitimacy and the desirability of the goal does not legitimize or make any means acceptable" (para. 127), the arbitrator found that the employee's conduct breached her duty of loyalty to the board and warranted very serious discipline. The arbitrator reinstated the employee but substituted an unpaid suspension from the date of termination to the date of reinstatement, which was over two years.

B. Express Duties

In addition to the implied duties of fidelity, loyalty and good faith, employee conduct is also regulated by various express duties.

Contractual Provisions

Many local government employees have written employment contracts setting out the terms and conditions of the employment relationship. Some contracts contain express language acknowledging the employee's duty to the local government, including provisions restricting the employee's ability to pursue additional employment. Contracts for senior employees often include a restriction on the use of confidential information obtained in the course of employment.

Workplace Statutes

Many employment-related statutes apply not only to local governments in their corporate capacity but also to individual agents of local governments, including their officers and employees. For example, individuals can be found personally liable for breaches of the codes of conduct contained in the *Human Rights Code*, the *Employment Standards Act*, the *Labour Relations Code*, the *Workers Compensation Act* and various other general application statutes that regulate workers and workplaces. A violation of one of these statutes may constitute a conflict of interest under an employer's policies or otherwise constitute a breach of implied or express contractual duties, thereby resulting in adverse employment consequences in addition to any statutory liability.

Self-Regulating Professions

Local government employees who are members of a self-regulating profession also may have express duties under provincial legislation and codes of conduct adopted by their professional organizations. Accountants, architects, building officials, engineers and geoscientists, forest professionals, land surveyors, lawyers, notaries, and police officers and are examples of employees regulated by provincial statutes and codes of conduct adopted by their professional organizations. Planners, while not regulated by a provincial statute, are also subject to a code of conduct as a condition of membership in their professional organization.

For example:

1. The Association of Professional Engineers and Geoscientists of British Columbia's Code of Ethics requires its members to: "act as faithful agents of their clients or employers, maintain confidentiality and avoid a conflict of interest but, where such conflict arises, fully disclose the circumstances without delay to the employer or client."
2. The Planning Institute of British Columbia's bylaws include a Code of Professional Conduct that requires members to: "ensure full disclosure to a client or employer of a possible conflict of interest arising from the Member's private or professional activities."
3. The Building Officials' Association of British Columbia's bylaws include Rules of Professional Conduct that require members to: "discharge all duties owed to the Member's employer, the Province, other members of the profession and the public, honestly, impartially, competently and without interference or undue delay."

To the extent that professional designation or membership in a particular organization is a requirement of a person's job, failure to maintain that designation or membership may amount to cause to discipline or dismiss that employee.

Statutory Decision-Makers

As a result of their independent statutory status, some local government employees have a duty to uphold certain principles or interests that may, on occasion, be at odds with their employers' actual or perceived interests. For example, the office of a subdivision approving officer is a designation independent of a local government and the person holding that office must exercise independent decision-making when performing his or her duties under the *Land Title Act* regardless of that person's affiliation with or employment by a local government. Election officers under the *Local Government Act* and information heads under the *Freedom of Information and Protection of Privacy Act* are similar examples of statutorily required offices often held by individuals otherwise employed by a local government.

While these employees must identify to whom they owe a duty in any given situation, in reality they often perform their dual roles with little friction. This highlights the fact that the wearing of more than one hat, so to speak, does not always result in a conflict of interest and that a case-by-case analysis is necessary to determine when those individuals cannot or should not be involved with a particular decision.

C. Consequences of Breaches of the Duty of Loyalty

As the above cases and labour arbitration decisions highlight, an employee whose conduct is at odds with his or her duty to the employer faces negative employment consequences. Like the elected official who might be disqualified from holding office for violating the *Community Charter's* code of conduct, an employee who engages in activity that is found to be an impermissible conflict of interest might be terminated on a with cause basis. Particularly in the union setting, lesser discipline (such as a warnings, or a suspension) may be issued, depending on the severity of the offence and the other criteria employers and labour arbitrators normally consider when addressing employment misconduct.

Unlike some of the other remedies described below, existence of an actual benefit to the employee or loss to the employer is not a prerequisite to the legitimate imposition of discipline or to an employer's finding of just cause for termination.

While rarely exercised, an employer whose employee's misconduct results in either a loss of profit to the employer or financial gain to the employee also has contractual and equitable remedies. A court may grant an injunction to prohibit the employee (or, more likely, the former employee) from engaging in certain conduct, such as misusing confidential information, to advance a personal project. A court may also require the employee or former employee to repay any damages (such as lost profit) to the employer or issue an order of disgorgement that requires the employee or former employee to account for any profit or benefit. The latter remedy was successfully obtained by the School District in *Rupert v. Greater Victoria School District No. 61*, a court case discussed above.

An employee or officer who engages in improper conduct in the discharge of express statutory duties may face penalties under the applicable statutory regime. Similarly, an employee whose conduct violates the code of conduct for a professional organization to whom he or she belongs faces sanction under that organization's governing bylaws.

D. Workplace Conflict of Interest Policies

The breadth of an employee's duty to his or her employer can result in a wide variety of "rules" inherent in the employment relationship. We encourage employers to reduce these rules to writing in the form a comprehensive but flexible conflict of interest policy. These policies assist employees in identifying when they may have an ethical dilemma or conflicting loyalty that needs to be disclosed and addressed.

Typical conflict of interest policies are remarkably similar to the conflict of interest provisions applicable to elected officials under the *Community Charter*. They often address matters such as:

- Inappropriate business dealings with family or friends;
- Conflicting second businesses and volunteer activities;
- Acceptance of gifts, donations or favours in the course of employment; and
- Misuse of the local government's resources, including records and information.

Well-drafted policies have a clear declaration and reporting mechanism to facilitate early disclosure of potentially problematic situations. They also clearly warn employees that breaches may lead to discipline up to and including dismissal. As with all policies, local governments must take positive steps to bring a conflict of interest policy to employees' attention, and will be well served to invest appropriate time and resources into periodic training for those tasked with administering or enforcing the policy.

Many conflict of interest policies are paired with whistleblower protection policies to ensure that an employee who, in good faith, reports a co-worker's possible conflict of interest is protected from negative workplace consequences.

Regardless of which type of conflict of interest policy a local government adopts, conducting an appropriate investigation of any alleged breach prior to imposing discipline is imperative.

IV. CONFLICT OF INTEREST RULES APPLICABLE TO LOCAL GOVERNMENT ELECTED OFFICIALS AND EMPLOYEES

A. Status as a Director of a Company or Society

Many local governments are involved in the ownership and management of corporations and societies. When a local government elected official or employee serves as a director of such an entity, questions about possible conflicts of interest can arise. In this section, we discuss the relevant statutory and common law duties of directors of companies and societies, and review the case law considering whether an elected official's dual role gives rise to impermissible conflicts of interests.

Directors of companies and societies are usually the individuals with control of and decision-making power with respect to the entity's affairs. It is therefore not surprising that the statutes regulating those entities contain rules aimed at avoiding certain conflicts of interest.

First, there is a stand-alone duty for company directors to "act honestly and in good faith with a view to the best interests of the company" and the *Society Act* imposes the same duty on society directors.

Sections 27 to 29 of the *Society Act* require a director of a society who has an interest (direct or indirect, pecuniary or non-pecuniary) in a proposed contract or transaction with the society to "disclose fully and promptly the nature and extent of the interest to each of the other directors" (s.27). If that director profits from such a contract or transaction, he or she may be liable to the society for that profit unless certain "savings" provisions apply, such as if the director made full and frank disclosure in accordance with s.27, the remaining directors approved the contract or transaction, and the affected director abstained from voting on its approval. If directors fail to observe this required process for disclosing matters in which they are personally interested and not participating in the approval of those matters, the members of the society or "an interested person" can apply to the Court for relief, including an order setting aside the impugned contract or transaction.

Directors and officers of companies have similar duties to refrain from acting in conflict with the company's best interest. Part 5, Division 3 of the *Business Corporations Act* contains a comprehensive conflict of interest code that requires disclosure of "material" interests in contracts and transactions that are "material" to the company. It also contains a disgorgement mechanism similar to that applicable to society directors.

Conflicts can arise when a local government elected official or employee also sits as a director of a company or society. On the one hand, the official or employee owes his or her local government a duty of fidelity and loyalty and is tasked with advancing the local government's best interest. What is in the local government's best interest may be adverse to what is in the company's or the society's best interest. In those situations, even the possibility of a conflict, or the perceived conflict, may be sufficient to require an elected official to declare a conflict of

interest under the *Community Charter* and for both an elected official and an employee to abstain from participation in the local government's management of matters involving the company or society.

Case law considering when an elected official has a conflict of interest with respect to matters involving a company or society tends to distinguish between the following types of situations:

1. where a statute requires the local government to appoint the official to the board of a corporation or society related to the local government or that the local government controls (e.g. *Save St. Anne's Coalition v. Victoria* (1991), 5 M.P.L.R. (2d) 331 (B.C.C.A.)); and
2. where an official sits as a director of a corporation or society unrelated to or not controlled by the local government (e.g. *Starr v. City of Calgary* (1985), 52 D.L.R. (2d) 726 (A.B.Q.B.)).

In *Save St. Anne's Academy*, the Provincial Capital Commission, a body established by Provincial statute, owned a historic property that it proposed to redevelop. City Council adopted the necessary rezoning but concerned citizens attempted to strike down the zoning bylaw on the basis that the two councillors who were also members of the Commission had a conflict of interest with respect to the matter. The Court of Appeal disagreed:

The structure of City Council in Victoria and the structure of the Provincial Capital Commission, and their interrelationship, require that there be two members of the Victoria Council involved in the decisions of the Provincial Capital Commission and it cannot be inherent in the structural inter-relationship that those two members must always disqualify themselves from any consideration, in their capacity as councillors, of the same issues as those raised in the deliberations of the Provincial Capital Commission. The structure would not have been set up that way if that result were contemplated.

In *Starr*, the City leased land to a company known as Calgary Exhibition and Stampede Limited. Provisions of the company's bylaws required it to appoint to its board of directors four councillors chosen by the City. The City and the company proposed to enter into a new lease, and it was alleged that the four councillors were disqualified from voting on the matter at council meetings. The Court agreed that the councillors were disqualified not only under the applicable municipal statute, but also at common law because their connection to the corporation raised an apprehension of bias:

If the [councillors] are not prohibited from voting, the citizens of Calgary may feel that alderman who have a bias in favour of the Stampede Company due to their interests 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.

However, we find the most common situation to be analogous to neither of the above cases: the elected official who sits as a director of a corporation or society wholly owned and controlled by the local government as the sole shareholder or member. In that case, there is no obligation for the local government to appoint one of its elected officials to the board (unlike *Save St. Anne's*) but the company or society is not an unrelated entity—indeed, it is usually just the alter-ego of the local government (unlike *Starr*). In these situations, it would appear to be a highly technical and artificial result if elected officials were prevented from participating and voting in their elected capacity on matters involving the company or society.

B. Criminal Conflict of Interest

Elected officials should be aware that certain breaches of the conflict of interest rules may actually amount to criminal misconduct and have repercussions under the Canadian *Criminal Code* that far exceed disqualification from office.

Section 122 addresses breaches of trust by public officers. It provides that every officer who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Section 123 sets out the offence of municipal corruption. Section 123(1) makes it an offence to give, offer or agree to give a municipal official, or anyone for the benefit of a municipal official, a loan, reward, advantage or benefit of any kind as consideration for the official: (a) abstaining from voting at a meeting of the municipal council or a committee of the council, (b) voting in favour of or against a motion or resolution, (c) aiding in procuring or preventing the adoption of a motion or resolution, or (d) performing or failing to perform an official act. Section 123(1) also makes it an offence for a municipal official to demand, accept or offer to accept from any person such a loan, reward, advantage or benefit given as consideration for any of the acts described in (a) through (d). It is an offence to influence or attempt to influence a municipal official to do anything mentioned in (a) through (d) by suppressing the truth (in the case of a person who is under a duty to disclose the truth), by threats or deceit, or by any unlawful means.

In the case of *R. v. Gyles*, [2003] O.J. No. 3188, the accused was charged with the criminal offences of breach of trust and municipal corruption under sections 122 and 123 of the *Criminal Code*. It was alleged that the accused, who was a municipal councillor, demanded or accepted a bribe in exchange for the exercise of his influence in obtaining rezoning for particular properties. The first complainant sought to have a piece of property rezoned for use as a funeral home, and arranged a meeting with the councillor with a view to obtaining his support for the project and advice on how to obtain the rezoning. During subsequent meetings, the complainant alleged that the councillor offered to fix things for him in return for \$50,000. The second complainant alleged that he also met with the councillor with respect to a rezoning

application, and the councillor indicated he would help get the rezoning but that his fee would be \$25,000.

In finding the councillor guilty of breach of trust, the Court stated that the essential elements of the charge of breach of trust that must be proved by the Crown are:

- (a) the accused is an official;
- (b) the impugned act was committed in connection with the duties of his office; and
- (c) the act constitutes a breach of trust.

Here, it was clear that the accused was an official, as he was elected a Mississauga City Councillor, and there was no doubt that the impugned acts of demanding or accepting a sum of money were committed in the general context of the duties of his office. The Court found that, in order to constitute a breach of trust, it must be shown that the councillor acted contrary to the duty imposed on him by statute, regulation, his contract of employment or directive in connection with his office and that the act gave him a personal benefit directly or indirectly. There need not be real prejudice or loss to the public or the local government, nor does the crime of breach of trust necessarily involve the idea of corruption. The advantage must flow from the very status and office of the official. The Crown is not required to prove that any official actions were altered as a result of the benefit.

Section 122 is sufficiently broad to ensnare the municipal official who, though performing the duties of his office or his official acts in a perfectly appropriate manner, does so in express return for considerations, benefits or rewards, accepted by the municipal official and offered by a person seeking the performance of that duty or official act.

In also finding the accused guilty of municipal corruption, a rarely prosecuted offence, the Court stated that the essential elements that must be proved by the Crown are:

- (a) the accused is a municipal official;
- (b) the accused demanded or accepted a benefit as consideration; and
- (c) the accused accepted this consideration for voting or for procuring the adoption of a municipal motion.

Here, the councillor both demanded and accepted money from each of the complainants, and the Court was left to consider whether he demanded or accepted these benefits as consideration for voting in favour of a rezoning application in the case of the first complainant, and as consideration for aiding in procuring the adoption of a motion in the case of the second complainant. Like section 122, section 123 does not require proof of an overtly corrupt action by a municipal official. Preferential treatment exercised by a municipal official is sufficient on

its own to constitute an offence under this section. The Court here concluded that the accused's actions, offering to support each of the rezoning applications in exchange for the payment of money, did amount to municipal corruption contrary to section 123 of the *Criminal Code*.

V. CONCLUSION

Given the breadth of elected officials' and employees' duties to their local government, it is perhaps not surprising that the phrase "conflict of interest" carries some confusion. While the individual circumstances of a situation must be carefully considered and case-specific legal advice is often necessary, by proceeding openly and cautiously in possible conflict situations, elected officials and employees are less likely to be caught off guard with allegations of improper conduct. Elected officials and employees are well served to disclose all possible conflicts of interest early and to seek appropriate assistance navigating their various duties.

NOTES