

Ethical Issues For Elected Officials

Presented by Kathleen Higgins and Olga Rivkin at LGLA Newly Elected Officials Forum, January 2015

BH+
BULL
HOUSER

BH+
BULL
HOUSER

Overview

- Conflicts of interests
- Influence
- Gifts
- Confidentiality
- Liabilities
- Standards of behaviour


BH+COM

BH+
BULL
HOUSER

Conflicts of Interests (sections 100 to 104, *Community Charter*)

- Types of conflicts
 - Pecuniary interests
 - Other interests (personal interest, pre-judgment)

BH+COM




BH+

BULL
HOUSSE

Pecuniary Interests

- What they are:

interests which may have monetary or money related consequences for the council member or for the local government




BH+

BULL
HOUSSE

Pecuniary Interests (cont.)

- Conflict:
 - Commercial transactions – *Tuchenhagen v. Mondoux* (2011, ON)
 - Councillor thinking of bidding on property set for tax sale
 - No actual offer made
 - Conflict of interests crystallized when councillor attended to view the property and saw himself as a potential buyer




BH+

BULL
HOUSSE

Pecuniary Interests (cont.)

- Conflict:
 - Business relationships – *Godfrey v. Bird* (2005, BC)
 - Councillor a real estate agent often working with applicant for rezoning
 - Property subject to rezoning was one on which councillor acted as a real estate agent




BULL

HOUSER

Pecuniary Interests (cont.)

- Conflict:
 - Matters affecting personal finances – *Sheehan v. Harte* (1993, ON)
 - Audit request against a councillor
 - Council considered whether to proceed with audit
 - Consequences of audit potentially significant for the councillor
 - Councillor should not have voted in respect of the audit request




BULL

HOUSER

Pecuniary Interests (cont.)

- Conflict:
 - Unpaid society directors – *Schlenker v. Torgimson* (2013, BC)
 - Salt Spring Island Local Trust Committee
 - Two councillors also directors of societies which received funding from the LTC
 - Councillors received no remuneration from societies
 - Court: "Divided loyalties" given directorship duties to put society's interests first
 - Conflicting pecuniary interest in matters concerning expenditure of public money, even though councillors received no personal financial benefit



BULL

HOUSER

Pecuniary Interests (cont.)

- Conflict not found:
 - Family connections – *Conibear v. Dahling* (2010, BC)
 - Mayor's son's former partner with whom mayor's son had a daughter applied for a contract with the municipality
 - Mayor not found to have a conflict of interests, as there was very little relationship between the mayor and the applicant

Pecuniary Interests (cont.)

- Conflict not found:
 - Contingent interests – *Lorello v. Meffe* (2010, ON)
 - > Councillor an employee of a subcontractor which bid on a contract with a developer of a project in the municipality
 - > Court found that potential for any business was too contingent and too hypothetical

BH+COM

Non-Pecuniary Interests

- What they are:
 - “another interest in the matter that constitutes a conflict of interests”
 - Councillors must approach matters with an open mind (*Old St. Boniface Residents Association v. Winnipeg*)
 - Interest must be substantial, unique and there must be a connection between the interest and the matter before council

BH+COM

Non-Pecuniary Interests (cont.)

- Political support of a cause:
 - *Old St. Boniface/Save Richmond Farmland Society*
 - > Councillors expressly supported controversial developments
 - > Court found that support of development did not amount to conflict of interests because there was no evidence of either closed mind or relationship to the developer

BH+COM

Non-Pecuniary Interests (cont.)

- Association with a lobby group:
 - *Waste Management of Canada v. Thorhild No. 7 (County)* (2008, AB)
 - > Councillor opposed a landfill
 - > Prior to being elected, councillor was active in a citizenship group opposing a landfill
 - > Court found that affiliation and support of the group was only based on common political views and there was no evidence of a closed mind

BH+COM

Non-Pecuniary Interests (cont.)


- Association with a social or religious organization:
 - *Watson v. Burnaby* (1994, BC)
 - > Councillor, a Mason, voted on reconstruction of a historical Masonic Lodge
 - > Court found that interests were not peculiar to him but in common with others (compare, for example, to Christians voting in favour of reconstructing an old church)

BH+COM

Obligations/prohibitions


- If councillor considers that they have a conflict of interest:
 - Declare the conflict
 - State the nature of conflict in general terms
 - Do not participate in discussion or vote on the matter
 - Leave the meeting and do not attempt to influence the vote

BH+COM




Meetings subject to conflict rules

- Council meetings
- Council committee meetings
- Parcel tax roll review panel
- Board of variance
- etc.



Consequences/Penalties

- Bylaw/resolution may be challenged
- If pecuniary interest, councillor is disqualified from holding office until next general local election UNLESS:
 - Contravention is inadvertent, or
 - Error in judgment made in good faith



Consequences/penalties (cont.)

- Financial gain:
 - If council member realized financial gain, may have to repay to the municipality
 - If elector brings successful action to recover financial gain, municipality must pay elector's costs

Consequences/penalties (cont.)

- If disqualified but continues to hold office:
 - 10 or more electors or the municipality may apply for an order of disqualification
 - If municipality, needs 2/3 resolution to initiate application
 - Application must be brought 45 days after becoming aware of the alleged basis of disqualification
 - If electors bring successful action, municipality must pay electors' costs

BH+COM

After declaration

- If councillor gets legal advice and determines that there is no conflict:
 - Return to the meeting
 - Withdraw the declaration
 - Participate and vote on the matter

BH+COM

Exceptions from conflict of interest

- Pecuniary interest in common with electors
- Remuneration, expenses or benefits of elected official
- Interest is so "remote or insignificant" that it "cannot reasonably be regarded as likely to influence the member"

BH+COM

Exceptions from conflict (cont.)

- Pecuniary interest prescribed by regulation
 - *Sun Peaks Mountain Resort Municipality Regulation* -- remuneration, etc. of councillors

BH+COM

Legal right to be heard (section 104, *Community Charter*)


- If a councillor has a legal right to be heard in respect of a matter or to make representations to council, BUT, is excluded due to conflict, may appoint a representative

BH+COM

Influence (sections 102 and 103, *Community Charter*)

- Where pecuniary interest, MUST NOT use office to attempt to influence a decision in any way, recommendation, or other action to be made or taken
 - At a council meeting
 - By an officer or employee
 - By a delegate
 - By any other person or body

BH+COM




BH+

BULL
HOUSSE

Consequences/penalties

- Disqualification from office
- Return of any financial gain




BH+

BULL
HOUSSE

Gifts (sections 105 to 106, *Community Charter*)

- Must not directly or indirectly accept a fee, gift or personal benefit that is connected with performance of duties




BH+

BULL
HOUSSE


Gifts (cont.)

- Exceptions:
 - Incident of the protocol of social obligations that normally accompany the responsibilities of office
 - Compensation authorized by law
 - Lawful election contribution




Obligations

- Report gifts exceeding \$250 in value (as a single gift or as a cumulative gift over 12 months from one source)
- File a disclosure statement with corporate officer:
 - Nature of the gift
 - Source of the gift
 - When received
 - Circumstances of receipt




Consequences/penalties

- For receiving unauthorized gift or for failing to disclose a gift:
 - Disqualification from office
 - Return of any financial gain




Disclosure of contracts (section 107, *Community Charter*)

- Municipality must report at open council meeting:
 - Contracts between a municipality and a council member or a former council member IN WHICH contract the council member has a pecuniary interest
- Council member or former council member must advise corporate officer of above contract




Consequences/penalties

- Disqualification from office
- Return of any financial gain



Use of insider information (section 108, *Community Charter*)

- Council member or former council member must not use for gaining or furthering pecuniary interest information:
 - Obtained in the performance of office
 - Not available to the general public
- Consequences/penalties:
 - Disqualification from office
 - Return of any financial gain



Confidentiality (section 117, *Community Charter*)

- Records must be kept in confidence until lawfully released to the public
- Example: *R. v. Skakun*
 - Mr. Skakun released a confidential report to CBC
 - Skakun convicted of breach of the *Freedom of Information and Protection of Privacy Act* and fined

Personal Liabilities (section 191, *Community Charter*)

- Councillors are personally liable to the municipality if they vote to authorize any use of money contrary to the *Community Charter* or the *Local Government Act*.
- Except: if relied on information provided by officer or employee and latter found negligent or dishonest
- May result in disqualification from office until 4 years after vote

BH.COM

Defence

- Liability for unauthorized expenditures not intended to punish councillors acting in good faith or honest belief
 - *Gook Country Estates Ltd. V. Quesnel (City)* (2006, BC)
 - *Orchiston v. Fomosa* (2014, BC)

BH.COM

Standard of behaviour

- No statutory restriction or prescription
- BUT, consider *Barnett v. Cariboo (RD)* (2009):
 - Mr. Barnett was allegedly uncivil to staff
 - Report by CAO to Council
 - Resolution in camera that Mr. Barnett should not communicate with staff except by e-mail
 - Board had jurisdiction to pass the resolution
 - BUT, did not act with due process

BH.COM

