

Ethics in Municipal Government

Presented by: Kevin Feehan, Q.C., LL.B.,
of Fraser Milner Casgrain LLP

Town meetings are to liberty what primary schools are to science; they bring it within people's reach, they teach men how to use it and how to enjoy it. A nation may establish the government but without municipal institutions it cannot be said to have the spirit of liberty. – De Tocqueville, Democracy in America¹

Introduction:

Municipal governments exist to provide for the needs and priorities of individuals within their community.² The decisions of city officials and employees affect the lives of citizens more frequently and more directly than any other level of government and determine to a large extent whether, on an everyday basis, people have equal access to benefits and opportunities that government provides.³ Furthermore, local government has been described as the “training ground for democracy” and a “matter of democratic principle”; upholding these principles requires municipal governance to be conducted ethically such that trust exists between the community and councillors that serve the community.⁴

Accordingly, city officials must discharge their duties fairly and objectively maintaining a trustworthy and accountable relationship with the public.⁵ In particular, occupying the office of a city councillor gives rise to three ethical duties: the duty of due diligence, the fiduciary duty of good faith, and the duty to act fairly, free from any conflicts of interest.

Due Diligence:

Municipalities have been described as analogous to business corporations, in which council is comparable to a board of directors and the mayor is comparable to the chair of the board.⁶ Drawing from this comparison, councillors share similar ethical duties to the directors of a corporation. Like to

¹ De Tocqueville, *Democracy in America* (New York, 1985), vol. 1 at 60.

² Stanley M. Makuch, Neil Craik and Signe B. Leisk, *Canadian Municipal and Planning Law*, 2nd ed. (Toronto: Tomson Carswell, 2004 (“CMPL”)) at 3.

³ Vincent R. Johnson, “Ethics in Government at the Local Level” (2005-2006) 36 *Seton Hall L. Rev.* 715 (“Johnson”) at 717 to 718.

⁴ Basile Chiasson, “Ethics in Local Government: Atlantic Canada Conflicts of Interest Enforcement Mechanisms – Pathways or Roadblocks to a Culture of Ethics” (2009) 59 *U.N.N.L.J.* 232 (“Chiasson”) at 233 to 234.

⁵ *Ibid.* at 231.

⁶ *Supra note 2* at 5.

directors, councillors must exercise their duties with the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.⁷ Examples of good due diligence practice include: making sure all decisions are informed decisions, educating yourself in governing legislation and municipal policies, seeking reliable professional advice when appropriate, attending all meetings having reviewed all materials before hand, and lastly, asking questions and taking notes during meetings.⁸

Fiduciary Duties and Conflict of Interest:

The actions of councillors should be “free of ‘bias’ and fair in the sense of responding appropriately to the concerns of the electorate”.⁹ Councillors are not only directors, but they are also public trustees, and owe fiduciary duties to both their municipal corporation and their communities; specifically they owe duties of good faith, trust, confidence and candour.¹⁰ A key component of being a fiduciary requires councillors to put the interests of the municipality ahead of their personal interests.¹¹ When the interests of the municipality become secondary fiduciary duties are breached, such as when a fiduciary makes a profit or receives advantages at the expense of the municipality.¹² The breach of fiduciary is not taken lightly by the courts, for example in the case of *Calgary Roman Catholic Separate School District No. 1. v. O’Malley* the court stated that “the position of fiduciary imports a high degree of trust requiring a very high standard of care. The need to maintain integrity in public office is of paramount importance and requires elected offices to be held at a very high objective standard of care”.¹³ In this case the court found Mr. O’Malley had breached his fiduciary duties through his “steadfast refusal to play by the rules [which] caused untold turmoil and grief, not to mention the wasted time, money and resources expended to address and respond to his unethical conduct, frivolous lawsuits and unmeritorious complaints”.¹⁴

⁷ J. Anthony VanDuzer, *The Law of Partnerships & Corporations*, 3rd ed. (Toronto: Irwing Law Inc., 2009) at 388 (“VanDuzer”).

⁸ J.E. Ingram, *Directors and Officers Duties and Obligations* (1998 Banff Refresher Course, Legal Education Society of Alberta) at 8 – 19.

⁹ *Supra* note 2 at 259.

¹⁰ *Ibid.* at 259 to 260; *Black’s Law Dictionary*, 9th ed., s.v. “fiduciary”.

¹¹ *Supra* note 7 at 341.

¹² *Ibid.*

¹³ *Calgary Roman Catholic Separate School District No. 1 v. O’Malley*, 2007 ABQB 574 (“O’Malley”) at para. 109.

¹⁴ *Ibid.*

Common law fiduciary duties of councillors have been codified in the Alberta *Municipal Government Act* which requires councillors not only to disclose any conflicts of interest but to put the community first by “[considering] the welfare and interests of the municipality as a whole and to bring to council’s attention anything that would promote the welfare or interests of the municipality”.¹⁵ The maintenance of fiduciary duties is necessary to maintain public trust in the integrity of local government.

Conflicts of Interest Rules:

Conflicts of interest for a municipal councillor arises where there is a “clash of private interest with public duty”.¹⁶ Two reasons have been proposed as to the importance of avoiding conflicts of interest in municipal governance:

First, decisions made by municipalities should reflect the values of the electorate without being skewed by the private interests of councillors and officials. Second, because these decisions affect the rights and privileges of individual citizens, those affected should have confidence that the process leading to those decisions was fair.¹⁷

The Supreme Court of Canada has defined conflicts of interest in the context of municipalities as follows:

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 at 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.¹⁸

There are several ways in which conflicts of interest are regulated at the municipal level.¹⁹ As described above the common law imposes fiduciary duties on councilors to act in the public’s interest. Furthermore, the *Criminal Code* regulates the more extreme acts of municipal conflicts of interests by

¹⁵ *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 153(a) and 172 (“MGA”).

¹⁶ *Supra note 4* at 232.

¹⁷ *Ibid.* at 233.

¹⁸ *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 at para. 55.

¹⁹ *Supra note 4* at 239.

creating certain offences such as bribery, accepting bribes, fraud or breach of trust of a public official in connection with his or her public duties, selling or purchasing offices and influencing appointments.²⁰

However, in addition to the common law and the *Criminal Code* provincial legislation contains conflicts of interest laws for municipal governance. Legislative conflicts of interest laws deal with the problem by disqualifying a person from seeking or holding office who has a conflict of interest or by codifying the common law relating to fiduciaries.²¹

A large focus on conflicts of interest and municipal government is the conflicts of interest that arise where a city official has a pecuniary interest in a matter before council. It is an accepted fact that “the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected”.²²

In the Alberta *Municipal Government Act* a councilor is disqualified from council if he or she fails to disclose a pecuniary interest in a matter or has a pecuniary interest in a matter that is not binding on the municipality (i.e. any agreement that is for emergency work, the sale of goods from a competitive price that is incidental to or in the ordinary course of business, the agreement was approved by the council before signed by the municipality, or the agreement was entered before the councilor’s term of office commenced).²³ A councilor may escape disqualification where they disclose their pecuniary interest in the matter before council and abstain from voting on and discussing the matter.²⁴

Disqualification from council had been viewed by Alberta courts as “a genuine condemnation, a stigma, not just a slap on the wrist or a minor embarrassment, and therefore, such declaration should not be made lightly”.²⁵ An example of behavior that has led to the disqualification of a councilor is illustrated in the case of *Crowsnest Pass (Municipality) v. Prince* where a city councilor attempted to influence council to lower rents in a public building where his wife leased space even after he was informed he was in conflict and should from abstain from discussing and voting on the matter.²⁶

²⁰ *Supra* note 2 at 260.

²¹ *Ibid.* at 261.

²² *Re Moll and Fisher et al.* (1979), 23 O.R. (2d) 609 at 4 (“*Moll*”).

²³ *MGA*, *supra* note 15, ss. 173, 174 (g) and (h); *CMPL*, *supra* note 2 at 261.

²⁴ *MGA*, *supra* note 15, ss. 172.

²⁵ *Lac La Biche (County) v. Bochkarev*, 2009 ABQB 400 at para. 49.

²⁶ *Crowsnest Pass (Municipality) v. Prince*, 2001 ABQB 212 (“*Crowsnest*”).

The case of *Crowsnest* is an example of a councilor blatantly acting in conflict of interest and reinforces that city councilors must subordinate their self-interests to the greater interests of the community. No less can be expected given that “public office is a public trust conferred by public authority for public purposes”.²⁷

Ethical Codes of Conduct:

In addition to the laws and duties imposed by legislation and the common law, city councilors can benefit from a code of ethics to provide guidance as to the “do’s” and “don’ts” of ethical behavior for city officials.²⁸ Beyond laws which largely act to deter unethical behavior, ethical codes are a tool to *promote* ethical behavior.²⁹

To this effect the Alberta Urban Municipalities Association (“AUMA”) has “Ethical Guidelines of Conduct for Members of Council”, which in turn have been adopted by member municipalities of the association.³⁰ The Guideline’s purpose is “to outline certain basic rules for elected municipal government officials in Alberta so that they may carry out their powers, duties and functions with impartiality and dignity, recognizing that the functions of council members is, at all times service to their community and the public”.³¹

The Guideline incorporates the ethical duties of due diligence, fiduciaries and avoidance of conflict of interests in providing that councilors should:

1. Govern their conduct in accordance with the requirements and obligations set out in the municipal legislation of the Province of Alberta.
2. Not use confidential information for the personal profit of themselves or any other person.
3. Not communicate confidential information to anyone not entitled to receive same.
4. Not use their position to secure special privileges, favors, or advantages for themselves or any other person.

²⁷ *Re Moll and Fisher et al.* (1979), 23 O.R. (2d) 609 at 4 (“*Moll*”).

²⁸ *Supra note 3* at 725.

²⁹ *Supra note 4* at 251 to 252.

³⁰ Alberta Urban Municipalities Association, Policy No. AP004, Ethical Guidelines; These guidelines have been adopted by both the City of Edmonton and the City of Calgary.

³¹ *Ibid.*

5. Preserve the integrity and impartiality of Council.
6. After leaving office, Members of Council shall continue to keep confidential, confidential information acquired as a member of Council.³²

This Guideline recognizes that “the proper operation of democratic local government requires that elected officials to be independent, impartial and duly responsible to the people” and that “it is imperative that councilors conform themselves to the highest ethical standards at all times”.³³

Conclusion:

Effective municipal governance requires that the public have confidence in the integrity and trustworthiness of its elected officials.³⁴ The fiduciary duty of good faith, the duty of due diligence and duty to act fairly, free from any conflicts of interest provide a structure to which councillors should conduct themselves to ensure values of transparency, honesty and accountability inform how they perform their public duties.³⁵

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra note 4 at 234; Supra note 31.*

³⁵ *Supra note 4 at 235.*