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Conflicts of Interest a Trap for Unwary Politicians

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CONFLICTS OF INTEREST
A TRAP FOR UNWARY POLITICIANS

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Purity of Administration

Many great men have gone down in history. Just recently the Mayor of Etobicoke went down. He was preceded, in the recent municipal election, by a North York Controller and a Toronto Alderman. Whereas the latter ran in the face of a judicial declaration of a conflict of interest and was defeated. the former prudently decided not to run under such circumstances. Earlier in 1972, four Thunder Bay Aldermen were unseated. Probably only one of all these deserved this fate. The others, whose motives were beyond reproach, were caught in the meshes of the conflicts of interest provisions of *The Municipal Act*,[1] a statutory trap for the honest but unwary local politician.

The purpose of all government is to bring about the greatest good for the greatest number of citizens. The representative system of government is designed to elect to office persons who impartially decide what is in "the public interest". Thus we have a national Parliament, ten provincial Legislatures and numerous local authorities. Parties traditionally have espoused certain broad principles. While these have become less distinct than in the past, support for candidates to elective office has been solicited on party lines; a vote for a federal and provincial candidate is an affirmation of support for his party and its platform. In Canada, municipal politics do not usually follow these lines. Those offering themselves to the municipal voters simply advocate their personal views without being committed to the policy of a particular party.

It is highly desirable that those elected to govern are completely free to arrive at decisions based on their opinions on policy, without being influenced by factors or ulterior motives which would prevent disinterested and unbiased decisions from being made. Public policy requires that, in order to ensure purity of administration, any person who participates in the decision-making process should not be in such a position that he might be suspected of being biased. The fundamental rule that a personal interest in a matter disqualifies a member from voting was firmly fixed in the ancient practice of parliamentary bodies. A conflict of interest can be simply defined as any circumstance where the personal interest of the council member in a matter before council may prevent him, or appear to prevent him, from giving an unbiased decision with respect to such matter.

It has never been settled beyond doubt whether the rule of public policy

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[1] R.S.O. 1970, c. 284.

which safeguards proceedings of the higher legislatures applies to the delegated jurisdiction entrusted to municipalities in the administration of local affairs. Their governing bodies are akin to legislatures in many respects and it follows that their deliberations should be governed by the same rules. It is all the more vital that this rule should apply to municipal councils, where party affiliation does not play any part and personal caprice is sometimes given free and unrestricted reign. Moreover, because of the small size of local councils, it is possible for a minority of two on a five-man council to become a majority of three at the next meeting. Putting it another way, a persuasive member may more easily gain his selfish ends by talking his fellow councillors into accepting his views. In 1904, an Ontario court held that the rule applied to local authorities.[2]

Mr. Justice Teetzell of the Supreme Court of Ontario in 1911 expressed in these words the desirability of adopting such a rule:

> It is of the utmost importance that members of a municipal council should have no interest to bias their judgment in deciding what is for the public good and they should strive to keep themselves absolutely free from the possibility of any imputation in this respect.[3]

While serving on the council, members are under a duty to act in the best interests of the corporation and of the citizens they represent. An individual councillor occupies a fiduciary position. When he is acting in his personal capacity, he can be said to be a trustee for the inhabitants in the sense that any decision of the council, which results from the misuse of his office for the purpose of private gain or advantage, is tainted with bad faith. In the case against Toronto's Mayor Bowes in 1853, the court declared that a member of council, "as trustee for the community, is not to vote or deal in such a way as to gain or appear to gain private advantage out of matters over which he, as one of the council, has supervision for the benefit of the public."[4]

The object of legislation respecting conflicts of interest is to prevent a person whose private interests might clash with those of the municipality from being elected to, and serving on, a council. No one who seeks to fill a municipal office should be in a position where his duty may even appear to conflict with his personal ends so as to bias his judgment in deciding what is for the public good. It has been said judicially that the "policy of the law is that no man shall be a member of a municipal council who cannot give a disinterested vote on a matter of dispute which may arise."[5]

The origin of this rule is two-fold. There is a plain principle of justice, as ancient as the law itself, that no one can be a judge in his own cause, although perhaps this applies only when a council is functioning in a quasi-judicial capacity. In any event, the well-established rule of equity which prevents a trustee from making a profit of his office can be invoked in support.

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[2] *Re L'Abbe and Blind River* (1904), 7 O.L.R. 230 (Div. Ct.).

[3] *R.* v. *Homan* (1911), 19 O.W.R. 427, aff'd., 19 O.W.R. 621.

[4] *Paterson* v. *Bowes* (1853), 4 Gr. 170 at 180. *Toronto* v. *Bowes* (1854), 4 Gr. 489, aff'd. 6 Gr. 1, aff'd. 11 Mod. P.C. 463, C.R. [3] A.C. 10.

[5] Per Wilson, J., in *R.* v. *Gauthier* (1869), 5 P.R. 24 (Judges Chambers).

These principles are the logical outgrowth of the precepts of Judaeo-Christian morality on which our society is based.

Misuse of Public Office

Notwithstanding the high ideal set for men in public office, there has, from time to time, been a misuse of the authority entrusted to them. Since the day when local self-government was established in Canada, elected representatives have been tempted to use their knowledge and influence to advance their selfish interests. Lawyers, insurance agents, real estate agents, and accountants, who often sit on councils, have from time to time fallen from grace because they were unable to resist temptation.

It is probably true to say that while we have never matched the Tammany Hall system in New York City for the harvest of graft and corruption it reaped, our civic record is not unblemished. We in Canada have nothing to be proud of, for breaches of trust in local government are becoming all too frequent. The law reports record many cases where civic dishonesty has produced profit for an individual member of government or his friends, and sometimes also a loss to the public treasury. In 1865, Mr. Bowes, then Mayor of the City of Toronto, made personal gains by secretly purchasing, through an intermediary, debentures which were being issued by the City at a discount. He was compelled, after lengthy litigation, to pay his profits to the City.[6]

Publicly owned property has frequently been disposed of at bargain prices to nominees of elected officials. An apartment site owned by the Ottawa Public School Board was sold for $12,500 to Donald Trudeau, a front for the chairman of the Board's finance committee which had fixed the price. This was a different type of "fix" from the U.S. variety. The solicitor on the sale was the Board's chairman. The land was later appraised at $60,000. Former Reeve Tonks of York Township bought Township land through a nominee and unsuccessfully appealed, to the Supreme Court of Canada, a decision which required him to reconvey the land to the Township.[7] In another case, wives of two members of the council of the Town of Eastview, now Vanier, bought lots owned by the Town at prices well below the market.

In Ontario until recently, three persons (the council member, his wife, brother, cousins or aunts) by incorporating as a company, could do legally what one person could not. By hiding behind the corporate veil, profitable contracts with the municipality could be entered into with impunity. As Ottawa's former Mayor Charlotte Whitton remarked as to this state of affairs that, "you can sell to or buy from the city to your bank account's content". Charlotte herself later ran afoul of the "thou shall nots" when she had a City resolution quashed and thus had a "proceeding" against it which lost her her seat.[8] Firms owned by Archie McCoy, a Hamilton alderman, obtained

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[6] *Supra,* note 3.

[7] *Tonks* v. *York,* [1967] S.C.R. 81, 59 D.L.R. (2d) 310, aff'g. [1965] 2 O.R. 381, 50 D.L.R. (2d) 674 (*sub. nom. Reid* v. *York*).

[8] *R.* v. *Whitton,* [1968] 1 O.R. 128, 65 D.L.R. (2d) 568.

$198,000 worth of business from that city, and a company owned by his brother-in-law, on the assets of which McCoy had a chattel mortgage, also did substantial business with the City. Former Mayor Hawrelak of Edmonton held shares in both Trans-Canada Pipe Lines and Alberta Gas Trunk Line, without disclosing the difficulty this might have created in the event of a revision of the gas rates which prevailed in the City. After resigning his office he was re-elected for another term, but has since been disqualified because of another conflict of interest involving land development.[9] Even then he refused to admit that he had erred morally, claiming only that he had been wrong "politically". The City compelled him to pay to it the profits he made.[10]

The acceptance of gifts by members of local authorities, in the form of free shares, trips to Mexico, or furniture are not far removed from outright bribery. Calgary's former Mayor McKay was the object of the generosity of many persons seeking favours from the City. Two members of York Township Council were charged with taking a bribe to ensure the issue of a building permit;[11] both were subsequently acquitted after the Supreme Court of Canada ordered a new trial. One must wonder how many politicians are under obligation to someone because they accepted election contributions (without strings, of course). Such contributions should be fully disclosed.

Legislative Approach

Provisions disqualifying persons from running for office, and elected members of municipal councils from both holding office and voting appeared in the *Baldwin Act* of 1849,[12] the forerunner of the present day *Municipal Act.*[13] The early disabling clauses were simple and brief compared with those appearing in five pages of the 1970 *Municipal Act.* There have been numerous statutory amendments since 1849, resulting in certain classes of persons and types of transactions being exempted from the sanctions imposed. Frequently court cases have resulted in decisions permitting someone with an obvious conflict of interest to escape from the consequences of a violation while others, acting *bona fide,* have been caught in a technical breach of the statute. Exceptions to the exceptions confront the bewildered councillor and his legal advisor. Loopholes still existed in the statutory maze for one desiring to avoid the spirit of the law while still complying with its letter. Conversely, there were traps for the person who sincerely wanted to avoid any possible conflict situation.

The Municipal Act[14] declares certain persons ineligible to sit on council by reason of holding another public office which is considered incompatible

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[9] *R.* v. *Hawrelak* (1965), 53 W.W.R. 257, (Alta. C.A.); aff'd. 55 W.W.R. 320, 53 D.L.R. (2d) 673 (S.C.C.).

[10] *Edmonton* v. *Hawrelak,* [1972] 2 W.W.R. 561, aff'd. [1973] 1 W.W.R. 179 (Alta. C.A.).

[11] See *Hall & Linden* v. *R.,* [1962] S.C.R. 465 aff'g. [1961] O.W.N. 153.

[12] 12 Vict. c. 81.

[13] R.S.O. 1970, c. 284.

[14] *Id.,* at s. 36(1) (a-p).

with that of a municipal councillor. Examples of those in this class are, for example, a judge, a Crown attorney, a chief constable, a member of a school board or public utilities commission, and a municipal employee. Behind this prohibition, there is undoubtedly the thought that political influence should not enable a council member to secure for himself a job with the municipality. There is also the view that the duties entailed in the enumerated positions might conflict with the duties owed by a member toward the electors of the municipality. Persons having a claim against the municipality or against whom the municipality has a claim for tax arrears are likewise barred from office.

The application of s. 36(1) (e) of *The Municipal Act*[15] had long been in doubt. The reference to an employee of "the corporation of a municipality" did not make it clear whether all municipal officers and employees were barred from running for office in all municipalities or merely in the municipality where they were employed. In *Waffle* v. *Flynn,*[16] the newly-elected Mayor of Etobicoke was unseated because he was Public Information Officer of the City of Toronto at the time he was nominated and elected, although he resigned from this post before he took office as Mayor. The irony was that this clause, which had been in the *Act* for 70 years, was repealed just a few days before the hearing, in order to allow employees with leave of absence to become candidates for office even in their own municipalities as well as others.[17] Mr. Dennis Flynn was re-elected Mayor by an overwhelming majority in a by-election held about 70 days after he was unseated.

A councillor having an interest in a contract with a municipal corporation or local board was frequently ousted from office. Many an aspiring candidate and sitting member has run afoul of this provision. The term "interest" was used in its broadest sense and did not presuppose the existence of pecuniary gain. A teacher's contract was excepted.

Until 1961, a person was not ineligible for office or liable to lose his seat by reason only of being a shareholder in a company having contractual relations with the municipal corporation. By the simple expedient of incorporating a company, a member of a council or local board could bring himself within the exemption. The only drawback was that the shareholder could not vote on any matter affecting the company, but even then there was no penalty imposed. It is difficult to see why immunity was conferred on one owning 99% of the voting stock. The Legislature finally came to realize this in 1962 and deprived any member of the exemption if he had a controlling interest in the company either personally or through his spouse.[18]

Even apart from statutory provisions, the courts have held that a council member is disqualified from voting on any question in which he has a special

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[15] *Id.*

[16] Decided by Cavers, C.C.J. on January 25, 1973.

[17] 21 Eliz. II, c. 169, s. 11. Proclaimed January 17, 1973.

[18] *The Municipal Act,* R.S.O. 1970, c. 284, s. 36(3) (a) repealed by 21 Eliz. II, c. 169, s. 1.

and personal interest distinct from that of the inhabitants generally.[19] While the public and personal duties of a councillor may conflict, it is not necessary, so far as the application of the rule is concerned, that they do. It is not essential to find that a vote was affected by the interest; the *mere possibility* that it might be so affected is considered sufficient to disentitle the member from voting. The principle applies, therefore, not only where there is a pecuniary interest but also where there is a reasonable probability that the interested councillor is likely to be biased.[20]

In 1962 the general principle was incorporated into the statute by the enactment of a disclosure requirement and a prohibition against voting on any contract or matter in which the councillor has a "pecuniary" interest.[21] Where such interest exists, the councillor must reveal it and then refrain from taking part in the discussion of or voting on the matter. Thus finally, after over 100 years, Ontario has adopted a cardinal rule which has been in the Quebec Municipal Code and the Imperial statutes for decades.

A New Approach — The Code of Conflicts

The law until 1972 was inadequate in several respects and did not ensure purity of administration. It failed to cite general principles insofar as they could be adopted in a statute, and provided for disqualification only in specific cases. The *Municipal Act's* disabling provisions, being penal in nature, have been strictly interpreted by the courts to exclude their application in cases not provided for. Of course, it may in fact be impossible for the statute to be exhaustive and comprehensive. Were an attempt made to codify the law further and to establish a definitive code, we would probably end up with a lengthy statute similar to the Quebec *Municipal Bribery and Corruption Act.*[22] As the New York City Board of Ethics has stated ". . . a code which is unnecessarily rigid and restrictive will defeat its purpose. It would discourage qualified persons from entering government and will have a demoralizing effect upon encumbents."

In specifying certain exemptions from disqualification, on the basis that the nature of the conflict was not serious enough to warrant the imposition of the penalty, the *Act* precluded a defence of *bona fides* by the well-intentioned offender. It took no account of minor infractions that arose through inadvertence, and assumed that in every case a council member dealing contractually with a council was acting for his own selfish ends. In situations where a loss of seat was not entailed, the provisions permitted conflicts of interest to exist and to continue, if such interest was revealed. However no penalty was imposed for non-disclosure or failure to refrain from voting, except in the case of a shareholder in respect of corporate contracts, who suffered the loss of his exemption and possibly his seat.

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[19] *Re L'Abbe and Blind River, supra,* note 2.

[20] *Id.* See also *Starr* v. *Calgary* (1965), 52 D.L.R. (2d) 726 (Alta. S.C.).

[21] *The Municipal Act,* s. 199.

[22] R.S.Q. 1964, c. 173.

A special committee of senior civil servants was established by the Ontario Government to enquire into the problems in this area. Representations were received from other groups and recommendations were published in 1968.[23] The main proposal called for adoption of the principle of disclosure, rather than specification of detailed disqualifying clauses. Penalties were to be applicable only where a person having a conflict failed to disclose.

In 1972, *The Municipal Conflicts of Interest Act*[24] was enacted to give effect to this recommendation. The Hon. Dalton Bales, Q.C., then Attorney-General, in introducing the legislation in the House, stated that under the present law "municipal government can be deprived of the services of good people" because of the penalty of loss of office for having contractual relations with the corporation. He also pointed out that failing to disclose an interest not involving a contract did not bring about forfeiture of office.

Under the new *Act,* the failure of a council member to disclose a pecuniary interest in any matter coming before council renders him liable to have his seat declared vacant on the application of a ratepayer. Section 36 of *The Municipal Act* has been re-enacted[25] so that persons having contracts with, or claims against, the municipality are now eligible to sit.

A case which demonstrates the difference in the old and new approaches involved former Toronto alderman Ben Grys, whose wife had a mortgage on land being rezoned for high rise apartments. No disclosure of his wife's interest was made by the alderman who voted when the matter came up both at committee and before the planning board. The City Council, in an act of censure, passed a resolution that Grys had a conflict and Grys promptly instituted an action for a declaration that he did not. The action was discontinued seven days after the writ was issued but it was too late to save the alderman from being caught by s. 36(1) (q), which declares a person to be ineligible if he has an action or proceeding against the corporation.[26] Alderman Grys was hoisted by his own petard. Ironically, since the interest was through his wife, he would not have been pinioned for this by the new Code, although he would likely have been caught by its "failure-to-disclose" provision. Such an interest would not have led to disqualification under the old provision since it was not of a contractual nature.

Another departure in the new Code of Conflicts[27] relates to the penalty. Formerly where a member was forced to vacate his seat because of disqualification he could purge himself of his wrongdoing and run for office at the

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[23] Report of the Ontario Committee on Conflicts of Interest, (Toronto: Queen's Printer, 1968). The enquiry was instituted as the result of *Re Election of Collins,* [1967] 2 O.R. 41 in which an alderman of the City of London was unseated because, while an employee of the London Transportation Commission he had signed a contract with the latter as union secretary.

[24] *The Municipal Conflict of Interest Act,* 1972, S.O. 1972, s. 5(1).

[25] *Supra,* note 17.

[26] *Re Grys & Stratton,* [1972] 2 O.R., reversed by C.A. not yet reported.

[27] *Supra,* note 24.

next election. While his ineligibility should not be permanent, it should continue for several years even if the circumstances giving rise to it have been removed. The judge is empowered by the new *Act* to declare the member to be ineligible for re-election for a period of up to seven years.[28] This discretionary jurisdiction enables the judge to differentiate between degrees of conflict and to award a heavier penalty in the case of more serious violations.

There is much to be said for the *Conflicts of Interest Act* and the principle of full disclosure on which it is based. There should be no question about when a person has a "pecuniary" interest. The interest does not necessarily have to be a monetary one, however, since it is possible to have a conflict even in the absence of a profit motive. The honest, well-intentioned councillor is not likely to run afoul of its sanctions as long as he discloses, although some profit-motivated councillor may regard the legislation as an open invitation to do business with the corporation. Does the *Act* require him to reveal his profit to the taxpayers?

It may be that public censure and the ballot box are the ultimate remedies. It remains to be seen whether the concept of public disclosure will result in the electorate weeding out those whose ethical conduct is open to question. This, of course, assumes an interested and enlightened democracy. In at least one Canadian city, the voters forgave their Mayor's fall from grace.[29] Even if the *Act* does not guarantee that municipal administrations will be purer than in the past, it does succeed in simplifying the law in this area and removing uncertainties which have existed for many years.

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[28] *The Municipal Conflict of Interest Act*, 1972, s. 5(1).

[29] See text, *supra*, at p. 6 for a discussion of Mayor Hawrelak of Edmonton.