

Report

Date	November 1, 2023	File:
Subject	Reimbursement of Legal Fees in Relation to Conflict of Interest Policy	

PURPOSE

To consider establishing a policy for reimbursing members of Council their costs for obtaining legal advice concerning a perceived or actual conflict of interest.

BACKGROUND

Elected officials have a fiduciary duty to act in the best interest of the municipal corporation. Actions that are in conflict of interest or demonstrate bias are not in the municipality's best interest. The Community Charter regulates conflicts of interest. Section 100 provides that an elected official must not vote, remain in the meeting, or influence the voting on any matter where the member has:

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

Elected officials faced with a potential or real situation of conflict of interest (s.100(2)(a)) or bias (s.100(2)(b)) may be faced with two types of disqualification:

- (1) disqualification from voting on the matter; and,
- (2) disqualification from office.

It is important to note that section 100(2)(b) [*another interest in a matter that constitutes a conflict of interest*] means that the common law principle of procedural fairness applies, which requires members to be free from certain kinds of bias (see Attachment 1 for more information on conflict of interest and Attachment 2 on bias).

The tests for conflict of interest and bias arise from the common law, as do many legal consequences. The *Community Charter* also contains important provisions prohibiting members of Council affected by a conflict from participating in discussion and voting. The common law recognizes two types of conflict of interest:

- (1) non-pecuniary private (closed mind/reasonable apprehension of bias); and,
- (2) personal interest and pecuniary interest.

Pecuniary

A pecuniary interest is any interest involving money. The pecuniary interest can be direct or indirect and typically arises in relation to business, land, family, and employment interests, where an elected official is a director of a Society or where the applicant had made significant contributions to their election campaign.

Non-Pecuniary / Bias

Non-pecuniary conflicts arise in situations of close personal relationships. The court examines whether there is a reasonable apprehension (concern/fear) that the elected official is biased. Would a reasonable

person find it likely or probable that the member would favour one position or party over another?

There are two tests to determine if the elected official might have a non-pecuniary personal interest that conflicts with their public duties:

- (1) Prejudgment (closed mind) test - applies when the elected official has expressed opinions in advance of a decision to such a degree that they might be biased. If the elected official were to state "that no matter what is said, I won't change my mind," they would be displaying a closed mind.
- (2) Personal interest bias test - applies when the elected official has associations or connections that their interests might override the public's interest. Under this test, it must be determined whether the elected official's interest is held in common with other citizens or if a *reasonable person* would conclude that their interest might influence their decision.

After Determining Conflict Exists

After a Council member has determined that a conflict exists, the following four requirements of section 101(2) of the *Community Charter* must be met:

- (1) The member must leave the meeting while the matter is under consideration;
- (2) The member must not participate in discussion at all;
- (3) The member must not vote on a question in respect of the matter; and,
- (4) The member must not attempt in any way to influence voting on the matter.

An elected official in a situation of conflict must take these steps regardless of whether or not they made the declaration as statutorily required. Contravention of the four requirements under section 101(2) of the *Community Charter* disqualifies that member from continuing to hold office unless the contravention was inadvertent or the result of a good-faith error in judgment (section 101(3) of the *Community Charter*). A court would render a councillor's vote invalid if made in contravention of these provisions.

Exemptions on Participation

The restrictions on participation in debate and on voting, are exempted in the following situations contained in section 104(1) of the *Community Charter*, if:

- (1) The pecuniary interest of the Council member is a pecuniary interest in common with the electors of the municipality generally;
- (2) 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;
- (3) The matter relates to the remuneration or expenses payable to one or more Council members in relation to their duties as Council member;
- (4) 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; or,
- (5) The pecuniary interest is of a nature prescribed by regulation.

Withdrawing a declaration

Contraventions of Section 101 in the *Community Charter* could lead to disqualification from office (see Section 110 and 111 for process). As an exception, if a member has made a declaration and, after receiving legal advice on the issue, determines that they were wrong respecting their entitlement to participate in respect of the matter, the member may:

- (1) return to the meeting or attend another meeting of the same body;
- (2) withdraw the declaration by stating in general terms the basis on which the member has determined that they are entitled to participate; and,
- (3) after this, participate and vote in relation to the matter.

A Council member's name (who makes a statement conflict) is recorded in the minutes with their declaration or statement with the reasons given and the times when the member left and returned to the meeting. Once a declaration has been made, the Chair must ensure that the member is not present at any part of the meeting during which the matter is under consideration.

DISCUSSION

Members of Council are exposed to various potential actual liabilities or costs in the good faith performance of their duties. 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 are less likely to be caught off guard by allegations of improper conduct.

For a member of Council to be reimbursed for their legal expenditures related to conflict of interest declarations, the reimbursement must be authorized by Council. That can be accomplished through a policy of Council or ad hoc resolutions.

Historically, when a member of Council has obtained legal advice to withdraw their declaration of conflict of interest, the member has been required to ask Council to approve the reimbursement.

OPTIONS

1. **(Recommended Option)** THAT Council approve the Reimbursement of Legal Fees in Relation to Conflict of Interest Policy.
2. THAT Council refer the Reimbursement of Legal Fees in Relation to Conflict of Interest Policy to the Committee of the Whole for further discussion.

IMPLICATIONS

Elected officials are well served to disclose all possible conflicts of interest early and to seek appropriate assistance navigating their various duties.

The policy reduces the red tape for Council members to get reimbursed for their conflict of interest legal fees. However, this does not negate the requirement for a member of Council who has made a declaration of conflict of interest to later withdraw their conflict of interest at a meeting by stating in general terms the basis on which it has been determined that they are entitled to participate.

RECOMMENDATION

THAT Council approve the Reimbursement of Legal Fees in Relation to Conflict of Interest Policy.

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Attachments:

- (1) Young Anderson seminar paper on "Council of Interest"
- (2) Young Anderson seminar paper on "What's the Problem with Bias?"
- (3) Reimbursement of Legal Fees in Relation to Conflict of Interest Policy