

May 12, 2015

Stephen F. Penney
Direct Dial: 709.570.8881
spenney@stewartmckelvey.com

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Town of Witless Bay
P.O. Box 130
Witless Bay NL A0A 4K0

Attention: Ms. Geraldine Caul, Town Clerk/Manager

Dear Mayor and:

Re: Potential Conflict of Interest

We write further to the Information Session with council which we attended in person on April 30, 2015.

Facts

In that meeting, council sought our views as to two potential conflicts of interest involving several councillors.

The first issue was in respect of snow clearing services (the "Snow Clearing Issue"). In discussions prior to a council meeting, Deputy Mayor Dena Wiseman and Councillor Ralph Carey participated in a discussion regarding the snow clearing contract for 2014 to 2016. In that pre-council meeting, there was a discussion as to why a certain private roadway was snow cleared.

The second allegation relates to the adoption of the town plan (the "Town Plan Issue"). The issue concerned whether Ms. Wiseman, Mr. Carey and Councillor Kevin Smart were in a conflict when they voted on the adoption of the new town plan.

I verbally advised council that neither allegation amounted to a conflict of interest pursuant to the *Municipalities Act, 1999* (the "Act"). I recommended against proceeding with a formal hearing to consider vacating the seats of the relevant councillors. Notwithstanding my recommendations, council decided to convene a hearing in respect of conflict of interest on the Town Plan Issue.

I was subsequently asked a series of questions by council. After a brief commentary on conflict of interest generally, I outline the answers to these questions.

Analysis

1. The Law of Conflict of Interest

The relevant provisions of the Act state the following:

207(1) A councillor shall not vote on or speak to a matter before the council or a committee of the council where

(a) the councillor has a monetary interest in the matter distinct from an interest arising from his or her functions as a councillor;

(b) the councillor has a monetary interest directly or indirectly in the matter; or

(c) a relative of the councillor has a monetary interest in the matter.

(d) the councillor is an officer, employee or agent of an incorporated or unincorporated company, or other association of persons, that has a monetary interest in the matter.

Sections 208 and 209 of the Act describe the process whereby a councillor who is unsure of a conflict can disclose that potential conflict to council and council can decide whether it is a conflict.

Section 206(2) speaks to the consequences of running afoul of the conflict provision:

206(2) A council shall, by resolution, declare vacant the office of an elected councillor where that councillor

(a) fails to disclose that he or she has a conflict of interest in a matter being discussed by the council; or

(b) discusses or votes on a matter on which he or she has a conflict of interest.

The term "monetary interest" is defined as follows:

2(1)(o) "monetary interest" means an interest of benefit

(i) consisting of money, exacted in money, relating to money or of which money is the object.

(ii) capable of being measured by its financial value, cost, benefit, advantage or disadvantage, or

(iii) affecting or potentially affecting a person's financial position or worth, his or her assets or asset value but does not include remuneration or a benefit to which a councillor is entitled under this Act.

While the Courts are very critical of councillors in conflict situations, they also closely scrutinize the procedures employed by councils when there is a motion to vacate a seat, and they have established that a measure of due process ought to be followed. Councils who are considering vacating a seat are required to offer the councillor the right to a hearing, the right to know the case against him or her, and the ability to have legal counsel present their case and cross-examine witnesses.

While narrow conflicts have resulted in seats being vacated, other councillors have been reinstated, and councils subject to criticism, as a result of the council failing to allow for due process. Put simply, there is a general reluctance on the part of the Courts to remove democratically elected officials from office, without proper reason, and the Courts will closely scrutinize situations where councillors have their seats vacated.

Despite the conflicting decisions, the Court stated the following in *Crane v Upper Island Cove*:

Though the conflict of interest in this case was minimal and unintended, nevertheless the perception of it by others was very real and such perceptions when allowed to take root are by their very nature corrosive and destructive to public confidence in municipal government.¹

The Courts have stated that they have a minimal ability to set aside conflicts of interest situations where there is inadvertence or a *bona fide* error in judgement on the part of the councillor. The Courts have recognized that the discretion is very limited, stating the following:

Even if [inadvertence or a bona fide error in judgment] is found to exist, it is my view that once a conflict of interest is found to have occurred, a Court reviewing a resolution to vacate a seat on that basis should quash such a decision very sparingly if at all. The legislation indicates that once a conflict of interest is found to exist, the Council "shall" declare vacate the office of the elected Councillor.²

The Courts have recognized that adjacent property owners will often have a monetary interest in development in nearby properties, thus resulting in a conflict of interest. For example, in *Fewer v. Harbour Main-Chapel's Cove-Lakeview*, the Court found that a councillor voting on matters relating to a water and sewer extension project on a street on which he lived resulted in a conflict of interest³. Additionally, in *Crane v Upper Island Cove*, the Court reached a similar conclusion when it was the brother's property on the area that was to be serviced⁴.

2. Legal Opinion relating to both alleged Conflicts of Interest

(a) The Snow Clearing Issue

In my opinion, the Snow Clearing Issue does not amount to a conflict of interest. Quite simply, the issue as to whether private laneways ought to be snow cleared was not a matter before council. For the provisions of the Act to operate, the issue has to be a "matter being discussed by the council" – meaning in a formal council meeting. I am aware that Ms. Wiseman and Mr. Carey have near a private laneway which was discussed before the council meeting. However, the fact that there was a discussion prior to a council meeting about whether private laneways ought to be snow cleared is irrelevant. The actual matter before council was reflected as follows:

2. (5d) Tender for Snow Clearing 2014-2016 – Ralph Carey/Kevin Smart

¹ 1999 CarswellNfld 128 at ¶ 38 (TD).

² *Payne v Cowhead (Town)*, (2001) 2007 Nfld & PEIR 108 ¶21.

³ 2007 NLTD 91.

⁴ 177 NFLD & PEIR 8 (NLTD).

Be it resolved Council empower public works via electronic means to award snow clearing motion contract for 2014-16. Motion carried unanimously.

I fail to see how Mr. Carey or Ms. Wiseman have some sort of financial interest in the empowerment of public works to award the snow clearing contract. If the issue being discussed by council in the council meeting involved the route for the snow clearing services, or whether a particular private road ought to be plowed, a conflict may have arisen, but that was simply not the case. I would strongly recommend against attempting to vacate the seat of Ms. Wiseman or Mr. Carey in these circumstances.

(b) The Town Plan Issue

Property belonging to Ms. Wiseman, Mr. Carey and Mr. Smart, was rezoned by a previous council as that council was preparing their new town plan. The new town plan had proceeded to the Minister, but had not been formally endorsed. Subsequent to the election of the new town council in September, 2013 there were certain amendments to the new town plan which were being considered. **None of these amendments related to the property of Ms. Wiseman, Mr. Carey, or Mr. Smart.**

Furthermore, it was suggested that perhaps these people may have been in conflict of interest on December 9, 2014. This was discussed in the public council meeting, and it was determined that no violation of the conflict of interest provision of the Act had occurred. The minutes stated the following:

Mayor Depres confirmed that this has been investigated and unanimous decision has been made that there is no conflict of interest. The amendment to rezone properties to residential was previously decided, voted on and adopted by a previous council a number of years ago. Sebastien explained that the amendment today has nothing to do with that, but that Council is now voting on changes that this Council made in the past months.

What was ultimately voted on was the following:

*2014-324 Ralph Carey/Rene Estrada
Be it resolved Council adopt the Town Plan 2014-2024
Motion carried unanimously.*

While the councillors at issue voted to adopt the town plan in resolution 2014-324, changes to the zone of their respective properties was not considered by council at that time. It had been considered by a previous council, and the councillors at issue were not on council at that time. I do not feel that a conflict of interest arises as the issue of the rezoning of their property was not a matter before council.

Additionally, the issue as to whether or not they were in conflict appears to have been considered in council. This fact raises a procedural fairness problem pursuant to Section 209 of the Act. There is precedent for a court overturning a conflict in a situation where council had given assurances that there was no conflict, even absent a formal section 209 resolution.⁵

⁵ See *Moss v Flatrock*, 2000 CarswellNfld 72.

In either of these two situations, should council vote to vacate their seat, a Court would most likely overturn that decision. It is unlikely that a court would find that there was a conflict. I further expect that with respect to the Town Plan Issue, a court would find that based on the previous assurances that there was no conflict, it is unfair now to determine that they were in conflict.

3. *When a Council's decision to vacate seats from Council because an alleged conflict of interest is appealed, what does the appeal process look like?*

Councillors were affected by a decision whose seat has been vacated under section 202(2) may appeal that decision to a judge of the Trial Division (s. 410(1)). The councillors at issue have 21 days from the date of being notified by the Clerk of the decision, and are obliged to pay a court a sum or a bond to defray the costs of the appeal. This sum is typically fairly nominal, and in our experience, is under \$500.00.

The appeal is done by way of Notice of Appeal (a short document which lists in point form the basis for the appeal). There is then usually a preliminary court appearance where there is a discussion of the timing of filing of the appeal materials, including the appeal record (the documents relevant to the appeal) and the facta (the written briefs). Sometimes, the parties will file affidavits. There can be cross-examination on these affidavits.

In our experience, these appeals are usually conducted in a day. The courts typically do not hear matters in the summertime, so I would expect that this matter would not be heard until September, and a decision rendered approximately 30 days after that. There is a further right of appeal to the Court of Appeal.

Preparing the necessary written arguments, and documentation, preparing for court, and appearing at a one day hearing would likely cost in the range of \$12,000.00. You could expect that retaining counsel would be roughly the same cost range for the individuals as well. The loser on the appeal would typically (although not always) have to pay the winner's costs. These costs would be on a partial indemnity basis (likely \$3,000-\$4,000) although there is discretion in the courts to award a higher amount. It is conceivable that because of council's approach to the Town Plan Issue (particularly considering their early decision to allow them to proceed with voting), a court could award costs on a higher or more full indemnity basis (which could then approximate the close to \$12,000.00 in legal fees you would have to pay to the councillors if they were successful in being reinstated).

4. *If Council votes in favor of a councillor's seat(s) to be vacated, what is the step by step process (and expected time frame involved) that Council must follow?*

As previously noted, Council is obliged to have a hearing to consider whether to vacate the seat of a councillor. In that hearing, the councillor(s) at issue are afforded certain rights of procedural fairness. They are entitled to know the case against them, to have ample notice of the hearing, to be provided any documentation that council intends to rely upon, and have the right to be heard at the hearing, with their legal counsel present. They are also entitled to call and cross-examine witnesses.

Courts look harshly on situations where procedural fairness is not afforded. In *Neary v Town of Portugal Cove-St. Philip's*, the court set aside the vacating of a seat because the councillor at

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issue was not provided with an adjournment to have a witness attend at the hearing.⁶ In our prior correspondence to the Town, we recommended 10 days notice of the hearing, and provided a draft letter and resolution of council as a precedent for council to use.

Our discussion of the appeal process is set out above.

5. *Can the three councillors who voted for it sign, or, under the Municipalities Act, am I as the Town Clerk/Manager required to sign on behalf of Council?*

The resolution of council should be signed by the councillors moving and seconding the motion to consider the issue of conflict. I drafted the letter as being signed by the Mayor. This is an internal matter, and is merely communicating the fact of the hearing. The signing of this can be carried out by the Town Clerk/Manager.

Yours truly,

Stewart McKelvey



Stephen F. Penney

SFP/seg

⁶ *Neary v Town of Portugal Cove-St. Philip's*, 2013, NLCA 47.