



Summary of Investigations

Allegations of Conflict of Interest Against Councillor Tim Probe and Former Councillor Joe Repetski of the Rural Municipality of Sherwood No. 159

January 2017

THE COMPLAINT

Residents of the Rural Municipality of Sherwood No. 159 complained to the Ombudsman that, at a January 13, 2016 council meeting, Councillor Tim Probe and former Councillor Joe Repetski each failed to declare a conflict of interest and participated in a discussion about whether Sherwood should take steps to recover the legal fees that Sherwood reimbursed them under its *Indemnity Bylaw* (No. 17/14), which was later determined to be invalid.

SUMMARY OF FACTS

Sherwood surrounds the City of Regina. Sherwood and its council - comprised of a reeve and six councillors - are subject to *The Municipalities Act*.

In the summer of 2014, the Minister of Government Relations appointed the Honourable Mr. Ronald Barclay, Q.C. to conduct an inspection and inquiry under *The Municipalities Act* into, among other things, whether any of Sherwood's council members had a pecuniary interest in the proposed Wascana Village development.

Councillors Probe and Repetski, and two other members of Sherwood's council each hired lawyers to represent them during the Barclay Inquiry.

On October 17, 2014, Sherwood's council passed the *Indemnity Bylaw* requiring Sherwood to pay the cost of defending any "Municipal Official... in respect of any action or proceeding arising out of acts or omissions done or made...in the course of his or her duties... if he or she acted honestly and in good faith with a view to the best interests of the RM."

In November 2014, Sherwood reimbursed Councillor Probe for \$49,999.98 in legal fees and Councillor

Repetski for \$11,011 in legal fees under the *Indemnity Bylaw*.

On February 5, 2015, the government removed Sherwood's reeve, and appointed an interim reeve and an official administrator to supervise Sherwood and its council. At this point, only two councillors reimbursed under the *Indemnity Bylaw* remained on council: Councillors Repetski and Probe.

On September 23, 2015, the Court of Queen's Bench issued *Baker v Sherwood No. 159 (Rural Municipality)* concluding that the "Council has exceeded its authority in purporting to provide for indemnification of councillors in circumstances where they are not the subject of a claim for liability." The court quashed the *Indemnity Bylaw*.

At October 14 and October 21, 2015 council meetings, a motion was made to seek reimbursement of the legal expenses paid out under the quashed bylaw. At both meetings, Councillors Probe and Repetski recused themselves during the discussion and votes. At the October 21, 2015 meeting, the remaining council members defeated the motion - meaning they decided not to seek reimbursement of the money paid to councillors under the *Indemnity Bylaw*.

At a December 9, 2015 council meeting, at which Councillors Repetski and Probe were present, Councillor Dale Heenan gave notice "that the matter of collection of legal fees...is to be brought to the January 2016 Council Meeting."

On January 7, 2016, a Sherwood resident, Mr. Gary Howland, submitted a letter to the reeve and council asking the council to seek reimbursement of the legal fees paid under the quashed bylaw. On January 12, 2016, he submitted a document to Sherwood signed by 112 individuals supporting his request.

Mr. Howland's request was put on the January 13, 2016 meeting agenda, which was made available to all council members on January 8, 2016. The "Notice of Motion from Councillor Heenan" was also on the agenda.

In the afternoon before the January 13, 2016 meeting, there was an email exchange between Councillor Repetski and Sherwood's Chief Administrative Officer, which was copied to all the councillors. In it, Councillor Repetski questioned whether Mr. Howland's request was properly on the agenda, in particular, whether it had been submitted on time to meet the requirements of Sherwood's *Procedure Bylaw*.

When the Reeve called the January 13, 2016 council meeting to order, Councillor Probe moved that the agenda be adopted as presented. His motion passed unanimously. No council member questioned whether Mr. Howland's presentation should be on the agenda.

Mr. Howland then made his presentation. Neither Councillor Repetski nor Councillor Probe declared a conflict of interest and both remained in the council chamber.

Later in the meeting, Councillor Heenan, moved:

THAT the RM of Sherwood No. 159 instruct Legal Counsel to write to the recipients of the payments for reimbursement of legal expenses of the Barclay Inquiry requesting repayment.

Neither Councillor Repetski nor Councillor Probe declared a conflict of interest. Instead, they engaged in a discussion about whether Councillor Heenan's motion could be made under *Robert's Rules of Order*, since it was worded identically to the motion that had already been defeated on October 21, 2015.

After the council's discussion, Councillor Probe moved "THAT the Reimbursement of Legal Expenses motion be tabled to seek legal advice." This motion was carried with four votes in favour (including Councillor Repetski and Councillor Probe) and three votes against.

CONFLICTS OF INTEREST UNDER THE MUNICIPALITIES ACT

Under *The Municipalities Act*, a council member has a conflict of interest if he or she makes a decision or participates in making a decision in the execution of his or her office and at the same time knows or ought reasonably to know that in the making of the decision there is the opportunity to further his or her private interests.

If a council member at a meeting has a conflict of interest in a matter before the council, he or she must:

- before any consideration or discussion of the matter, **declare** that he or she has a conflict of interest;
- **disclose** the general nature of the conflict of interest and any material details that could reasonably be seen to affect the member's impartiality in the exercise of his or her office;
- **abstain** from voting on any question, decision, recommendation or other action to be taken relating to the matter;
- **refrain** from participating in any discussion relating to the matter; and
- **leave** the room in which the meeting is being held until discussion and voting on the matter have concluded.

SUMMARY OF FINDINGS

The Presentation by the Delegation

Before the January 13, 2016 meeting, Councillor Repetski questioned whether Mr. Howland's request was properly on the agenda, because it had not been submitted on time according to Sherwood's *Procedure Bylaw*.

However, neither Councillor Repetski nor Councillor Probe raised this point of order at the meeting, and both of them voted in favour of adopting the agenda with this item included.

Councillors Probe and Repetski stayed in the room while Mr. Howland made his presentation. According

to the *Procedure Bylaw*, once he was finished, the council was to “consider the delegation’s brief and, by the introduction of a motion...resolve to take some action” to deal with his request. Municipal councils can only make decisions by making and voting on motions. Sherwood’s council did not do this. Nor did they ask Mr. Howland any questions or otherwise discuss his presentation.

We considered whether it was appropriate for Councillors Probe and Repetski to stay and listen to Mr. Howland’s presentation even though he was asking the council to seek reimbursement from them. In our view, Mr. Howland’s presentation was itself a matter before the council, governed by the conflict of interest rules in *The Municipalities Act*. A council member must declare and disclose his or her conflict of interest in a matter as soon as the matter arises, whether or not any motion has been made or proposed to deal with it. A council member’s mere presence in the room when such a matter is before the council may, in many cases, have a chilling effect on the council’s ability to freely consider a matter.

We find that Councillors Probe and Repetski each knew or ought reasonably to have known there was an opportunity to further his private interest if he participated in council’s consideration of Mr. Howland’s presentation, whether or not any motion was made to deal with it. They were each in a conflict of interest with respect to the matter before the council. Therefore, they both should have complied with subsection 144(1) of *The Municipalities Act* by declaring they had a conflict of interest, disclosing the general nature of the conflict, and leaving the room while the rest of council heard and considered Mr. Howland’s presentation.

The Motion to Seek Reimbursement of Legal Fees

Councillor Repetski and Councillor Probe had reasonable notice that the council was going to discuss and possibly vote at the January 13, 2016 council meeting on Councillor Heenan’s motion that Sherwood take steps to recover the money paid to them under the *Indemnity Bylaw*.

We find that Councillor Probe and Councillor Repetski each knew or ought reasonably to have known there was an opportunity to further his private interest if he participated in the council’s discussion and consideration of Councillor Heenan’s motion. Each had a financial interest in not being asked to repay the money paid to him under the invalid *Indemnity Bylaw*. Therefore, they each should have complied with subsection 144(1) of *The Municipalities Act* by declaring a conflict of interest, disclosing the general nature of the conflict, and leaving the room until the rest of the council finished considering Councillor Heenan’s motion.

The Motion to Table and Seek Legal Advice

Councillor Repetski and Councillor Probe both stated that they only stayed in the council chamber after Councillor Heenan’s motion was made because they wanted legal advice about whether or not a previously defeated motion could be brought back and voted on again.

We do not accept that Councillor Probe and Councillor Repetski were motivated to stay in the room and participate in the discussion because they were interested in ensuring Sherwood’s procedural rules were followed. If the motion could not be brought back again, they would avoid the council possibly directing Sherwood’s lawyer to take steps to seek reimbursement of the legal fees paid to them.

It is impossible to dissociate Councillor Probe’s and Councillor Repetski’s conflict of interest in the underlying motion from their interest in questioning whether the motion could be brought back and voted on again. They each had a private interest in the outcome of the procedural debate.

Therefore, we find that Councillor Repetski’s and Councillor Probe’s conflict of interest extended to any discussion about the procedural issue, and to tabling the motion to seek legal advice about whether it could be brought back and voted on again.

CONCLUSION AND RECOMMENDATION

Councillors Probe and Repetski were in a conflict of interest at Sherwood's January 13, 2016 regular council meeting. Specifically, they had a conflict of interest in:

1. The presentation made by the delegation asking the council to examine all available procedures for securing reimbursement of the legal expenses paid under the *Indemnity Bylaw*;
2. The motion to instruct legal counsel to write to the recipients of the payments for reimbursement of legal expenses of the Barclay Inquiry, requesting repayment; and
3. The motion to table the reimbursement motion to seek legal advice about defeated motions being brought back and voted on again.

Under *The Ombudsman Act, 2012*, if there are sufficient grounds for making a report that may adversely affect any entity or person investigated, we must give the entity or person an opportunity to make representations with respect to the matter and they may do so by counsel.

We provided Councillors Probe and Repetski, and Sherwood (through the Reeve) with an opportunity to make representations on our draft report of findings and recommendations before we finalized it.

Motion to Recover the Monies Paid to Councillors Under the *Indemnity Bylaw*

In our draft report, we proposed two recommendations to Sherwood's council that, if accepted and implemented, would have resulted in Councillor Heenan's motion being brought back and voted on without Councillor Probe or Councillor Repetski being involved. After receiving our draft report, Sherwood's council passed a motion authorizing Sherwood to take action to recover the money paid to the councillors under the *Indemnity Bylaw*. Therefore, it is now unnecessary for us to make these two recommendations.

Actions of Councillor Probe and Councillor Repetski

Under *The Municipalities Act*, a council member who contravenes section 144 is disqualified from council, must resign immediately, and is not eligible to be nominated or elected in any municipality for 12 years.

Given that Councillor Repetski and Councillor Probe were each in a conflict of interest at the January 13, 2016 meeting and did not take the steps set out in *The Municipalities Act* to deal with the conflict of interest, they are both disqualified from council, should have resigned immediately, and are not eligible to be nominated or elected in any municipality for 12 years.

If a disqualified council member does not resign, section 148 sets out a process for the council (or a voter) to apply to the Court of Queen's Bench to enforce the disqualification. Based on the evidence presented, a judge may declare a person disqualified because of a failure to disclose a conflict of interest. However, section 149 requires the judge to dismiss the application if the judge is of the opinion that the disqualification arose through inadvertence or an honest mistake.

In our draft report, we tentatively recommended that the Sherwood council consider whether to apply to the court to have Councillor Repetski and Councillor Probe declared to be disqualified from council. However, Councillor Repetski did not seek re-election in the last municipal election, so it is not necessary to make this recommendation about him.

Although Councillor Probe is currently on approved leave from council, he is still a council member. Therefore, we recommend that:

The council of the Rural Municipality of Sherwood No. 159, at its next regular council meeting, should vote on whether to apply to the Court of Queen's Bench under section 148 of *The Municipalities Act* for an order declaring Tim Probe to be disqualified from council, and Tim Probe should fully comply with section 144 of *The Municipalities Act* in relation to the motion.