



An Investigation into Allegations of Conflict of Interest against Former Councillor Joe Repetski of the Rural Municipality of Sherwood No. 159

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THE COMPLAINT

We received complaints from residents of the Rural Municipality of Sherwood No. 159 (Sherwood) that Joe Repetski, while a member of the Sherwood council, failed to comply with the conflict of interest provisions of *The Municipalities Act*.

Specifically, the complainants alleged that at a January 13, 2016 council meeting, Councillor Repetski failed to declare a conflict of interest and participated in a discussion about whether Sherwood should take steps to recover the amount it reimbursed him for legal fees under Sherwood's Bylaw No. 17/14 – *A Bylaw to Provide for the Indemnity and Defence of Members of Council Against Liability Incurred While Acting on Behalf of the Municipality (Indemnity Bylaw)*.

THE OMBUDSMAN'S MANDATE

The Ombudsman is an independent officer of the Legislative Assembly of Saskatchewan. Under *The Ombudsman Act, 2012*, the Ombudsman receives, informally resolves, and investigates complaints from citizens about their treatment by government entities. The Office of the Ombudsman was created in 1973 with the mandate to review the actions, omissions and decisions of provincial ministries, Crown corporations, and most provincial government agencies, boards, commissions and authorities.

In November 2015, the Ombudsman's mandate was expanded to give the Office jurisdiction to receive complaints about municipal government entities and their council members, including the authority to investigate any matter respecting a council member's conflict of interest or alleged contravention of a code of ethics.

Ombudsman Saskatchewan does not advocate for the people who complain to us, nor for the government entities, board members, council members, officers or employees whose actions we investigate. We are impartial and independent from the government entities we oversee. If, after an investigation, we determine that an administrative decision, action, recommendation or omission was unreasonable, unjust, improperly discriminatory, unlawful, based on a mistake of law or fact, or wrong, or if we find that a council member was in a conflict or interest in carrying out his or her duties, or breached a code of conduct, we may make recommendations aimed at resolving the issues we uncover. We cannot order any council member or government entity to do anything or take any specific action. We may also issue public reports about our work, including about any case we have investigated.

THE OMBUDSMAN'S ROLE IN SASKATCHEWAN'S MUNICIPAL SECTOR

The Legislative Assembly of Saskatchewan enacted *The Cities Act*, *The Municipalities Act*, and *The Northern Municipalities Act, 2010* to provide for the establishment of cities, towns, villages, resort villages, rural municipalities, northern municipalities and other local government entities across the province. Municipalities are empowered under these Acts to govern themselves, to make decisions and provide the services and facilities they consider appropriate and in the best interest of their residents and ratepayers, to whom they are accountable. Municipalities exercise their powers through their councils passing bylaws or resolutions.

There are 780 cities, towns, villages, resort villages, rural municipalities, and northern municipalities in Saskatchewan. There are approximately 3,700 council members sitting on the councils of these municipalities.

While these municipalities and their council members have wide discretion to decide how they will exercise their delegated powers, the Legislative Assembly has an interest in being sure municipalities exercise their powers fairly, reasonably and in the public interest. This is one of the reasons why, in our opinion, the Ombudsman's oversight mandate was expanded to include municipalities and their council members.

Sherwood and its council – comprised of a reeve and six councillors who each represent a geographical division – are subject to *The Municipalities Act*. Sherwood surrounds the City of Regina and, according to the Government of Saskatchewan's Municipal Directory System, has a population of 929. Its 2016 total approved budget was \$13,419,430.

OUR INVESTIGATIVE METHODOLOGY

The Ombudsman Act, 2012 requires us to give notice to the reeve if we intend to investigate the actions of a council member of a rural municipality. We issued notice to the Reeve of Sherwood on April 22, 2016, of our intention to investigate whether Councillor Repetski was in a conflict of interest at the January 13, 2016 council meeting and, if so, whether he took the steps required of him under *The Municipalities Act* to address the conflict of interest. Councillor Repetski was also notified in writing of our intention to investigate.

The Ombudsman has wide powers of investigation under *The Ombudsman Act, 2012*. We gather information through interviews and reviewing documents. Our investigations are not like court proceedings. The Ombudsman is not required

to hold hearings and does not issue orders like a judge. Once information is gathered and analyzed, the Ombudsman makes findings and, if appropriate, recommendations.

Under *The Ombudsman Act, 2012*, if there are sufficient grounds for making a report that may adversely affect any entity or person, we must give the entity or person an opportunity to respond and they may do so through legal counsel. On October 6, 2016, we provided Councillor Repetski with a copy of our draft report and advised him that he could make representations to us through legal counsel about the findings and conclusions in our draft report. He made written representations to us on October 28, 2016 and November 8, 2016. He made them himself and not through legal counsel.

For the same reasons, we also provided the draft report to the Reeve, as our findings involved the activities and decisions of Sherwood's council and administration.

Our investigation was conducted in private as required by *The Ombudsman Act, 2012*. We did not discuss any of the information about this investigation with anyone outside of the investigation process. We asked everyone we interviewed to respect the confidentiality and integrity of the process and to not discuss the investigation with anyone.

After it was publicly reported that the Minister of Government Relations had asked Councillor Tim Probe to step down as councillor because he had been charged criminally, and that the Ombudsman was possibly investigating, several media organizations contacted us to confirm whether we were investigating. The Ombudsman decided that it was in the public interest to confirm that we were investigating matters concerning Sherwood, but that we would not discuss the investigation until it was completed. No information about the subject matter of the investigation, or any indication that it involved Councillor Repetski was provided.

REFERENCES

ACTS, REGULATIONS AND BYLAWS

The Municipalities Act

The Municipal Conflict of Interest Amendment Act, 2015

Sherwood Bylaw 17/14 – A Bylaw to Provide for the Indemnity and Defence of Members of Council Against Liability Incurred While Acting on Behalf of the Municipality

Sherwood Bylaw No. 29/12 – A Bylaw to Regulate the Proceedings of the Council of the Rural Municipality of Sherwood No. 159

CASES AND OTHER DOCUMENTS

Baker v. Sherwood No. 159 (Rural Municipality), 2015 SKQB 301 (CanLII)

Legislative Assembly of Saskatchewan, *Standing Committee on Intergovernmental Affairs and Justice, Hansard Verbatim Report, No. 46, November 16, 2015*

OC 30/2015 - Rural Municipality of Sherwood No. 159 – *Removal of Reeve (Mr. Kevin Eberle) and Appoint New Reeve (Mr. Neil Robertson, Q.C.)*

Ronald L. Barclay, Q.C., *Final Report of the Inspection and Inquiry into the R.M. of Sherwood, No. 159, Volume 1 of 2, December 30, 2014*

Various Minutes and Agendas of Regular Council Meetings and Special Council Meetings of the RM of Sherwood No. 159 between October 8, 2014 and November 9, 2016

FACTS

On June 16, 2014, the Minister of Government Relations ordered an inspection under *The Municipalities Act* of the appropriateness of the directions, actions or inactions of Sherwood’s council members relating to the proposed Wascana Village development. The Minister appointed the Honourable Ronald L. Barclay, Q.C. as inspector.

On July 24, 2014, based on Mr. Barclay’s Interim Report, the Minister ordered an inquiry under *The Municipalities Act* into, among other things, whether any of Sherwood’s council members had pecuniary (financial) interests in the Wascana Village development and, if so, whether they were appropriately disclosed, or whether any council members inappropriately attempted to influence, promote or advance the development to benefit themselves.

Mr. Barclay had issued twenty-five subpoenas to Produce Documents to individuals and corporations that he believed would have relevant information and these individuals included current members of Sherwood’s council.

On July 30, 2014, Councillor Repetski emailed the other councillors, Sherwood’s Chief Administrative Officer (CAO) and Sherwood’s lawyer. In the email, he said the Saskatchewan Association of Rural Municipalities (SARM) told him that it did not expect the SARM Liability Self-Insurance Plan would provide coverage for the councillors’ legal fees during the Barclay Inquiry. He suggested that “the issue of individual councillor’s legal costs be part of our discussions today.” The CAO told us that during the *in camera* (closed to the public) portion of the special meeting held later that day, Sherwood’s lawyer advised the councillors that they would need to hire their own lawyers for the inquiry (Barclay Inquiry).

The Reeve, Councillor Repetski and two other councillors each hired lawyers to represent them during the Barclay Inquiry.

On August 21, 2014, SARM emailed the CAO to confirm that it believed its insurance plan would not cover expenses incurred by a council member seeking independent legal advice in a situation such as the Barclay Inquiry.

At an August 25, 2014 information session attended by Councillor Repetski, Sherwood's lawyer agreed to provide an opinion regarding payment of individual councillors' legal fees.

The CAO told us that Councillor Tim Probe asked him to arrange a "strategy session" to deal with the Barclay Inquiry. The CAO told us that the CAO and Sherwood's lawyer, along with four of Sherwood's council members, including Councillor Repetski, attended this October 6, 2014 session, three of whom attended with their lawyers. The CAO recalls Sherwood's lawyer again telling the councillors that they would need to engage their own lawyers independently.

At its regular meeting on October 8, 2014, the Council unanimously passed resolution 535/14 directing the CAO to, "work with legal counsel to draft a policy that [may be] adopted by bylaw for reimbursement of legal expenses for Council Members and Staff to be presented to Council for consideration in November 2014."

On October 17, 2014, the CAO issued a notice of a special council meeting, which states it was being sent in part because the CAO, "received verbal requests from the majority of the Council...to call a Special Meeting...prior to November 2014." At the special council meeting that followed on October 18, 2014, the CAO submitted an Administration & Finance Report stating in part:

If Council adopts the proposed policy, by resolution or bylaw, the CAO will have the responsibility to implement the policy; have the authority to scrutinize the expense claim(s) submitted by members of Council; and have the authority to approve, deny and/or adjust payment.

...

[The] relationship of legal expense reimbursement payment is between the municipality (RM of Sherwood) and individual members of Council, not between the municipality and any respective lawyer or law firm.

At the same meeting, the council passed the *Indemnity Bylaw* (No. 17/14) requiring Sherwood to indemnify 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 as a Municipal Official, if he or she acted honestly and in good faith with a view to the best interests of the RM." The indemnity rules included paying the cost of defending council members in any legal action or proceeding.

Councillor Repetski's lawyer issued an invoice to him dated November 19, 2014, for services rendered at the Barclay Inquiry in the amount \$11,011. On November 24, 2014, Sherwood issued a cheque to Councillor Repetski reimbursing him for these legal expenses.

On December 30, 2014, Mr. Barclay issued his *Final Report of the Inspection and Inquiry into the R.M. of Sherwood, No. 159* (Barclay Report) to the Minister of Government Relations. Based on Mr. Barclay's findings, on February 5, 2015, an order in council was issued to remove Sherwood's reeve and appoint an interim reeve in his place. Also, the Minister appointed an official administrator to supervise Sherwood and its council.

At this point, only two of the councillors whose legal fees were reimbursed under the *Indemnity Bylaw* remained on Sherwood's council – Councillor Repetski and Councillor Probe.

On April 14, 2015, a group of Sherwood residents and ratepayers made a court application for an order quashing the *Indemnity Bylaw* under section 358 of *The Municipalities Act*. On September 23, 2015, the Court of Queen's Bench issued its judgment in *Baker v. Sherwood No. 159 (Rural Municipality) (Baker)*. It held 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 found the *Indemnity Bylaw* to be *ultra vires* (not within the legal authority of the council to make.)

Sherwood's council held a special meeting on October 13, 2015, to review the *Baker* decision. Councillor Repetski was in attendance. The council heard from a delegation of residents and voters. In a written statement, the delegation urged, in relation to the council's deliberations over the *Baker* decision, "all members of council to be honest in assessing whether they should take part in the deliberations and also voting on the final decision. Our group requests that no appeal should be made." Councillor Repetski did not declare a pecuniary interest in the discussion or leave the room.

Following the delegation, the meeting went *in camera* to receive legal advice. Councillor Repetski did not declare a pecuniary interest or leave the room for the discussion. After reconvening into regular session, the council unanimously carried a motion to table (adjourn) council's review of the Queen's Bench decision until the October 14, 2015 meeting.

At Sherwood's regular council meeting on October 14, 2015, the official administrator issued a general caution about conflicts of interest, advising both Councillor Repetski and Councillor Probe that he believed it would be a conflict of interest for them to participate in the discussion and vote on whether Sherwood should appeal the court's decision. Both of them recused themselves and left the room.

A motion was then made to have Sherwood appeal the *Baker* decision. It was defeated.

The interim reeve then 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.” The council decided to table this motion in order to seek legal advice. After conducting other business relating to the matter, Councillors Repetski and Probe re-entered the council chamber.

On October 20, 2015, the CAO, Councillors Repetski and Probe, and another Sherwood employee met to discuss an upcoming committee meeting. The CAO told us that both councillors asked him about what the council decided on October 14, 2015, when they recused themselves. The CAO told them he was instructed to get legal advice about seeking reimbursement from them and the other councillors. The CAO told us Councillor Probe questioned council’s decision. Councillor Repetski told us that he could not remember this discussion.

The Sherwood council held a special meeting on October 21, 2015, to “finish the agenda items from the October 14, 2015 Council Meeting.” According to the minutes, after adopting the agenda and the presentation of the minutes of the October 14, 2015 meeting, the special meeting was recessed. According to the CAO, during the recess, there was a discussion about whether the council could reconsider the motion to seek legal advice. There was some discussion about unanimous consent being required in order for it to be reconsidered, because it had not been included in the notice of the special meeting. There was also discussion that it could be reconsidered, because the purpose of the special meeting was to finish the October 14, 2015 agenda items, so it qualified as a continuation of the October 14, 2015 meeting.

After the recess, a councillor moved reconsideration of the decision to table the original motion about seeking reimbursement of the legal expenses. The motion to reconsider was carried unanimously. Councillor Repetski and Councillor Probe both recused themselves and left the room. The remaining councillors voted unanimously to defeat the tabling motion, which had the effect of bringing back the original motion: “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” This original motion was then voted on and defeated. Councillors Probe and Repetski re-entered the room.

Defeating this original motion meant the council had decided not to instruct its lawyer to seek repayment of the legal fees reimbursed to councillors under the *Indemnity Bylaw*.

On October 28, 2015, Mr. Jeff Poissant was elected as the Reeve of Sherwood. He was sworn in on November 4, 2015, replacing the interim reeve.

The CAO told us that, at the November 4, 2015 regular council meeting, Councillor Dale Heenan asked about what was happening with the legal fees matter. Councillor Repetski was at the meeting. The CAO told us that he advised Councillor Heenan that the matter had been dealt with in October 2015.

The CAO told us, between the November and December 2015 council meetings, he advised Councillor Heenan that he would need to provide a notice of motion to bring the legal fees matter back to council. At the December 9, 2015 council meeting, which Councillor Repetski attended, Councillor Heenan gave verbal notice “that the matter of collection of legal fees...is to be brought to the January 2016 Council Meeting.”

Mr. Gary Howland, a Sherwood resident, submitted a letter to the reeve and council dated January 7, 2016, to “request that RM Council examine all available procedures for securing reimbursement of the legal expenses paid under Bylaw No. 17/14, and pursue diligently and with some sense of urgency what are determined to be the best procedure(s) in this instance.” The letter was not signed.

In a January 8, 2016 email sent to all the councillors, a Sherwood employee advised that the January 13, 2016 council meeting agenda package was available to them on the council portal on Sherwood’s website. The first item on the agenda was “Gary Howland – Letter to Council with Supporting Signatures Re: Re-imbursement of Legal Expenses.” The agenda package included a copy Mr. Howland’s unsigned letter. The agenda also indicated that a “Notice of Motion from Councillor Heenan” would be discussed.

On January 12, 2016, Mr. Howland emailed Sherwood a copy of a document entitled “Ratepayer/Resident Signatures: Reimbursement of Legal Expenses” with the signatures of 112 individuals, including his own, dated from December 23, 2015 to January 9, 2016.

In the afternoon of January 13, 2016, before the council meeting, Councillor Repetski emailed the CAO and the other councillors, expressing his opinion that the matter should not have been included on the meeting agenda as it was incomplete, not received in time, and, therefore, did not comply with Sherwood’s *Procedure Bylaw*.

The CAO replied to Councillor Repetski (and the other councillors), quoting section 13 of Sherwood’s Bylaw No. 29/12, *A Bylaw to Regulate the Proceedings of the Council of the Rural Municipality of Sherwood No. 159 (Procedure Bylaw)*. Subsection 13 a) requires anyone wishing to bring a matter to the attention of the council or to have a matter considered by the council to deliver a letter, petition or other communication to the CAO “at least one week prior to the next regular Council meeting.” Clause 13 b) iii) requires the communication to “contain the signature... of the person submitting it.” The CAO advised the councillors that:

The letter, included in the agenda, was provided at least one week prior to the meeting; the signatures were not. The letter does not contain Mr. Howland's signature, pursuant to Section 13. b) iii) of the *Procedure Bylaw*.

The CAO could not verify, and none of the documents we reviewed indicate, when Mr. Howland's unsigned January 7, 2016 letter was delivered to the CAO. Given that it was posted to the council portal on January 8, 2016, we find that it was delivered either January 7 or January 8, 2016. The *Ratepayer/Resident Signatures* document was not delivered until January 12, 2016.

The Reeve called the January 13, 2016 regular council meeting to order. Then Councillor Probe moved the first motion of the evening – "THAT the agenda be adopted as presented." The motion passed unanimously. No council member raised the issue that Mr. Howland's presentation should not be on the agenda because it violated the *Procedure Bylaw*.

Several people attended the meeting, including reporters from the Regina Leader-Post and CBC News Regina. Mr. Howland made a presentation to council on behalf of the delegation he represented, urging the council to examine all available procedures for securing reimbursement of the legal expenses paid under the quashed *Indemnity Bylaw*. Councillor Repetski did not declare a conflict of interest and remained in the council chamber for the presentation. According to the CAO, none of the council members discussed or commented on Mr. Howland's presentation.

Councillor Heenan, in accordance with his verbal notice of motion at the December 9, 2015 meeting and the written notice in the meeting agenda, 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.

He commented that, with a new reeve and a newly appointed councillor, the matter was worthy of reconsideration.

Councillor Repetski submitted to us that he fully intended to recuse himself from the matter of the reimbursement of legal fees, but the discussion about the procedural issue ensued. He told us that he remained in the council chamber after Councillor Heenan made his motion and actively took part in the discussion – but only to discuss whether the council could bring back a defeated motion. He told us that he did not discuss the substance of Councillor Heenan's motion, nor did any of the discussion among the council members address whether to seek reimbursement from him and the other councillors. He told us the discussion was only about whether a defeated motion could be brought back to be voted on again.

In a May 2016 written submission to us, Councillor Repetski stated:

The discussion at the table was about the **process involved in bringing back a defeated motion** – including whether *Roberts* [sic] *Rules of Order* addressed such a situation, whether there was a time limitation requirement, and how many times a defeated motion could be brought back to Council. We asked our CAO...for information from *Roberts* [sic] *Rules of Order* and although he was looking through a copy of the *Rules*, he couldn't come up with a definitive answer. At one point he indicated that a motion could be reconsidered if it was brought back at the next Council meeting with a majority vote to do so. (This would have been the November 4, 2015 Regular Meeting of Council.) He mused that it appears that a motion to “renew” and “reconsider” were essentially the same thing, but it was unclear what the process should be...

Both the CAO and the Reeve told us that Councillor Repetski's comments were focussed on challenging whether the motion, which had been previously defeated, could be brought back and voted on again.

The CAO told us, as was reported by a Leader-Post reporter who attended the meeting, he advised the council that, under *Robert's Rules of Order*, a previously defeated motion could be brought back and voted on again.

After the council's discussion, according to the minutes, 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. The Reeve told us that neither he nor Councillor Grant Paul, the newly appointed councillor, had an opportunity to speak to the original motion about the reimbursement of legal fees, because Councillor Probe made the motion to table it before they could speak.

The CAO told us that, on January 14, 2016, a Leader-Post reporter asked him about what he understood the motion about getting legal advice meant. He told the reporter that he thought he was to get legal advice about seeking reimbursement of the fees paid to the councillors. This answer was reflected in a Leader-Post article. The CAO told us that this conversation made him question his understanding of the motion. He tried to contact five of the councillors to ask them what they thought. Three told him that the advice was to be about the reimbursement of legal fees, one said the motion was a stall tactic and another did not call him back. The CAO did not contact Councillor Repetski or Councillor Probe to get their opinions. Councillor Repetski told us that the motion was about getting advice about bringing back a defeated motion.

Everyone we spoke to who was at the January 13, 2016 meeting told us the discussion was focused only on whether a defeated motion could be brought back. Therefore, we find that Councillor Probe's motion, despite the confusion about it

what it was for, was to table the reimbursement motion to seek legal advice about whether defeated motions could be brought back.

On February 2, 2016, the CAO did receive a legal opinion about whether a cause of action exists against the councillors who received reimbursement of their legal fees pursuant to the *Indemnity Bylaw*. Further, at its regular council meeting on February 10, 2016, the Sherwood council passed resolution 101/16, “THAT the R.M. of Sherwood No. 159 Council receive a written summary of the procedures regarding bringing a motion back to Council from [Sherwood’s lawyer].”

At a special council meeting held on May 25, 2016, the CAO submitted and discussed an administration report he prepared, which discusses the procedures for reconsidering motions:

The procedure bylaw provides direction on motions of Council and also adopts Robert’s Rules of Order. Robert’s Rules cannot override legislative process. Simply put, by giving “notice of motion”, a matter can be brought back to Council at any time. [Sherwood’s lawyer] advised that the notice provided [by Councillor Heenan about the legal fees] was “spot on”. While Robert’s Rules provides for a process of meetings and motions, there is nothing that prevents a Council from re-considering a motion, at any time.

...

[I]n principle, one legislature cannot bind another legislature. In other words, the matter was considered in October 2015, followed by a by-election and annual organizational meeting of Council in November 2015, which may be deemed a new session of Council. Whether a matter is considered or reconsidered in a former or current session of Council appears to be irrelevant. What is relevant is that “every legislative body has the inherent right to reconsider a vote on any action previously taken by it.”

The council held a special meeting on October 28, 2016. Councillor Repetski was not present. Neither was Councillor Probe. The council passed the following resolution:

THAT Council authorize Administration and [Sherwood’s lawyer] to proceed with any and all action necessary for the recovery of all monies paid out for the personal legal fees of certain Councillors, past and present, under Bylaw No. 17/14 which was quashed by the Court of Queen’s Bench for Saskatchewan on September 23, 2015.

Mr. Repetski did not seek re-election during Sherwood’s October 2016 election and ceased to be a councillor on November 9, 2016, the date of Sherwood’s next council meeting after the election.

ANALYSIS AND FINDINGS

The issue we investigated in this case is whether Councillor Repetski was in a conflict of interest at the January 13, 2016 council meeting. And, if so, whether he took the steps required of him under *The Municipalities Act*.

WHAT IS A CONFLICT OF INTEREST?

The Municipalities Act sets out when a council member will have a conflict of interest in relation to a matter that is before council. Subsection 141.1(1) states that a council member has a conflict of interest if:

...the member 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 or the private interests of a closely connected person.

Subsection 141.1(2) states that having financial interest – including if a council member could be adversely affected financially by a decision of council – always constitutes a conflict of interest. Subsection 143(2) lists several situations in which council members are considered not to have a financial interest, even if they could be affected financially by a related council decision, but this situation – Sherwood’s decision about seeking reimbursement of the legal fees – is not covered by this list.

WHAT DO COUNCIL MEMBERS HAVE TO DO IF THEY HAVE CONFLICT OF INTEREST? DECLARE, DISCLOSE, ABSTAIN, REFRAIN AND LEAVE

Subsection 144(1) states that, if a council member has a conflict of interest in a matter before the council, the member, must, if present:

- 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 are concluded.

Read together, sections 141.1 and 144 make it clear that if a council member would be in a conflict of interest (because he or she knows or ought reasonably to know there is the opportunity to further his or her private interest if he or she were to make a decision or participate in a decision) then he or she must take the steps in subsection 144(1) to avoid the conflict of interest.

In addition, subsection 144(2) states that “No member of a council shall attempt in any way, whether before, during or after the meeting, to influence the discussion or voting on any question, decision, recommendation or other action to be taken involving a matter in which the member of council has a conflict of interest.”

Lastly, subsection 141.1(4) states that the conflict of interest provisions in the Act are not to be interpreted as affecting the application of other requirements, duties or responsibilities imposed on council members under the common law in relation to conflicts of interest. So if there are any common law requirements not covered in the Act, council members have to comply with them too.

DID COUNCILLOR REPETSKI HAVE A CONFLICT OF INTEREST? AND, IF SO, DID HE DECLARE, DISCLOSE, ABSTAIN, REFRAIN AND LEAVE?

We considered whether Councillor Repetski had a conflict of interest in two items on the January 13, 2016 meeting agenda: the presentation by the delegation regarding the reimbursement of legal expenses, and the notice of motion from Councillor Heenan. We also considered a third issue – whether he had a conflict of interest in the discussion and related motion about whether a defeated motion could be brought back and voted on again.

1. The Presentation by the Delegation

The delegation’s January 7, 2016 letter to council was distributed with the January 13, 2016 meeting agenda on January 8, 2016, which also indicated that the delegation was scheduled to speak to the matter. The letter was very clear that the delegation’s submission was about asking the council “to examine all available procedures for securing reimbursement of the legal expenses paid under Bylaw 17/14”. The signatures accompanying the letter were not distributed to the councillors until January 13, 2016.

In his October 28, 2016 submission to the Ombudsman, Councillor Repetski made the following representation:

I received the petition for Mr. Gary Howland’s deliberation in a separate e-mail on January 13, 2016. If the issue of repayment of legal fees presented in the petition and delegation of Howland on January 13, 2016 posed a conflict of interest for me, how is it that the documentation was sent to me by RM administration? Would not receiving it entrap me in a conflict?

There is no evidence whatsoever that making Mr. Howland's letter available to Councillor Repetski as part of the meeting agenda package or later emailing him the companion signatures document, was an attempt to induce him into contravening *The Municipalities Act*. In our opinion, giving him the delegation's submission in advance of the meeting provided him an opportunity to consider whether he had a conflict of interest before he attended the meeting.

Before the meeting, Councillor Repetski questioned the CAO about whether Mr. Howland's letter was properly before the council at the January 13, 2016 meeting, because the accompanying *Ratepayer/Resident Signatures* document was not submitted in time according to Sherwood's *Procedure Bylaw* and, therefore, the delegation package was incomplete. The *Procedure Bylaw* required the letter to be received "at least one week" before the next regular council meeting. What "at least one week" means is not set out in the bylaw.

Municipal bylaws are "enactments" under *The Interpretation Act, 1995*. It states, if a calculation of time is expressed as "at least" a number weeks, then the first day and last days must be excluded. Therefore, Mr. Howland's letter should have been delivered to the CAO by no later than January 5, 2016, to be put on the January 13, 2016 meeting agenda. Since it was submitted no earlier than January 7, 2016, the deadline was not met. It also did not comply with subclause 13) b) iii) of the *Procedure Bylaw*, which required it to be signed; Mr. Howland only signed the *Ratepayer/Resident Signatures* document, which was submitted on January 12, 2016.

We also considered whether Mr. Howland's letter met the requirements of section 14 of the *Procedure Bylaw*, which specifically deals with delegations. It states that every delegation wishing to appear before council must submit a letter to the CAO. The letter must include, among other things, the date of the meeting at which the delegation wishes to appear and a brief "clearly setting out the full text of the delegation's presentation and the request being made of Council." Clause 14) b) states if the brief "deals with a report or bylaw" the CAO is to "place the matter on the agenda for the meeting at which the related item is to be considered." And if it deals with "a subject that is not on the Council agenda", the CAO is to list the brief on the agenda and provide copies of it to the members of council.

Since Mr. Howland's letter neither makes a request to appear before council nor provides the full text of the delegation's presentation, we find that it also did not meet the requirements of section 14 of the bylaw. However, the subject of trying to recover the money paid under the *Indemnity Bylaw* was already on the January 13, 2016 agenda due to Councillor Heenan's notice of motion.

Despite the deficiencies in Mr. Howland's letter and the delegation's presentation, and despite his email comments earlier on January 13, 2016, about the letter being invalid, Councillor Repetski did not, at the meeting, object to it being on the agenda or otherwise raise it as a procedural issue. When the Reeve called the

January 13, 2016 meeting to order, Councillor Probe moved to adopt the agenda as presented. The agenda was approved unanimously and then Mr. Howland made his presentation. Given this, in our view, Councillor Repetski (and the rest of the council), tacitly waived the deficiencies in the delegation's submission.

According to subsection 14 e) of the *Procedure Bylaw*, once a delegation has finished presenting, council members may ask questions. The chair is then to excuse the delegation and the "Council shall consider the delegation's brief and, by the introduction of a motion Council will resolve to take some action with respect to the brief." The CAO and others told us that the council did not discuss Mr. Howland's presentation or ask him any questions. According to the minutes, the council did not resolve to take any action with respect to it. This lack of action appears to be contrary to Sherwood's *Procedure Bylaw*.

The Municipalities Act states that a council can only exercise its powers by passing bylaws or resolutions. No council member made a motion to deal with the delegation's submission. So, we considered whether Councillor Repetski could be in a conflict of interest since, according to section 144.1, there must first be a decision to participate in before a conflict of interest arises. We also considered whether the intention of subsections 144(1) and 144(2) was to allow a council member with a conflict of interest to continue to participate in the meeting until a motion was made, as long as he or she did not contravene 144(2) by attempting to influence the discussion.

The requirements in subsection 144(1) make it clear that a council member must declare a conflict *before* any discussion or consideration of the matter. In our view, this means a motion does not need to be made for there to be "a matter before the council." We acknowledge that typical meeting rules, such as Robert's Rules of Order, require a motion to be made before any discussion ensues. However, to interpret subsection 144(1) as only applying once a motion is made ignores that each councillor's decision-making process starts as soon as there is a matter before council – that council members are obviously considering what motion to make, if any, to deal with the matter before any motion is made.

In our view, interpreting subsection 144(1) as allowing council members to stay silent about matters before the council in which he or she had a conflict of interest until a motion is made is difficult to reconcile with the purpose of the conflict of interest provisions in the Act.

In the Hansard Verbatim Report, No. 46 of the November 16, 2015 proceedings of the Standing Committee on Intergovernmental Affairs and Justice, the then Minister of Government Relations stated that the purpose of *The Municipal Conflict of Interest Amendment Act, 2015* was to "implement specific recommendations and respond to observations in the Barclay report regarding legislative changes to provide clearer direction and guidance for elected officials to prevent conflicts of interest at the local level." In the Barclay Report, Mr. Barclay prefaced his

recommendations with the following statement that aptly summarizes the fundamental purpose of the conflict of interest rules in *The Municipalities Act*:

As Conflict of Interest Commissioner for the Province of Saskatchewan, I have always been of the opinion that ethics and integrity are at the core of public confidence in government and in the political process, and elected officials are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence, avoids the improper use of influence of their office and conflicts of interest, both apparent and real, and the need to uphold the letter and the spirit of the law.

In our view, a council member's mere presence in the meeting room may, in many cases, have a chilling effect on the council's ability to freely consider a matter, even if it cannot be said that the council member is attempting to influence the discussion or voting contrary to subsection 144(2).

In our opinion, the better interpretation of subsection 144(1) that accounts for the broader principles of ethics and integrity that elected officials must meet, is that 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. Under *The Municipalities Act*, a council member has a conflict of interest when the council member participates in *any* of council's deliberations over a matter in which the conflict of interest exists, including just being present in the council chamber while a delegation speaks to it or other councillors consider what motions to make to deal with it.

In this case, the delegation's written submission and Mr. Howland's comments to the council at the January 13, 2016 meeting constituted "a matter before council," whether any council member decided to make a motion about it or not. Any council member could have asked Mr. Howland questions about it and otherwise engaged in a conversation about it. Any council member could have made a motion about it. That no council member actually asked a question, engaged in a conversation, or made a motion should not be the basis for concluding that there was no conflict of interest under *The Municipalities Act*.

Given the clear wording of the delegation's written submission, and that Councillor Repetski had already declared a conflict of interest over motions made at the October 13 and October 21, 2015 meetings that were substantially similar to what the delegation was asking the council to do, we find that he knew or ought reasonably to have known there was an opportunity to further his private interest if he participated in council's decision about how to respond to the delegation's submission. We find that Councillor Repetski was in a conflict of interest with respect to the matter brought before the council by the delegation.

Therefore, he should have complied with subsection 144(1) by declaring his conflict, disclosing the general nature of the conflict, and leaving the room until the rest of council finished considering the delegation's submission.

2. The Motion to Seek Reimbursement of Legal Fees

On December 9, 2015, Councillor Heenan verbally notified the council that he intended to raise the reimbursement of the legal fees paid under the *Indemnity By-law* at the January 2016 meeting. His notice of motion was distributed to all council members with the January 13, 2016 meeting agenda. Therefore, Councillor Repetski had reasonable notice that the council was going to discuss and possibly vote on whether Sherwood would take steps to recover the money paid to him under the *Indemnity Bylaw*. Once Councillor Heenan made the motion, Councillor Repetski did not declare a conflict of interest or take any of the steps required by subsection 144(1).

In our view, Councillor Repetski had a conflict of interest in Councillor Heenan's motion. He had a financial interest in not being asked to repay the money paid to him under the invalid *Indemnity Bylaw*. The motion was worded exactly the same way as the motion made at the October 13, 2015 meeting and voted on at the October 21, 2015 meeting, during which he declared a conflict of interest and left the council chamber. Given this, we find that he knew that he had a conflict of interest in Councillor Heenan's motion at the January 13, 2016 meeting. Even if he did not know, we find that he ought to have reasonably known.

Therefore, he should have complied with subsection 144(1) by declaring his conflict of interest, disclosing the general nature of the conflict, and leaving the room until the rest of council finished considering Councillor Heenan's motion.

3. The Motion to Table and Seek Legal Advice

Councillor Repetski was clear that he only stayed in the council chamber because he wanted legal advice about whether a defeated motion could be brought back for a vote. The Reeve and the CAO confirmed that he only spoke to this procedural issue, and that no other council member spoke to the main motion. According to the Reeve, this was because Councillor Probe moved to table it to seek legal advice before anyone could speak to the main motion.

In his submissions to us about this issue, Councillor Repetski referred to the *Procedure Bylaw*, which requires "Any procedural question which arises that is not provided for in this bylaw shall be decided by reference to the current version which Administration holds in the Municipal Office, of *Robert's Rules of Order*." He made the following representation:

The issue of process is important for Council to consider. If a person or group isn't satisfied with a resolution that has been defeated and decides to have the motion brought back to Council, without clear direction on the process, a Council could be in a constant loop of having to deal over and over again with the same motions. It would be a filibuster that ensnares Council. Getting legal advice was a prudent and reasonable action to clarify Councillor Heenan's resolution.

In his October 28, 2016 submission, Councillor Repetski made the following additional representations on this issue:

The CAO is responsible for council following *Robert's*. He or she has a copy in his/her office which is readily available in our meetings; councillors expect the CAO to provide guidance as needed in accordance with section 11 of the procedural bylaw.

...

In my view, we still did not have a clear understanding and neither did the CAO because motions to reconsider and to renew are significantly different.

...

[The CAO] was using “reconsider” and “renew” interchangeably. *Robert's*, on the other hand, makes a distinct difference between a motion to reconsider and a motion to review. On January 13, this distinction was blurry... I understood Heenan's motion was to reconsider. I will briefly summarize the difference:

1. Requirements for a motion to reconsider:
 - The motion must be made on the “next day” (or in this case, the next council meeting) after the original motion was enacted.
 - Only a person on the prevailing side of the original motion can bring back the motion for reconsideration...
 - A prescribed procedure is necessary to bring back a motion: there must first be a vote taken on a motion to reconsider and if the majority votes for reconsideration, the original motion can be on the floor for consideration and debate.
2. Requirements for a motion to renew-
 - A motion to renew can be introduced at any future session of council, but not on the same meeting as the original motion was made.
 - The timing issue is less stringent... than for a motion to reconsider.

...

The time for reconsideration had lapsed. [Councillor Probe's resolution was] to seek legal clarification on the procedural issue of bringing back a defeated motion from the October 21, 2015 council meeting. The procedural issue was clearly appropriate for council's deliberation and I was not in a conflict of interest to be in the discussion as it pertains to many issues of governance.

...

If our CAO would have been able to provide a clear answer, there would have been no reason to seek legal advice. We needed legal advice for the sake of procedural clarity.

...As my earlier conduct would indicate [– declaring a conflict and leaving the room when the motion was made and voted on the first time in October 2015 –] if the issue was not about procedure, but rather the legal fees themselves, I would have recused myself immediately.

I stand by my affirmation of motive and reject the notion of ulterior motive. There was no “guilty intent” – *mens rea*.

Councillor Repetski’s submission hinges on Councillor Heenan’s motion being a motion to “reconsider” according to the current version of *Robert’s Rules of Order* in the Sherwood’s municipal offices, which is the 11th edition of *Robert’s Rules of Order Newly Revised* (Robert’s Rules).

The following are some of the Robert’s Rules applicable to this issue:

- There is a distinction between a “meeting” and a “session.” “A session may be loosely described as a single complete course of an assembly’s engagement in the conduct of business, and may consist of one or more meetings” (p. 2). For example, the sessions of the Legislative Assembly are established by the *Rules and Procedures of the Legislative Assembly of Saskatchewan*. Sherwood does not formally conduct business in sessions.
- Once a motion is made – such as Councillor Heenan’s motion at the January 13, 2016 meeting – “discussion of any subject is permitted only with reference to the pending motion”(p. 34), unless a member makes what is known as a secondary motion (p. 59).
- One type of secondary motion is called a *Point of Order*. “When a member thinks that the rules of the assembly are being violated, he can make a *Point of Order*...thereby calling upon the chair for a ruling and an enforcement of the regular rules” (p. 247). A point of order cannot be debated unless the chair either refers it to the assembly, or consents to a member explaining his or her point of view or a knowledgeable member providing an explanation.
- The motion to reconsider is within a class of motions which support the principle that “During the meeting or series of connected meetings (called a “session”) in which the assembly has decided a question, the same or substantially the same question cannot be brought up again, except through special procedures.” It is used to “reopen a completed question during the same session...” (pp. 74-75).
- “If, in the same session that a motion has been voted on but no later than the same day or the next day on which a business meeting is held, new information or a changed situation makes it appear that a different result might reflect the true will of the assembly, a member who voted for the prevailing side can, by moving to *Reconsider* the vote, propose that the question come before the assembly again as if it had not been previously voted on” (p. 76).
- “Motions are...improper when they present practically the same question as a motion previously decided at the same session” (p. 343).

For the reasons that follow below, it is not necessary for us to decide whether Councillor Heenan's motion was out of order. However, it is not clear Robert's Rules about motions to reconsider were applicable to Councillor Heenan's motion.

First, they are only applicable to the reconsideration of a motion dealt with earlier in the day or, if the council meets in sessions, earlier in the current session. Sherwood was under the direction of a provincially-appointed official administrator when the interim reeve's motion was decided on October 21, 2015. By January 13, 2016, both the official administrator and interim reeve were gone, and both the Reeve and Councillor Paul had been elected. In our view, it was a new council meeting in a new session. Also, it would be unreasonable to apply the rule about only "a member who voted for the prevailing side" bringing the motion on January 13, 2016, because, by then, the "sides" who voted in October 2015 no longer existed.

Second, as the CAO alluded to in his May 26, 2016 report to the council, Robert's Rules state that they cannot be applied in a way that would supersede the legislative power granted to municipal councils in *The Municipalities Act*. In our view, this means Robert's Rules cannot serve to bind a current council's discretion to change its mind about an issue, or a newly-constituted council's discretion to take up the same issue again.

Regardless of the validity of the procedural issue about Councillor Heenan's motion, it is impossible to dissociate Councillor Repetski's conflict of interest in the underlying motion from his interest in questioning whether it could be brought back and voted on again. He was personally and privately interested in the outcome of the procedural debate. If the motion could not be brought back, he would avoid the council possibly directing Sherwood's lawyer to seek reimbursement of the legal fees paid to him. Even if he would ultimately be successful defending against Sherwood's efforts to get the money back, he would still avoid the costs and personal consequences of being subjected to Sherwood's efforts, if the motion could not be brought back again.

We do not accept that he was motivated to stay in the room and participate in the discussion because he was interested in ensuring Sherwood's procedural rules were followed for the sake of the community. We find that he was chiefly, if not entirely, motivated by his personal interest in stopping the council from discussing and voting on whether Sherwood should take steps to seek reimbursement from him. In other words, we find that Councillor Repetski's conflict of interest extended to any discussion about whether to table the reimbursement motion to seek legal advice about whether defeated motions could be brought back. The answer to this procedural issue was inextricably tied to Councillor Repetski's interest in avoiding having to repay the legal fees he was reimbursed.

Even if there was a legitimate procedural question about whether a previously defeated motion could be voted on again, it was not, in our view, appropriate for

Councillor Repetski to raise it or discuss in the face of his conflict of interest, because there was no way for him to act impartially in Sherwood's best interest.

Councillor Repetski had a conflict of interest in the motion to seek reimbursement of the legal fees. Therefore, he had the same conflict of interest in the decision about whether the motion could be brought back and voted on again.

CONCLUSION

In conclusion, we find that Councillor Joe Repetski was in a conflict of interest at Sherwood's January 13, 2016 regular council meeting. Specifically, he 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.

We find that he knew or ought reasonably to have known there was an opportunity to further his private interest if he participated in council's decision about how to respond to the delegation's submission, or in any discussions about the motion seek reimbursement of the legal fees paid to councillors, including himself, under the invalid *Indemnity Bylaw*. He had a financial interest in not being asked to repay the money paid to him under the invalid *Indemnity Bylaw*.

His conflict of interest extended to any discussion about whether the reimbursement motion could be brought back. He ought to have reasonably known that there was an opportunity to further his private interest by discussing and voting to table this motion to get legal advice about whether defeated motions could be brought back to council under Robert's Rules. The answer to this procedural issue was inextricably tied to his interest in avoiding having to repay the legal fees he was reimbursed. We find that he was chiefly, if not entirely, motivated by his personal interest in stopping the council from discussing and voting on whether Sherwood should take steps to seek reimbursement from him. Even if there was a legitimate procedural question about whether a previously defeated motion could be voted on again, it was not, in our view, appropriate for him to raise it or discuss it in the face of his conflict of interest, because there was no way for him to act impartially in Sherwood's best interest.

Therefore, we find that Councillor Repetski contravened subsection 144(1) of *The Municipalities Act*. He did not declare a conflict of interest in the delegation's submission or in the motion to seek reimbursement, he did not disclose the general nature of the conflict or any relevant details, he did not abstain from voting on the decision to table the reimbursement motion, he did not refrain from participating in any discussion about whether it was procedurally valid, and he did not leave the room. Instead, he stayed to listen to the delegation's presentation and actively engaged council in a discussion about the validity of the motion to seek reimbursement of the legal fees paid to him. Then, along with Councillor Probe who was also in a conflict of interest, he voted in favour of the motion to table it in order to seek legal advice. This motion passed with only four votes, so if he and Councillor Probe had properly declared their conflict of interests, the rest of the council would have discussed the reimbursement motion and, possibly, voted on it.

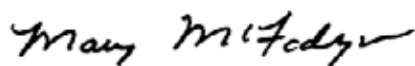
In our draft report, we proposed two tentative recommendations aimed at Sherwood's council bringing back and voting on Councillor Heenan's motion to seek reimbursement of the legal fees paid to councillors under the invalid *Indemnity Bylaw*. However, at an October 28, 2016 special meeting, Sherwood's 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 those recommendations.

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. If a disqualified council member does not resign, section 148 sets out a process that allows council (or a voter) to apply to the Court of Queen's Bench to enforce the disqualification.

Therefore, given our findings that Councillor Repetski was in a conflict of interest at the January 13, 2016 meeting, and did not take the steps to deal with the conflict of interest as set out in *The Municipalities Act*, he is disqualified from council, he should have resigned immediately, and is not eligible to be nominated or elected in any municipality for 12 years.

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

Dated this 27th day of January, 2017



Mary McFadyen, Q.C.



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