



## **SUMMARY OF INVESTIGATION**

### **Resort Village of District of Katepwa**

#### **COMPLAINT**

We received a complaint that a council member had a conflict of interest in the council's discussions and decisions concerning the potential lease of the District's former landfill site to the Katepwa Beach Golf Club Inc., because his father is a member of the Golf Club and sits on its board of directors.

#### **FACTS**

The council member was elected in 2012. By mid-2013, the council discussed that the landfill was reaching its capacity and, when it did, the Ministry of the Environment would require it to be closed. The council member was appointed to a landfill committee to further the goal of either having the Ministry approve a plan to keep the landfill open for 5 more years or, if not, decommissioning it and arranging an alternative site for the District's garbage.

By November 2015, the Ministry had told the District that it needed to decommission the landfill, though it remained open to reviewing the District's plans to keep using it for a period. A version of a decommissioning plan devised by a contracted engineering firm would have allowed the District to use the site for five more years, but would have cost the District over \$1 million. The landfill committee approached the Ministry with its own cost-reduced plan (about \$65,000) to operate the site for another 5 years. On a related aside, the District had discovered that, as a result of putting out a sustained fire that burned at the landfill in 2013 and early 2014, contaminated leachate and garbage-contaminated soil had migrated onto an adjacent property.

By May 2016, the council member had arranged for the landfill property to be surveyed and appraised, and for an offer to purchase the contaminated land from the adjacent property owners so it could be consolidated with the landfill.

By mid-2016, the Ministry accepted the landfill committee's plan in principle, but said it wanted the landfill closed by 2018.

At its June 23, 2016 meeting, the council passed a resolution [116/2016] to enter into a memorandum of understanding with the Golf Club about leasing the landfill site after its closure. The council member participated in the discussion and vote on this motion. (The landfill site is right beside the Golf Club.)

On July 29, 2016, the District signed the MOU with the Golf Club under which the District would close the landfill, place final cover over it and retain liability for it along with responsibility for all necessary ongoing environmental monitoring. In exchange, the Golf Club would lease the land for 25 years for \$1 per year with the option of leasing it for a further 25 years at the same rent, allow the District to use soil from its existing land for the final cover, provide a 6-inch seed base on top of cover and be responsible for any applications and approvals if it intended to use the site for anything other than greenspace.

At its August 16, 2016 meeting, the council carried the council member's motion to accept a counteroffer proposed by the landowners adjacent to the landfill site, to buy their contaminated land for \$2,000, plus take responsibility for \$1,500 in associated real estate costs and fees.

The landfill site closed on October 31, 2017.

A February 23, 2018 letter from the complainant to the council alleged the council did not comply with the requirement to give public notice before considering leasing the landfill site to the Golf Club for less than fair market value, and that this decision and the decision to close the landfill was timed in a way that raised "the spectre of bias or possible failure of certain council members to act in good faith[.]" The complainant specifically alleged that the council member had a conflict of interest because his father is a member and on the board of the Golf Club.

In response, the council decided to hold a public meeting to discuss the Golf Club MOU and related lease. The council member participated and voted on this motion. The public notice on its website (and emailed to 531 subscribers) stated that the MOU and lease "FOR THE FUTURE USE AND MAINTENANCE OF THE DISTRICT OF KATEPWA LANDFILL PROPERTY" would be discussed by Council at its regular meeting on April 17, 2018.

As planned, on April 17, 2018, the council discussed leasing the landfill to the Golf Club. The minutes indicate that a redacted copy of the complainant's letter to the council was discussed, and that the Golf Club's CEO attended to support the MOU and lease, but they do not indicate anyone else attended the public meeting for the purpose of speaking to the Golf Club's proposal to lease the landfill property. Afterwards, the council moved into a closed session to discuss the landfill property and the MOU. After moving back into the open meeting, the council passed the following resolution:

THAT resolution 116/2016 be rescinded, and that the CAO have the District's solicitor ... prepare a new memorandum of understanding based on the terms & conditions from the original memorandum of understanding in 2016.

The council member participated in the council's discussions and voted in favour of this motion. The minutes do not indicate that the council made any decisions about how to deal with the complainant's allegations of conflict of interest against the council member. Then, on May 10, 2018, it rescinded this resolution and passed another resolution to revisit its decision about the landfill property and the MOU with

the Golf Club at a later date. The council member participated in the vote on this resolution.

On August 21, 2018, the council member made and then withdrew the following motion:

THAT the draft Memorandum of Understanding be accepted with the addition of a signature line. THAT the motion be amended to move forward with draft Memorandum of Understanding, and the draft be presented to the Katepwa Beach Golf Club Inc. for their comments.

Another council member then made the following motion, which was carried:

THAT a letter be sent to the Katepwa Beach Golf Club Inc. to notify of the District not proceeding with the draft Memorandum of Understanding, and that a formal lease agreement to be revisited upon final closure of the landfill site.

The council member participated in the discussion and voting on this motion. As a result of this motion passing, we understand that there is still no MOU or lease agreement in place between the District and the Golf Club.

## **FINDINGS**

**Did the council member have a conflict of interest in the council's decisions involving the Golf Club and the District's landfill site because of his father's interest in the Golf Club; and, if so, did he take the steps required of him to deal with the conflict of interest?**

### **What constitutes a conflict of interest?**

Under Subsection 141.1(1) of *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 or the private interests of a closely connected person. Closely connected person is defined under the Act as the agent, business partner, family or employer of the council member. Family is defined as the spouse and dependent children of a council member. Therefore, the council member's father is not part of his "family" and is not a "closely connected person" as defined by the Act.

Subsection 141.1(2) of the Act states that having a financial interest always constitutes a conflict of interest unless it falls within a specific list of exceptions described in the Act – including clause 143(1)(g). A financial interest includes if the council member or a closely connected person could make a financial profit from or be adversely affected financially by a council decision, or if the council member or a

family member is a director of a corporation that could make a financial profit from or be adversely affected financially by the decision.

While we appreciate that a father is not included in the definition of family or closely connected person under this Part of the Act, we nevertheless decided to consider whether the specific exception in clause 143(1)(g) could apply, and whether that exception would deem the council member's father's interest in the Golf Club to not be a financial interest, and therefore not a conflict of interest for the council member.

Clause 143(2)(g) says that a council member does not have a financial interest by reason only of any interest the member or a closely connected person may have by being a member or director of a non-profit organization as defined in *The Municipalities Act*. For this to apply, it is not enough that the Golf Club is a non-profit corporation under *The Non-profit Corporations Act, 1995*, it needs to be a "non-profit organization" under *The Municipalities Act*. Specifically, it must be prohibited, first, from distributing dividends to its members and, second, from distributing assets to its members if it is ever dissolved. As a membership non-profit corporation, it is true that none of the Golf Club's profits can be distributed to its members, but since *The Non-profit Corporations Act, 1995* allows membership non-profit corporations to distribute assets to their members upon their dissolution, we found that the Golf Club does not meet the second requirement for being a "non-profit organization" under *The Municipalities Act*.

In our view, the clause 143(2)(g) exception is intended to allow council members, their families and their close friends to participate as members and on the boards of charitable organizations. Unlike being a member of service club or on the board of a charitable organization, however, members of the Golf Club like the council member's father, derive private financial benefits from their memberships, including discounted greens fees among other things. Every member of the Golf Club has a private interest in how the club is operated. If it is managed well and can offer improved or better amenities as a result, members get more value for their membership fees. For the membership fees they pay, members do not derive income, capital gains or dividends from its operations, but they derive membership benefits to which others in the community do not have access. Further, the council member's father's interest in the Club goes further: he is on the board of directors and, therefore, has a duty to ensure the Club is governed and managed well – for the benefit of its members.

In summary, the council member's father is not a "closely-connected person" under *The Municipalities Act*. If he was, while there is an argument that the exception in clause 143(2)(g) might apply, we do not believe it should, because the Golf Club is not a "non-profit organization" under the Act. Even if it was, his father's interest in the Club is more than only by reason of his membership and participation on the board – he has a private, personal interest in the viability and success of the Club. Since, however, his father is not a "closely-connected person" under the Act and the council member has no private interest in the Club himself, we find that he did not have the conflict of interest described in subsection 141.1(1) of the Act in the council's decisions about leasing the landfill site to the Golf Club.

However, subsection 141.1(1) does not limit the kinds of conflicts of interest that council members must avoid. The narrow definitions of “family” and “closely connected person” in *The Municipalities Act* are not intended to narrow the types of conflicts of interest the Act is governing. The purpose of these narrow definitions is to limit the persons and family members whose names and corporations must be included on a council member’s public disclosure statement.

While the council member did not have to include his father’s interest in the Golf Club in his public disclosure statement, this does not mean he could participate in the council’s discussions and decisions when he knew there was an opportunity to further his father’s long-standing private interests in the Club.

Subsection 141.1(4) states that council members must also comply with the conflict of interest obligations imposed by any other laws. This means that council members may still have a conflict of interest in a matter before council, based on another Act or law, including, for example, the common law. The question is, would an informed, reasonable person be concerned that the council member’s ability to participate in the council’s discussions about whether to lease the landfill land to the Golf Club could be affected by his father’s private interest in the Golf Club?

The lease contemplated in the MOU would have resulted in the Golf Club getting the exclusive use of the landfill site for up to 50 years for nominal rent of \$1 per year. Whether this exclusive use turns out to be a significant benefit to the Club is, in our view, irrelevant. What is relevant is that the Golf Club had a financial interest in the outcome of the negotiations over the lease – that it would take on rights and responsibilities under the lease. This means that the council member’s father, as a member of the Club’s Board, had a private interest in the outcome of the council’s decisions regarding the lease. Also, because the lease would also affect the Club’s members, it would affect his father’s private interest as a member.

Therefore, we found that a reasonable person, with knowledge of all the circumstances and details of the situation, would recognize that the council member’s ability to participate in the council’s decisions about whether to lease the landfill site to the Golf Club impartially in the best interests of the District could be influenced because of his father’s private interest in these decisions as a member and board member of the Golf Club. In our view, the council member had a conflict of interest in the council’s discussions and decisions about whether to lease the former landfill property to the Golf Club. He was required to take steps to deal with the conflict as required under *The Municipalities Act*. At every meeting when the matter was discussed or was the subject of a vote, he was to:

**Declare** the conflict of interest before any discussion occurs,

**Disclose** the general nature of the conflict of interest,

**Abstain** from voting on it,

**Refrain** from participating in any discussion about it, and

**Leave** the room until all discussions and voting are over.

In conclusion, we found that the council member had a conflict of interest when the matter of the lease of the landfill site to the Golf Club came up and he did not take the steps required of him under *The Municipalities Act* to deal with his conflict of interest.

## **RECOMMENDATIONS**

The circumstances of this case illustrate the complexity that municipal council members face when considering whether they have a conflict of interest. To understand how the rules in the Act apply in each case, it is necessary to delve into some of the principles of statutory interpretation – an area perhaps best practiced by lawyers and the courts. Nevertheless, all council members have a duty to understand when they have conflicts of interest, whether under the Act or the common law, and then properly deal with them.

The consequences of a council member failing to do what is required are serious. A council member who contravenes the conflict of interest rules is disqualified from council, must resign immediately, and is not eligible to be nominated or elected in any municipality for 12 years. If a council member does not resign as required, either the council or a voter may apply to the Court of Queen’s Bench for an order declaring the council member to be disqualified. However, the judge must dismiss the application if he or she is of the opinion that the disqualification arose through inadvertence or because of an honest mistake.

Because it is a complicated business for council members to interpret how to be sure they comply with the conflict of interest rules and exceptions in *The Municipalities Act* and the common law, and because the consequences of them not following the conflict of interest rules in *The Municipalities Act* are so serious, it seems the best advice we can give is for council members to exercise caution and, if they are in any way unsure, to seek advice about whether they should be declaring and disclosing a conflict of interest whenever matters come before the council in which they might have a private interest.

In any event, in the circumstances of this case, we are not making recommendations to address the council member’s conflict of interest resulting from his father’s interest in the Golf Club. We found that he had an honest, though incorrect belief, that he could participate in these decisions because the Golf Club’s status as a non-profit corporation meant his father would not directly profit from its operations or its acquisition of the former landfill site.

The potential lease of the landfill site to the Golf Club will likely be the subject of future council discussions, and possibly votes. To be certain that the council can have these discussions and make decisions about the future of the landfill, it is imperative, moving forward, that all the council members – not just this council member – are certain that they understand whether they have a conflict of interest, and, if so, that they deal with it appropriately.

One of an Ombudsman’s roles is to improve how municipal governments carry out their duties, and to help municipal councils understand their responsibilities under

legislation and move forward in compliance with legislation. Therefore, we made the following recommendations in connection with the conflict of interest:

1. The council of the District of Katepwa arrange for each council member to take training on conflicts of interest and how to deal with them when they arise while carrying out their duties.
2. Each council member of the District of Katepwa decide – with the benefit of professional advice if necessary – whether they have a conflict of interest in the council’s discussions and decisions relating to the lease of the landfill site to the Katepwa Beach Golf Club Inc. and, if they do, they properly address the conflict by taking all the steps detailed in section 144 of *The Municipalities Act*.

During our investigation, it was also alleged that the council did not comply with subsection 128(1) of *The Municipalities Act*, which requires a council to ensure public notice is given in accordance with its *Public Notice Policy* (Bylaw 17-05) before initially considering any report respecting the sale or lease of land for less than fair market value and without a public offering. We found that the District failed to issue a public notice before the council initially considered leasing the landfill site to the Golf Club at its June 23, 2016 meeting, which resulted in it resolving to sign the first MOU. However, we acknowledge that it arranged to give public notice in accordance with the bylaw in advance of its April 17, 2018 meeting that it was discussing the MOU, the lease, and the potential transfer of the landfill land to the Golf Club. We also note that the council has not yet made a final decision about this matter. Therefore, we also made the following recommendation:

3. The council of the District of Katepwa ensures it gives reasonable public notice of its intention to further consider whether to sell or lease the former landfill site for less than fair market value or without a public offering, whether to Katepwa Beach Golf Club Inc. or to any other person, and an opportunity for interested persons to present their views to it at a public hearing or council meeting.

## **RESPONSE TO INVESTIGATION REPORT**

The Resort Village of District of Katepwa accepted our recommendations, passing the following resolution:

265/2019

THAT we do acknowledge the Investigation Report as submitted by Ombudsman Saskatchewan, and further; THAT we do accept the recommendations provided for in the Report.

This investigation is now closed.