



SUMMARY OF INVESTIGATION

R.M. OF ENNISKILLEN NO. 3

COMPLAINT

We received complaints that two council members were in a conflict of interest when they participated in council's discussions and decisions to pay one of the council members for clay that was used by the RM for a road project. The other council member was the brother-in-law of the council member who was paid for clay.

FACTS

In late 2016, the RM agreed to cost share the straightening and reconstruction of part of a road with a private company. This part of the road was adjacent to land owned by a council member, and land owned by another ratepayer. When the council was discussing and making decisions about the road project, the council member declared a conflict of interest because of his relationship with the private company and because the road was adjacent to his land.

The RM entered into easement agreements with the council member and the other ratepayer, in which they each agreed to grant a right-of-way across their land and the right to remove clay from their land and use it for the construction of the road. In exchange, the agreement stated they would each receive the sum of \$10.00 and that no additional consideration (i.e. money) was payable to them.

By March 28, 2017, the road project was complete. At the April 2017 council meeting, resolutions were passed to pay the construction company and to bill the private company for its agreed share of the project costs. The council member declared a conflict of interest in these matters. The construction invoice estimated that 11,000 cubic yards of clay had been used from the council member's land, and 6,000 cubic yards from the other landowner's land. Nevertheless, during the same meeting, under an agenda item called "Clay removed from both sides to build this road", the council decided to instruct the administrator to get further information from the construction company about how much clay was used. The council member did not declare a conflict of interest in this decision. He said he did not declare a conflict of interest because there was no money involved and there was no vote.

The council member then submitted a \$20,200 invoice to the RM for 10,100 cubic yards of clay used from his land for the road project. He said he submitted the invoice because the RM had paid other landowners for clay on previous road projects.

At the May 2017 council meeting, the construction company said that a total of 25,000 cubic yards of clay was used, with about 65% coming from private land, the majority of which was from

the council member's land. The council member did not participate in this discussion and was not in the council chamber.

Thereafter, the RM received a legal opinion stating that under the easement agreement, the council member and the other landowner were not entitled to receive any further compensation for the clay that was used from their land. The legal opinion was put on the agenda for the June 2017 council meeting. At this meeting, the council member asked to go *in camera*, asking that the RM's employees leave the council chambers. We were told that the payment of the council member's invoice for clay was not discussed during the *in camera* session, but that he asked why a legal opinion had been sought about this issue and by whom, and that he expressed his opinion that others were going after him personally. When the *in camera* session was over, the council member left the council meeting.

The administrator then told the rest of the council that according to her notes from the last council meeting, they had requested that she get clarification about whether additional monies were owed for the clay used in the road project – which was why she obtained the legal opinion. The council then discussed whether to pay the council member's invoice. While some council members told us they were opposed to it, they all nevertheless voted in favour of paying the invoice. The council member received a cheque for \$20,200 the next day.

At the June 2017 meeting, the council member read a letter that he wrote to council, expressing that he felt personally attacked by RM staff “as a lawyer was hired to write me a letter that for \$10 I gave all my rights away by signing [the easement agreement]...That [the] RM could remove soils from my land whenever, wherever, they see fit.” He also expressed concerns that the easement agreement had been shared with others in the community.

At the July 2017 council meeting, council voted to pay the other landowner for the removal of 6,000 cubic yards of clay from his land for a total of \$12,000. The other landowner told us he contacted the RM asking why he had received the payment. He was told that the RM had decided in 2016 to pay for clay. He told us if that was true, then why did the RM have him sign an easement agreement which said that \$10 would be the only consideration paid for using his clay on the road project? We were also told that, due to the confusion around paying for clay, council passed a resolution at this meeting that it would need to enter into clay agreements with landowners for removal of clay. (The agreement the RM now enters into has two options for payment – \$2 per cubic yard or a dugout plus \$1 per cubic yard.)

Before its October 2017 council meeting, all council members met in private without any RM staff present. At the council meeting, the council then discussed whether the easement agreement was a public document. Despite receiving a legal opinion that it was, council passed a resolution that the easement agreement would not be released to the public. It also passed a resolution that the ratepayer who had requested a copy would not get one. The council member participated in the private discussions before the council meeting, but did not participate in the discussions of these two matters during the council meeting.

At its November 2017 council meeting, the other landowner attended, expressing that he and the council member should not have been paid any additional money for the clay used in the project, and that the money should be returned. At this council meeting, the council passed a resolution to release the easement agreements to the public. The council member did not participate in these discussions.

ANALYSIS AND FINDINGS

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.

However, the Act does not say that this is the only time a council member will have a conflict of interest. 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 common law rules about avoiding conflicts of interest can be summarized as follows:

- As trustees for the local community, council members cannot vote or otherwise seek to gain or appear to gain private advantage out of matters over which they have supervision for the benefit of the public.
- Council members must conduct themselves to avoid any reasonable apprehension that their personal interest could in any way influence their elected responsibility.
- They are not to use their office to promote private interests, whether their own or those of relatives or friends.
- They must be unbiased in the exercise of their municipal duties.

To help council members determine whether they have a 'common law' conflict of interest in a matter before council, council members should ask themselves the following questions:

- Am I, or is someone close to me (e.g. a family member, a friend or business partner) likely to be directly affected (negatively or positively) by the decision, issue or situation that is being discussed or decided?
- Do I, or does someone close to me, have an interest in, or hold a position in, a company or organization that is likely to be affected?
- Am I, or is someone close to me, likely to have a financial gain or loss because of the decision, issue, or situation that is being discussed or decided?
- Have I, or has someone close to me, received a gift (money or otherwise) from a person, company, or organization that is likely to be directly affected?
- Am I uncertain of my ability to act impartially and in the public interest?
- Could a person with knowledge of the situation reasonably perceive that my ability to carry out my public duties impartially could be influenced because I or someone close to me has a private interest in the decision, issue, or situation that is being discussed or decided?

If the answer is 'yes' to any of these questions, there may be a conflict of interest that needs to be addressed. If council members are uncertain whether they have a conflict of interest or what to do about it, they should get advice from a trusted advisor.

What should a council member do if he or she has a conflict of interest?

At every meeting when a matter comes up in which a council member has a conflict of interest, no matter how many times it has come up before, and even if everyone on the council already knows about it, the council member, if at the meeting, must:

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 discussion and voting is over.

When a council member is not at a meeting when a matter in which the member has a conflict of interest is discussed, *The Municipalities Act* requires the member to disclose the conflict of interest at the next meeting of the council that the member attends.

If council members do not take these steps, *The Municipalities Act* states that they are disqualified from being a council member, must resign immediately, and are not eligible to be elected to any municipal council for 12 years. If they do not resign, the council or a voter may apply to the court for an order declaring the person to be disqualified. If the judge hearing the application is of the opinion that the disqualification arose through inadvertence or by reason of an honest mistake, the judge shall dismiss the application.

Council members with a conflict of interest in a matter, must also not try to influence the discussion or vote on the matter that will be taking place in their absence.

Did the council member have a conflict of interest in the matters before council and if so, did he take the steps required of him by *The Municipalities Act* to deal with it?

We found that the council member did have a conflict of interest in the council's discussions and decisions concerning the road project and the decision to enter into an easement agreement with him. He had a private interest in these matters as he had a relationship with the private company and the road project was adjacent to his land. We also found that he took the steps required of him to deal with these conflicts as required under *The Municipalities Act*.

He also had a conflict of interest in the council's later discussions about whether he should be paid any additional money for the clay that was removed from his land for the road project. He should have declared a conflict and should not have participated in the discussions at the April 2017 council meeting during which the council instructed the administrator to ask the construction company how much clay it removed from his and the other landowner's land for the project.

We also found that the council member had a conflict of interest in the council's *in camera* discussions regarding the legal advice it received about him not being entitled to any additional compensation for the removal of the clay, according to the terms of the easement agreement

that he had signed. He should not have been involved in any council discussions about the RM's staff's involvement in seeking the opinion in the first place. In our view, no reasonable person with knowledge of what the opinion said (that he was not entitled to further compensation for clay under the easement agreement) would conclude that his actions were done for the benefit of the community: he called for an *in camera* session, asked the staff to be removed from the meeting room, and then involved himself in the council's discussion about the matter. In our view, he was motivated by self-interest.

Lastly, we found that the council member had a conflict of interest in the council's discussion and decision regarding whether to release his easement agreement to the public. We acknowledge that at the meeting, he declared his conflict of interest and left the room. However, he did participate in a private discussion with council members just before the council meeting. After this private discussion, the council resolved to ignore the legal opinion and decided that his easement agreement would not be made public. In our view, he had the opportunity to influence the other council members to decide not to release the agreement to the public.

Did the other council member have a conflict of interest in the council's decision to pay the other council member for the clay? And, if so, did he take the steps required of him under *The Municipalities Act* to deal with it?

This second council member's sister is married to the first council member (who had the clay removed from his property). The decisions made by the council involved an opportunity to further his brother-in-law's private interests. He told us that they were not close, and that they were often at odds during council meetings, so he felt that he did not have a conflict of interest in those decisions.

However, it is not that simple. Having a conflict of interest is not only about whether you are fond of a relative or friend. It is about whether your private relationship – be it friendly or acrimonious – could be seen by a reasonable, informed person as creating a likelihood for bias. The council member participated in these discussions and decisions which financially benefitted his brother-in-law. In our view, a reasonable person would have serious concerns about whether this council member's participation was in the best interests of the community.

CONCLUSION

Since the council member who received the additional moneys for the clay is no longer on the council, we did not make any recommendations concerning his conduct.

Regarding the other council member, while we found that he should not have participated in the matters that resulted in his brother in law receiving a financial benefit, in our opinion, he did not do so intentionally. He was a new council member and, in our view, his failure to comply with the conflict of interest rules was through honest mistake or inadvertence.

This case does, however, highlight that some members of the RM's council do not understand or fully appreciate the vital importance of each of them fully and wholeheartedly embracing the ethical principles underpinning the municipal conflict of interest rules in *The Municipalities Act*.

We cannot stress enough that individuals who have been given the privilege to represent voters on a municipal council must exercise their public powers and duties **only** for the benefit of their communities. As the results of several court cases point out, our system of representative

democracy cannot work if elected officials use the power and authority of their public office to promote their private interests.

As a result of our investigation, and with a view of ensuring the council has the opportunity to move forward in full compliance with the conflict of interest rules in *The Municipalities Act*, we made the following recommendations:

1. Each member of the council of the Rural Municipality of Enniskillen No. 3 arrange to take training from a qualified provider about their personal duty and responsibility to comply with the conflict of interest rules in *The Municipalities Act* and the common law.
2. Each member of the council of the Rural Municipality of Enniskillen No. 3 ensure that they fully comply with section 144 of *The Municipalities Act* by:
 - a. declaring and disclosing the nature of their conflict of interest in matters before the council,
 - b. refraining from engaging in any discussion about the matters, or attempting in any way to influence the council's decision about the matters, whether before during or after any council meeting,
 - c. abstaining from voting on the matters,
 - d. removing themselves from the meeting room during the council's discussions about them – whether in public or in camera sessions of official council meetings or in any informal discussions or meetings about them, and
 - e. if they are not present at the meeting when a matter in which the member was a conflict of interest is discussed, by disclosing the conflict of interest at the next council meeting they attend.
3. Each member of the council of the Rural Municipality of Enniskillen No. 3 ensure every instance in which they declare and disclose their conflicts of interest in matters before the council, is accurately and fully recorded in the minutes of the meeting.

RESPONSE TO DRAFT INVESTIGATION REPORT

The draft investigation report was provided to the parties, giving everyone the opportunity to review it and provide us with any representations before we finalized the report. We specifically asked the RM council to advise us in writing whether it accepted or rejected our recommendations.

The former council member responded, and his comments were considered and incorporated into the final report where appropriate.

The RM did not accept the recommendations. In June 2019, it passed the following resolution concerning our investigation report and recommendations:

Resolution # 2019

Moved by: Shane Boyes

That we do not accept the recommendations from the Ombudsmen of Saskatchewan due to the fact that the conflict of interest as laid out in the Ombudsmen Report does not fall into the scope as per the definitions of conflict of interest as laid out in *The Municipalities Act*. Furthermore this be a recorded vote. Also, Council stated that they would appreciate a 1 page summary report, not a 42 page report.

Name	In Favour	Opposed	Abstained	Absent
Barry Fitzpatrick				✓
Cameron Nordin	✓			
Rae Wright	✓			
Ryan Nielsen			✓	
Shane Boyes	✓			
Trevor Walls				✓
Trina Randall	✓			

Carried

These recommendations were made with the purpose of ensuring that all council members understood what a conflict of interest could be and when it may be necessary to take steps to deal with a conflict of interest, and that meeting minutes accurately recorded when a conflict of interest was declared.

This RM, like many others, does not seem to understand what constitutes a conflict of interest and when they need to step aside when decisions are made that affect them or someone close to them. They have an obligation to act, and be seen to be acting, in the best interests of their communities, and not for their own private interests, or those of friends or relatives.

We strongly urge the RM of Enniskillen to implement our recommendations. We also note that the draft investigation report provided to the RM was 18 pages, and not 42 pages as indicated in their resolution.

This investigation is now closed.