

In short, band councillors, in their capacity as publicly elected officials, are required to place their band's interests ahead of their own, without exception. Failure to do so may result in unfavourable legal consequences for individual councillors, or for entire councils.

Toney v. Annapolis Valley First Nations Band, [2004] F.C.J. No. 2107

The Federal Court of Canada held that a band council chief breached his fiduciary duty to the band when the council awarded the chief and two councillors five-year employment contracts with the band's gaming commission.

The band chief had removed himself from the discussions involving his contract, in accordance with legal advice the council had received. Notwithstanding this step, the court noted that the difficulty was that all the remaining councillors involved in making the decision had their own conflict of interest. It was in their best interest to award the chief a favourable contract so that he would support their own contracts.

Accordingly, it made no difference whether the chief left the room when his contract was being discussed, since all of the council members were tainted by self-interest. In addition, the chief put himself in a direct position of conflict when he signed the band council resolution accepting and ratifying his own employment contract.

The court held that in assessing whether a council member has breached his or her fiduciary duty, the central inquiry should be whether the chief acted in the best interests of the band and without conflict of interest. The court further emphasized that while conflict of interest rules could be relaxed in small bands, the chief was not permitted to award himself substantial benefits to the detriment of the band.

The Court also explained that the mere fact that a "procedural safeguard" put in place to reduce conflict, such as abstention from the decision-making process, has been followed does not mean that a breach of fiduciary duty has not occurred. Procedural safeguards are simply tools that help a councillor avoid a breach his or her obligations. The effectiveness of such steps, however, will depend on the particular circumstances of the case.

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Employment Law Primer: Potential Conflicts of Interest for First Nations Band Councillors

Fiduciary Duty of Band Councillors

As elected representatives, First Nations band councillors owe what is called a "fiduciary duty" to the band they govern. In other words, they have a duty of utmost good faith to act in the best interests of the band and to avoid any conflicts of interest.

Conflicts of Interest

A conflict of interest will arise where a band councillor's personal interests conflict or could potentially conflict with his or her duties as councillor. In these circumstances, it is difficult for council members to fulfill their duties impartially.

A conflict of interest can become a legal problem if a band councillor tries to and/or succeeds in influencing the outcome of a council decision, for personal gain. To avoid such a problem, band councillors must disclose their personal interests and abstain from any decisions that involve, and that may affect, those interests. Band councillors who do participate in decisions which advance their personal interests may be held liable for damages to the band based on a breach of fiduciary duty. In addition, the resolution or decision of the band council may be set aside as void, and the band will have to begin the process again in order to pass a valid resolution.

In one case, for instance, an elected chief was found to have breached her fiduciary duty by participating in council decisions that provided a mobile home for her use on the reserve and authorized payment with band funds

of her student loan and her children's private school fees (*Gilbert v. Abbey*, 1992).

A conflict of interest can arise not only when a decision benefits the councillor personally, but also where it affects a councillor's family member. As a general rule, band councillors must be careful to follow the rules of disclosure and abstention in decisions that affect close family members. However, band councillors will be held to a less strict standard if the band is relatively small and in bands where many members are related to each other. The courts recognize that applying the strict rules regarding conflict of interests in such a case would make it very difficult or impossible for band councils to operate (*Assu v. Chickite*, 1998).

In addition to the common law obligations set out above related to fiduciary duties, a band's constitution, by-laws or policy manual may create additional obligations on band councillors. For example, these documents may set out situations that are deemed to be a conflict of interest, or may provide a definition of "family" for the purposes of conflict issues. In these cases, councillors must be careful to comply with these additional obligations.

Conflicts of Interest for Band Councillors Making Employment Decisions

Band councillors may find themselves in a conflict when participating

in employment decisions concerning either family members or themselves as employees of the band council. In such a case, the usual rules of disclosure and abstention will apply. For example, if an issue relating to the termination of a councillor's spouse was raised at a council meeting, that councillor would be required to abstain from discussion on the subject and from voting on related resolutions.

Dual Role as Councillor and Employee

Band councillors are not precluded from holding office and simultaneously being employees of the band council, provided that they consistently act in the best interest of the band and that precautions are taken to prevent any breaches of their fiduciary duty. However, in some cases, the band's constitution, by-laws or policies may prohibit someone taking on both roles at the same time.

At a minimum, any band councillor in the dual role of council member and employee, must, without exception, disclose any conflicts of interest and abstain from any decisions concerning his or her employment. It is important to note, however, that although strict compliance with the rules of disclosure and abstention is necessary for band councillors to fulfill their fiduciary obligations, these steps alone may not be sufficient. Courts will look at all of the circumstances in determining whether a councillor breached his or her obligations. (See the discussion below in the summary of *Toney v. Annapolis Valley First Nations Band*.)

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