

# CONFLICTS OF INTEREST

Mattagami First Nation - Trust Workshop

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# OUTLINE

## 1. Introduction

- Basic definition

## 2. Conflicts of interest in **three contexts**:

- Trustees
- Directors of Corporations
- Chief & Council

## 3. Conclusion/Questions

# CONFLICT OF INTEREST

- The duty to avoid placing oneself in conflicts of interest is bound up in the **duty of loyalty** that is placed upon all fiduciaries
- **Basic definition:**
  - Where a **personal interest** is sufficiently connected with **public or professional duties** that it creates the potential that the personal interest may ***influence*** decisions made in the exercise of those professional or public responsibilities

# CONFLICT OF INTEREST

- The presence of a conflict of interest can result in a **breach of fiduciary duty** (although not always)
- What is or is not a conflict of interest, and what should be done to avoid or manage a conflict, **depends on the context**

# CONFLICT OF INTEREST

Conflicts of interest in three contexts:

1. Trustees
2. Directors (of Corporations)
3. Chief & Council

# CONFLICT OF INTEREST: TRUSTEES

## General rule:

- Trustees must administer the trust in the **best interests of the beneficiaries**, must **disregard his/her own self-interests**, and must **not personally benefit** from any transaction associated with the administration of the trust
- **Courts take a strict approach:** transaction will be set aside if the trustee received a personal benefit from it, even if the trustee acted honestly

# CONFLICT OF INTEREST: TRUSTEES

## Examples of conflicts of interest in the trustee context

1. A trustee **purchases trust property**/assets for him or herself.
  - All fiduciaries must abstain from purchasing trust property, but trustees are held most strictly to this rule
  - **Some exceptions:**
    - Transactional structures: if the beneficiary knew all the facts and was at arm's length with the trustee, a trustee can purchase the beneficiary's interest
    - Third party purchasers: Where a third party purchases the trust property and was a *bona fide* purchaser, the third party is entitled to keep the property, and the trust beneficiaries are entitled to proceeds of sale only

# CONFLICT OF INTEREST: TRUSTEES

## Examples of conflicts of interest in the trustee context (cont'd)

2. The trustee **sells/loans his or her own assets** to the trust.
  - Conveying personal property to the trust creates opportunities for the trustee to prefer his/her own interest to those of the trust & beneficiaries
  - Cannot carry out the duties of a trustee if his/her own interests as a vendor/lender are at stake
  - Transaction is voidable at the insistence of the beneficiaries



# CONFLICT OF INTEREST: TRUSTEES

## Examples of conflicts of interest in the trustee context (cont'd)

### 3. The trustee **borrow**s from the trust.

- Even where consent is given, it may not be enough to waive this prohibition
  - **E.g.** *Re Lerner* – had consent of all interested parties; Guardian of a minor objected; held: advancement to trustee not appropriate

# CONFLICT OF INTEREST: TRUSTEES

**Consequences** of entering into a transaction where the trustee is in a conflict of interest:

- The transaction is **voidable** at the insistence of the beneficiary
- Until the beneficiaries or other interested parties obtain an order setting the contract aside, the trustee can pass valid title to a third party who gives value
- Any profit made or improper gain acquired by the trustee must be returned to the beneficiaries

# CONFLICT OF INTEREST: TRUSTEES

Where a trustee can pursue a transaction in which he/she is in a conflict of interest:

- Where the trustee has the **prior consent** of all beneficiaries
  - Valid consent requires that beneficiaries have **full legal capacity**, and that the beneficiaries have been provided with **full and frank disclosure** of all information with respect to the transaction

# CONFLICT OF INTEREST: TRUSTEES

Ways to avoid and/or manage conflicts of interest:

1. Have **multiple trustees**.
2. Make early and comprehensive **disclosure** to beneficiaries.
3. Obtain **consent** of beneficiaries.
4. **Document** decisions, actions and reasons for decisions and actions.

# CONFLICT OF INTEREST: DIRECTORS

## General rule:

- A Director must act in the best interests of the corporation and its shareholders, and must not put his/her interests ahead of the corporation so as to compete with the corporation for business opportunities, or obtain a personal profit

# CONFLICT OF INTEREST: DIRECTORS

Examples of conflicts of interest in the corporate context:

1. **“Self-dealing” or related party transactions:** contracts or transactions concluded between directors of a corporation (either directly or through their interest in another entity) and the corporation itself

# CONFLICT OF INTEREST: DIRECTORS

- Legislation allows for these types of transactions, so long as any interest or potential conflict is **disclosed** and the agreement is **valid**
- **Directors' disclosure obligations in the presence of a conflict:**
  - **Disclose** (in writing) the nature and extent of any interest at the earliest stage of a transaction, and as it develops (continuous disclosure)
  - **Abstain from voting** on any resolution to approve the contract or transaction

# CONFLICT OF INTEREST: DIRECTORS

- Directors **should** also:
  - **Constantly evaluate** whether the decision-making process and the decisions themselves are aligned with the best interests of the corporation and its shareholders
  - **Document** any efforts taken to mitigate the conflict in the board's meeting minutes
- If a Director can show that the conflict/potential conflict was managed appropriately, then it is less likely that courts will find a conflict of interest, or that the Director is in breach of his/her fiduciary duty



# CONFLICT OF INTEREST: DIRECTORS

Examples of conflicts of interest in the corporate context: (cont'd)

2. **Corporate opportunities:** situations where a director of a corporation independently invests – i.e. in his/her personal capacity – in a project that could have been acquired by the corporation

# CONFLICT OF INTEREST: DIRECTORS

- Courts have held that if a Director **considers/assesses** the possibility of capitalizing on a corporate opportunity, but **decides to reject** it because it was **not in the best interests of the corporation**, directors can, in a personal capacity, seize the opportunity without there being a breach of fiduciary duty
- **However**, this interest should still be **disclosed** (in writing, recorded in meeting minutes, abstain from voting, etc.)

# CONFLICT OF INTEREST: CHIEF & COUNCIL

## General rule:

- Chief and Council must act in the best interests of the band and band members, must disregard self-interests, and must avoid the acquisition of any personal profit or gain acquired by virtue of their position of authority

# CONFLICT OF INTEREST: CHIEF & COUNCIL

Examples of conflicts of interest in the Band Council context:

- A Chief or Council member participates (discusses, votes, etc.) in decisions made to use Band funds to cover personal expenses (see e.g. *Gilbert v Abbey* [1992] 4 CNLR 21 at p 7; also *Silver v Ned*, [2002] 4 CNLR 280)

# CONFLICT OF INTEREST: CHIEF & COUNCIL

## Disclosure obligations in the case of a conflict:

- As in the case of corporate Directors and trustees, Chief and Council must: (see *Gilbert v Abbey* [1992] 4 CNLR 21 at p 7)
  - **Disclose** any conflict of interest;
  - **Not participate** in Band Council discussion with respect to any transactions in which the Chief and/or Councillor may have an interest;
  - **Refrain from voting** on any issue or resolution in which their personal interests may be affected.

# CONFLICT OF INTEREST: CHIEF & COUNCIL

**Consequences** of entering into a transaction where there is in a conflict of interest:

- Chief and/or Council member may be required to return to the First Nation any profit realized by the Chief or the member by advancing their interests over those of the First Nation (see *Gilbert v Abbey* [1992] 4 CNLR 21 at p 7; also *Silver v Ned*, [2002] 4 CNLR 280)

# CONFLICT OF INTEREST: CHIEF & COUNCIL

Despite the prohibition on conflict of interest, in some circumstances, this rule will be **relaxed** – e.g. **small bands**

- **Why?**

- A strict prohibition on conflict of interest could disqualify so many Councillors so as to paralyze Band Council, making it impossible for the Band or its Council to operate

**Focus:** whether there is the presence of any direct, personal benefit received by the Chief and/or Council member

- Even though conflict of interest rules will be relaxed, this will not permit Chief & Council members to award themselves benefits to the detriment of the band (see *Annapolis Valley First Nations Band v Toney*, [2005] 2 CNLR 1(FC))

# CONFLICT OF INTEREST: CHIEF & COUNCIL

## Ways to avoid and/or manage conflicts of interest:

- Place the interests of the First Nation before personal interests
- If a Chief/Council member has a personal interest in a matter to be decided on, disclose it to Council and abstain from voting
- Develop a conflict of interest policy – this might address:
  - What a conflict of interest might be;
  - What a person in a conflict of interest must do/abstain from doing;
  - Consequences for breach;
  - What will happen to contracts involving the receipt/expenditure of Band funds where a contract is made by a person in a conflict