dispensable. If the latter view is taken (as it was by the Court of Appeal) a value judgment on the importance of each condition is required of the court. Diplock, L. J. stated: [7]

> I recognize the cogency and logic of the reasoning which has led Latey, J. to the conclusion that we cannot regard it as effective then because we would not have recognized it as effective at the time at which it was made. We are dealing, however, with a rule of public policy whose object is to prevent creating "limping marriage".

That "limping marriages" (i.e. marriages valid in one country while invalid in another) should be prevented is certainly the policy of the Act but it is submitted that the alteration in the law should coincide with the effect given by the courts to public policy and both changes should be prospective. If it were otherwise the courts would be giving effect to a policy which was contrary to the law when the cause of action arose. An individual can only regulate his affairs by reference to the law and policy currently being enforced. Should his expectations be defeated by retroactive common law or statute?

On the theme of pursuing the policy of preventing "limping marriages" to extremes, Russell, L. J. (dissenting) said: [8]

> The judiciary is not unfettered by domestic legislation in pursuing such public policy, otherwise all limping marriages would be avoided by recognition of all foreign divorce decrees.

In this case both parties to the second marriage wished to end the matrimonial relationship and the result was that they remained bound by it since the Czechoslovakian divorce was recognized. Thus it would not even have taken a "hard case to make good law."

—JEREMY WILLIAMS*

7 [1966] 3 All E.R. 583, at 590.
8 *Id.*, at 592.
* Jeremy Williams, LL.B. (Sheffield), B.C.L. (Oxon), Assistant Professor, The University of Alberta.

MUNICIPAL COUNCILLORS—DISQUALIFICATION FOR INTEREST—APPLICATION OF THE RULE IN *KEECH* v. *SANFORD*— *R. ex rel ANDERSON* v. *HAWRELAK; STARR* v. *CITY OF CALGARY*

Introduction

Provincial legislation prescribes qualifications relating to candidacy for municipal office. These not only may disqualify a candidate running for office, but may disqualify a person from holding office after he has been duly elected. One of the most common is that which disqualifies councillors who have a direct or indirect interest in any subsisting contract with the municipality.

Statutory Interpretation

The courts have tended to give full effect to these provisions and to enforce them strictly against council members.[1] However, they have

1 R. v. *Homan* (1911), 19 O. R. 427, 621; *Coughlan and Mayo* v. *City of Victoria* (1893), 3 B. C.R. 57: "A rigorous interpretation must . . . be applied to section 30 (similar to S.97(f) of the Alberta City Act) if the intention of the legislature is to be carried out."—per Walkem, J. at 66.

sometimes relieved against the statutory penalty where there was apparently no *mala fides* on the part of the councillor.[2] At the same time it has been held that statutory provisions of this type must be strictly construed according to their plain meaning.[3] The allegations of ineligibility must then be proven beyond a reasonable doubt before a disqualification order will be made.[4]

The Equitable Jurisdiction

But while courts have often been concerned in the construction of statutory provisions of this type, it appears that the legislation is not comprehensive. The statutes should not be regarded as setting out the only instances in which municipal councillors are liable to disqualification. Rather, they are more properly to be regarded as statutory declarations that the situations specified are deemed to come within a broader rule of equity.

Thus, in *Toronto (City) v. Bowes,*[5] The Chancellor Hume stated:

> It is enacted by a recent statute 'that no person having by himself or partner any interest or share in any contract with or on behalf of the . . . city in which he reside shall be qualified to be, or be elected alderman or councillor . . .' Now that is a virtual adoption of the equitable doctrine. Equity had already provided that no person being an alderman or councillor could be allowed to make the business of his municipality a matter of interest to himself; and the legislature has now declared that every person who is in that position is disqualified and cannot be elected alderman or councillor; *thus adopting and extending the doctrine long established by the courts of equity.*[6]

Similarly in *Hackett* v. *Perry,*[7] Ritchie, C. J. C., referring to a statute disqualifying from election to the Prince Edward Island Legislative Assembly any person who held a contract or agreement with the Crown, said:

> The whole act has but one object, namely, that of preventing undue influence and securing the freedom and independence of the legislature. The case of the respondent is not only within the express words but also within the very spirit of the Act.[8]

By the "spirit of the Act", the Chief Justice undoubtedly meant the underlying equitable principle.

The Rule in Keech v. *Sandford*

The rule stems from the old Chancery case of *Keech* v. *Sandford,*[9] decided in 1726. It was there held that a trustee should not be allowed to make a profit out of his trust by renewing a lease for his own benefit, even though the lessor had previously refused a renewal in favour of the infant *cestui que trust.* Lord King, L. C. said:

> I very well see, if a trustee, on the refusal to renew, might have a lease for himself, few trust estates would be renewed to *cestuis que trust.*[10]

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2 *Currie* v. *Reid* (1956), 18 W.W.R. (NS) 601; *Mason* v. *Meston* (1908), 9 W.L.R. 113 (B.C.C.A.). It is submitted that these cases are wrong on this point since the Privy Council held in *R. and Provincial Treasurer for Alberta* v. *C.N.R.,* [1923] 3 W.W.R. 547, 554, that the court's discretion to relieve against forfeiture does not apply to a statutory penalty.
3 *R.* v. *Robb* (1925), 57 O.L.R. 23; *R.* v. *Robinson,* [1939] O.R. 235.
4 *R.* v. *Grant* (1929), 37 O.W.N. 434; *Cameron* v. *Beaton* (1915), 48 N.S.R. 353, 21 D.L.R. 386 (N.S.C.A)
5 (1854), 4 Gr. Ch. 489, (Court of Chancery of Upper Canada), Aff'd, (1856), 6 Gr. Ch. 1, (Court of Error and Appeal of Upper Canada), 14 E.R. 770 (P.C.).
6 *Id.,* at 511 (Gr. Ch.) Italics added.
7 (1877), 14 S.C.R. 625.
8 *Id.,* at 276-277.
9 (1726), Sel. Cas. Ch. 61.
10 *Ibid.*

This principle has received wide application, having been extended to all who occupy a fiduciary position. In *Broughton* v. *Broughton*,[11] Lord Cranworth, L. C. restated the rule as follows:

> No one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty.[12]

In this somewhat wider form, the principle has been applied to joint tenants[13] (but not tenants in common), company directors[14] and the vice chairman of a college,[15] as well as to municipal councillors as indicated above.[16]

The Hawrelak Case

The Appellate Division of the Supreme Court of Alberta in the recent case of *R. ex rel Anderson* v. *Hawrelak*[17] stated the rule fully and applied it to a municipal council member, despite the existence of express statutory provisions. Hawrelak, who was mayor of Edmonton, owned 40 per cent of the issued shares of a development company which in 1963 agreed to purchase 68 acres of city-owned land. According to previous recommendations of the Planning Department, the land in question was slated for development during the period 1963 to 1965. A further agreement was entered into in 1964 which provided for replotting of the land. The City agreed to pay the development company a sum of money as compensation for loss suffered as a result of the replotting. Subsequently, a resolution was passed by city council (on which Hawrelak did not vote) adopting the replotting scheme and directing the city officials to take all necessary steps to obtain registration of the subdivision plans. Such registration had been recommended by the city commission, of which Hawrelak as mayor was a member.

Section 97 (f) of the City Act[18] was the provision under which it was alleged that the mayor was disqualified. The section reads as follows:

> 97. The following persons are not eligible to be elected mayor or a member of the council or entitled to sit or vote thereon, (a) . . .
>
> (f) a person who is for the time being a party to any subsisting contract with the city under which any money of the city is payable or may become payable for any service, work, matter, or thing, or who has any pecuniary interest in any such contract whether the interest is direct or indirect.

Section 98 makes section 97 (f) inapplicable to a person by reason only of the fact,

> (a) of his being a shareholder in any incorporated company having a contract or dealings with the council,
>
> (i) unless he holds or there is held by himself and his spouse, parents, children, brothers and sisters more than twenty-five per cent of the issued capital stock of the corporation, ...

On the main issue—whether the appellant was disqualified from sitting on council—Smith, C. J. stated the broad equitable rule—that no person having a duty to perform shall be allowed to place himself in a

11 (1855), 5 DeG.M. and G. 160.
12 *Id.*, at 164.
13 *Kennedy* v. *De Trafford*, [1897] A.C. 180.
14 *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378, 386 (H.L.); *Cook* v. *Deeks*, [1916] 1 A.C. 544 (P.C.).
15 *Bray* v. *Ford*, [1896] A.C. 44.
16 *Ante*, at 2.
17 (1966), 53 D.L.R. (2d) 353, affirmed without reasons by the Supreme Court of Canada: 53 D.L.R. (2d) 673.
18 R.S.A. 1955, c. 42.

position in which his duty and his interest conflict[19]—and affirmed its application to municipal councillors. He quoted from the judgment of Lord Justice Knight Bruce, in *Bowes* v. *City of Toronto*,[20] and from the judgment of The Chancellor Hume in the same case[21] where the latter said:

> . . . The corporation was entitled to his best advice and assistance in the management of its affairs, and to ensure the discharge of this duty, equity incapacitates those who fill such situations from acquiring any private interest opposed to their public duty.[22]

Chief Justice Smith concluded:

> I think there is no doubt that William Hawrelak placed himself in a position in which his duty and interest were in conflict, as a result of which he was prevented from giving the council the benefit of his unbiased opinion in the interests of the city to which the electors of Edmonton were entitled.[23]

The statutory provisions, he said, were passed "because of the underlying principle as to the duty of city councillors to which I have referred".[24] They merely provide "statutory machinery" by which a municipal councillor who has placed himself within the bane of the equitable principle may be removed. The legislative provisions are necessary because

> Neither in common law[25] nor equity was there any procedure for removing from office a councillor who placed himself in the position that his duty and his interest were or might be in conflict. The statute to some extent fills this void.[26]

In the application of the equitable rule to municipal councillors several refinements made to the original rule become relevant. First, the rule does not apply in as full a form as it does to other classes of persons, such as executors and trustees.[27] The "constructive trust" alleged may be rebutted by proof that the position of council member was in no way abused. Consequently, in the *Hawrelak Case*, counsel for the appellant devoted much argument to showing either that no contract was in existence at the time of the vote, or that Hawrelak was not a party to it because he had ceased to hold shares in the contracting company before the case came on for trial. Probably, quite cogent evidence is necessary to this end; although it may be that the evidentiary burden is less than that required to free a partner or a mortgagee. For persons of these latter classes the clearest evidence is required.[28]

Secondly, the rule in no way depends upon fraud or the absence of

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19 *Ante*, n. 17, at 366, quoting Lord Cranworth, L. C. in *Broughton* v. *Broughton*, *ante*, n. 12.
20 (1858), 14 E.R. 770 (P.C.).
21 *Ante*, n. 6.
22 *Id.*, at 512, citing *York and North Midland Railway Co.* v. *Hudson* (1845), 16 Beav. 491, 51 E.R. 866.
23 *Ante*, n. 17, at 367.
24 *Id.*, at 368.
25 This is not strictly correct. At common law councillors can be removed by writ of *Quo Warranto* unless the legislature has expressly or by necessary implication taken the right away by statute; *R.* v. *Maycock*, [1924] 3 W.W.R. 540, [1924] 4 D.L.R. 1222 (Man. K.B.); *R.* v. *Balment* (1915), 8 W.W.R. 111; *Re St. Vital Municipal Election: Tod* v. *Mager* (1912), 2 W.W.R. 185, (1912), 21 W.L.R. 203, affirming (1912), 1 W.W.R. 929, (1912), 20 W.L.R. 537 (Man. C.A.). But the remedy is discretionary, and so where an equally effective statutory remedy exists the writ will be refused: *Re Richmond* (1958), 26 W.W.R. (N.S.) 4, (1958), 14 D.L.R. (2d) 132 (B.C.S.C.).
26 *Ante*, n. 17, at 368.
27 In *Re Biss*, [1903] 2 Ch. 40, the Court set out two classes of fiduciary duties. The first included executors, trustees, administrators and agents; the second included partners joint tenants and mortgagees. In the first case a compelling presumption of fact is raised, whereas the second raises only a rebuttable presumption of fact. It is submitted that municipal councillors fall within the second class.
28 Keeton, *The Law of Truts* 170 (8th ed. 1963).

bona fides, and therefore evidence to this effect is of no value.[29] The reason for this is implicit in the words of Lord Russell in *Regal (Hastings) Ltd.* v. *Gulliver*[30] where he said:

> The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.[31]

As Upjohn, L. J. pointed out in *Boulting* v. *A.C.T.A.T.*,[32] it is seldom, if ever, necessary to rely on the rule in a true case of fraud, since simpler common law remedies are normally available.

Smith, C. J. in the *Hawrelak Case* gave effect to this limitation when he said of Hawrelak:

> That he disclosed his interest and did not vote upon the motion . . . is beside the point.[33]

Another point that must be made concerns the Chief Justice's statement that sections 97 (f) and 98 of the City Act are merely "statutory machinery". These provisions are not entirely procedural. Rather they are substantive provisions embodying the equitable rule and extending it. They are only procedural in the sense that a relator action[34] may be brought to disqualify councillors who have allowed their personal interest to compromise their municipal duties within the broad import of the sections.

The Starr Case

In another recent Alberta case involving several members of the Calgary City Council, a completely different approach was taken. This was the decision of Riley, J. in *Starr* v. *City of Calgary.*[35] The plaintiff aldermen were also directors of the Calgary Exhibition and Stampede Association. Their presence on the company's board was due to terms in a lease between the city as lessor and the company as lessee which required that the city council be represented on the company's board of directors. The company determined to move to a new location in the Lincoln Park area, and to negotiate a lease for the necessary land. The issue which the aldermen raised for determination was whether they, as members of the company's board, were disqualified from participating in the debate and vote on the lease question in their capacity as city councillors.

The relevant section of the City Act[36] was section 98 (2), which reads in part:

> (2) No mayor or alderman shall vote in the council
>
> (a) on any question
>
> (iv) affecting a company of which he is a director.

Counsel for the aldermen had argued that the situation was not one contemplated by section 98 (2). He therefore urged that in the unique

29 *Boulting* v. *A. C. T. A. T.*, [1963] 2 W.L.R. 529, 547 per Upjohn, L. J. The statement in Rogers, *Law of Canadian Municipal Corporations* Vol. 1, p. 146, that a councillor "can be said to be a trustee for the inhabitants in the sense that any decision of the council which results from the misuse of his office for the purpose of private gain or advantage is tainted with bad faith and will be annulled by the courts", is misleading in this regard.

30 *Ante,* n. 14.

31 *Id.,* at 386.

32 *Ante,* n. 29.

33 *Ante,* n. 17 at 368.

34 The *Hawrelak Case* was a relator action brought under Section 41 of The City Act, R.C.A. 1955 c. 42.

35 (1966), 52 D.L.R. (2d) 726.

36 R.S.A. 1955 c. 42.

circumstances a restricted interpretation be given to the word "director" so as to limit it to a director who has a direct or indirect pecuniary interest.[37]

Mr. Justice Riley however, construed the statute strictly. He concluded that,

> . . . the provision of section 98(2) is plain and unequivocal and the plaintiffs fall squarely within its prohibition. The plain language of section 98(2) must be given its natural meaning.[38]

While he did go on to consider the general law, his discussion was limited to the possibility of bias. The equitable principle that requires council members to refrain from bringing their private interest into conflict with their civic duty was not mentioned.

On its construction aspect, it is clear that Riley, J.'s decision is virtually unassailable. However, it is submitted that the case could have been considered on the basis of the rule in *Keech* v. *Sandford.*[39]

It is true that section 98(2) deals with voting, while section 97(f) concerns contracts with the municipality. But the broad rationale behind both sections is the same—to prevent municipal council members' personal interest and civic duty from coming into collision.

On this view of the case, the same principles that Chief Justice Smith set out in the *Hawrelak Case*[40] ought to have been applied. The statute ought not to have been construed strictly. The statutory provisions are in fact, as Smith, C. J. pointed out in the *Hawrelak Case,* to be regarded as providing procedural machinery for invoking the equitable principle.

The equitable rule and the substantive portions of the statutory provisions may be likened to two partially overlapping elipses. There are then four possibilities for any given set of facts:

(i) it is within a statutory provision that extends the equitable rule;

(ii) it is outside the language of the statutory provisions, but is still caught by the equitable rule;

(iii) it is within the statutory provision and also within the equitable rule;

(iv) it is outside both the statute and the rule of equity, and consequently not a case for disqualification.

The first thing to notice is that the second case contemplates a situation where a councillor may be disqualified even though his action is outside the four corners of the statute. Therefore, even after a court has broadly construed the statute, its task is not finished. It must go on to consider whether the councillor's personal stake would in any way influence him in the exercise of his fiduciary duty owed to the ratepayers.

The *Hawrelak Case* was quite clearly an instance of the third situation.

As for the *Starr Case,* it is suggested that the facts place the case outside the equitable rule. The aldermen were special directors not elected by the shareholders. They were entirely appointees of the city and

37 *Ante,* n. 35, at 730.
38 *Id.,* at 732.
39 *Ante,* n. 9.
40 *Ante,* n. 17.

never held shares in the company. In fact, their prime function was to act as watchdogs over the company's activities on behalf of the City of Calgary.

As regards the statutory provision, it is submitted that the word "director" in scetion 98(2) is very much open to a narrow construction. Since section 98(2) is based upon the equitable rule, the Legislature could not in the absence of clearer language have intended the section to extend the rule to the special facts before the court. The words of O'Halloran, J. A. in *Waugh and Esquimalt Lumber Co.* v. *Pedneault* (Nos. 2 and 3)[41] are in point, *viz*:

> An enactment of the legislature, subject as it is to the limitations which beset all things human, cannot possibly have in view every situation which may arise. A combination of circumstances may arise which on its face appears to come within the strict language of the enactment yet cannot be so included, because obviously the Legislature would not have included it, if it had such a situation in mind when the enactment was made. That is one reason, in my opinion, why it is said in *Stradling* v. *Morgan*[42] that statutes 'which comprehend all things in the letter' may be expounded 'to extend but to some things according to that which is consonant to reason and good discretion.'[43]

Starr v. *City of Calgary* then, might be regarded as an example of the fourth type of case.

—ALASTAIR R. LUCAS*

41 [1949] 1 W.W.R. 14 (B.C.C.A.).
42 (1558), 1 Plowd 199, 205, 75 E.R. 305.
43 *Ante*, n. 41, at 16.
* Alastair R. Lucas, B.A., LL.B. (Alta.).

THE DOCTRINE OF INCOMPLETE PRIVILEGE—APPLICATION IN THE UNITED STATES—THE CANADIAN VIEW—THE CONCEPT OF FAULT IN THE LAW OF TORT—*MANOR & CO.* v *M.V. "SIR JOHN CROSBIE"*

It is a well known fact that the common law does not generally allow intentional invasions of the property rights of others. Yet it has long been an equally accepted principle of American and English jurisprudence that one may intentionally trespass on the property of another in order to preserve one's own property. This concept is known as the defence of private necessity or, as it is more commonly called in the United States, the doctrine of incomplete privilege.

> The American Restatement on Torts uses the word "privilege"
> . . . to denote the fact that conduct which under ordinary circumstances would subject the actor to liability, under particular circumstances does not subject him to such liability.[1]

This definition seems clear and complete and yet it leaves totally unresolved the basic problem—is the individual so privileged entitled to invade the property of another with impunity or does the law impose upon him a duty of compensation to the injured party? It is this problem and how it has been met by the American Courts which forms the subject matter of this comment.

In February, 1965, the Exchequer Court of Canada in *Manor & Co.*

1 *Restatement of Torts 2d*, No. 10.