

An Unprecedented Decision in Municipal Conflict of Interest Law — *Tuchenhagen v. Mondoux*

by George H. Rust-D'Eye

Every municipal councillor and municipal legal advisor in Ontario should review carefully both the majority and dissenting judgments in the Divisional Court decision, *Tuchenhagen v. Mondoux*, 2011 ONSC 5398 (Div. Ct. Oct. 26, 2011) (application for leave to appeal filed November 4, 2011), particularly the decision of the majority as to when and how the councillor in this case was found to have acquired a pecuniary interest in the sale of a municipally-owned property.

The case is well worth reading in any event, due to the substantial number of issues and the wide range of principles of municipal conflict of interest law addressed, and the significant judgments quoted, by Lederer and Gordon JJ., for the majority, and J. Wilson J., in dissent. The outcome of the case is to lower, significantly, the burden upon an applicant in an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990. c. M.50 ("MCIA"), as amended, in establishing a pecuniary interest on the part of a municipal council member.

In a nutshell, the case concerned a situation in which a member of the Council of the City of Thunder Bay expressed an interest in a tax-sale property, to be sold by the City by tender. The essential facts, and the conclusion of the majority, are best summed up in the following extract from the dissenting decision:

> ...where a decision by council has been made to sell property by public tender, does an elected member of council have an "indirect pecuniary interest" within the meaning of the MCIA where he expresses interest by email to perhaps put in an offer on the property, requests a copy of the public advertisement, and sets up an appointment to view the property? Is this member in these circumstances required to declare a conflict of interest in a meeting when the issue of declaring the land surplus is considered?

Based on these facts, the councillor, Tuchenhagen, was found by the applications judge, and, on appeal, by the majority of the Divisional Court, to have contravened the MCIA. Since he was no longer a member of the Council at the time of the hearing of the application, the court ordered him disqualified from being a member of Council for four years, in order to prevent his running in the next election.

The court held that the contravention was not committed through inadvertence or by reason of an error in judgment, and ordered costs of the appeal payable by Tuchenhagen to the respondent, in the amount of $9,612.31. The decision includes the following findings of fact, essentially undisputed by the parties:

- Councillor Tuchenhagen was open with the City about his interest in the property;
- there was no evidence that he acted in bad faith;
- the City suffered no loss or prejudice, nor did any other party;
- there was no public policy prohibiting Tuchenhagen from bidding on real estate that had been declared surplus to the City's needs;
- there was no interference with the public tendering process;
- the councillor had given the City 12 years of public service.

With respect to the conclusion that Councillor Tuchenhagen had a pecuniary interest in the sale of the property from the point in time at which he made an appointment to see it (the Council meeting in question occurred later on the day that he made the appointment, and the day before he actually viewed the property), the following undisputed facts are also relevant:

- Councillor Tuchenhagen had not made a decision as to whether or not to bid on the property;
- he had made no commitment and invested no money;
- it was the policy and practice of the City to offer repossessed tax arrears properties by calling for public tenders;
- the Council decision to do so was unanimous;
- there was no suggestion that Councillor Tuchenhagen had any insider information, or acted in bad faith;
- Councillor Tuchenhagen had previously sought legal advice confirming that a member of council was not precluded from bidding on tax-sale properties;
- there was no evidence to suggest that it occurred to him that he might have acquired a pecuniary interest by communicating that he might be interested in bidding, obtaining the advertisement, and/or making an appointment to see the property;
- once he had put in a bid on the property (through a corporation which he owned), Tuchenhagen declared an interest, and took no further part in Council's consideration of any matter relating to the sale.

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26. *Id.*
27. *See e.g.,* TEX. GOV'T CODE § 552.352(b), (c); Miss. Code § 43-15-21.
28. *See e.g.,* 20 U.S.C § 1232g; 45 C.F.R. § 164 (2010); MODEL CODE OF PROF'L CONDUCT R. 1.6 (2003).
29. *See* TEX. GOV'T CODE § 551.143.
30. *See* Op. Tex. Att'y Gen. No. DM-95 (1992).
31. *See* Op. Tex. Att'y Gen. No. JC-307 (2000).
32. Wood v. Battle Ground Sch. Dist., 27 P.3d 1208 (Wash. Ct. App. 2001).
33. Texas Workforce Commission, *Texas Business Today*, "Employee Social Networking: It's Time to Address the Issue," 4-6 (Spring 2009).
34. *See* City of Seattle, *City of Seattle Blogging Policy*, http://www.seattle.gov/pan/BloggingPolicy.htm (last visited Oct. 24, 2011).
35. *See* Doe v. Cahill, 884 A.2d 451 (Del. 2005). ML

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treatment of similarly situated property owners." Further, the "fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings."

Nordlinger v. Hahn, 505 U.S. 1 (1992), involved a California constitutional amendment that imposed limits on the rate at which real property was taxed, on the rate at which assessments were increased annually, and which reassessed property up to its current appraised value upon new construction or a change in ownership. Stephanie Nordlinger discovered that she was paying about five times more in taxes than her neighbors, who owned comparable homes within the same residential district. She sued, claiming the assessment system treated newer owners less favorably, in violation of equal protection. (Longer-term owners paid lower taxes reflecting historic property values, while newer owners paid higher taxes reflecting more recent values.) The Supreme Court ruled the acquisition-value assessment scheme did not violate the Equal Protection Clause. As in *Armour*, the case revolved around the "rationally related" test. Significantly, the scheme did not discriminate between old and new owners with respect to either the tax rate or the annual rate of adjustment in assessments. The only distinction—the basis on which their property was initially assessed—satisfied rational review as it furthered a legitimate state interest in local neighborhood preservation, continuity, and stability by discouraging a rapid turnover in ownership of homes and businesses. In addition, "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." The Court distinguished *Allegheny Pittsburgh* as "not controlling," as it was "the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits" of the state-established tax scheme.

IMLA will be following this case; a decision is expected by June 2012. ML

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Decisions by the Divisional Court under the MCIA are relatively few and far between. For this additional reason, the majority decision, while it stands, should be regarded as a major warning light to councillors who might even think about entering into a financial transaction with their municipality. In the words of the majority judgment:

> "The question that must be asked and answered is 'does the matter to be voted upon *have a potential* to affect the pecuniary interest of the municipal councillor?'"... As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest. The e-mail he sent on July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest...
>
> Robert Tuchenhagen had been a member of the City Council for almost twelve years. He should have been aware of the need to avoid placing himself in a position of conflict. It is difficult to understand how, when, on July 2, 2008, he advised the Realty Department that he might be interested in making a bid, he would not see that he was demonstrating a personal pecuniary interest that would conflict with that of the municipality and the electors he served.

With respect to the defence of inadvertence, the court held as follows:

> This [his active role at Council prior to acquiring a pecuniary interest] was only exacerbated when, on July 21, 2008, he arranged to view the property as part of his consideration as to whether to make a bid and then, at the meeting of the Committee of the Whole that evening, failed to declare an interest. This is not inadvertence; it is fairly characterized as being willfully blind or reckless.

As to the significance of the decision, and the danger signals raised, in the words of the dissenting judgment:

> ...this extraordinarily broad interpretation of what constitutes an indirect pecuniary interest (the conclusion of the majority of the Divisional Court) appears to be without precedent and takes the conflict provisions to new heights. This extremely broad, novel interpretation of the scope of the MCIA, which is a penal statute, should also be a factor in determining whether the saving provisions [inadvertence or error in judgment – MCIA, s. 10(2)] should apply.

Be forewarned!

(*Editor's note*: The ruling is available online at http://www.canlii.org/en/on/onscdc/doc/2011/2011onsc5398/2011onsc5398.html.)

Called to the Bar in 1971, George Rust-D'Eye practises municipal and planning law, administrative law, and public law litigation. The former Metropolitan Solicitor for Metropolitan Toronto, Mr. Rust-D'Eye joined the firm of WeirFoulds LLP in 1989. He is co-author of Ontario Municipal Law: A User's Manual–2011 and Ontario's Municipal Conflict of Interest Act–A Handbook, and author of Handbook for Municipal Councillors. He has been designated by The Law Society of Upper Canada as a Certified Specialist in Municipal Law. He is co-Director and a Lecturer of the Part-Time Municipal Law LL.M. programme at Osgoode Hall Law School, York University. In June 2007, he was awarded the Ontario Bar Association's Award of Excellence in Municipal Law. ML

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they were constitutionally exempt from the application of the trespass legislation and Parks By-law, and contended that the trespass notice violated their rights under sections 2(a) through (d) of the *Canadian Charter of Rights and Freedoms* (their rights of freedom of conscience, expression, peaceful assembly, and association).

The judge rejected the City's argument that the protesters' act of camping out and, in effect, taking over a public park was not activity which engaged section 2 of the *Charter*, but concluded that the trespass notice was constitutionally valid and dismissed the application. Although enforcement of the trespass notice would infringe the applicants' section 2 fundamental freedoms, such an infringement could be justified under section 1 of the *Charter*. The City "has established that the limitations resulting from the enforcement of the Trespass Notice on the applicants' section 2 freedoms are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'." "Although proclaiming a message of participatory democracy, the evidence, unfortunately, reveals that the Protesters did not practise what they were preaching when they decided to occupy the Park. Specifically, they did not ask those who live and work around the Park or those who use the Park—or their civic representatives—what they would think if the Park was turned into a tent city... The *Charter* does not permit the Protesters to take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are under no obligation to leave. By taking that position and by occupying the Park the Protesters are breaking the law. Such civil disobedience attracts consequences...." For the 54-page ruling, see http://tinyurl.com/bpvsflt. ML

Second Look

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Schreiber v. Society for Sav. Bancorp, Inc., 11 F.3d 217, 220-21 (D.C. Cir. 1993); [*In re Subpoena Served Upon Comptroller of Currency, & Sec'y of Bd. of Governors of Federal Res. Sys. (Fleet Bank)*, 967 F.2d 630, 633-34 (D.C. Cir. 1992)].

Houston Bus. Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury, 86 F.3d 1208, 1212 (D.C. Cir. 1996).

Treat the relator's attorney just as you would treat outside counsel retained by a plaintiff corporation. All discovery sought from the plaintiff is served on its attorney. Do not let the relator's attorney make you seek third-party discovery from federal agencies as if the United States were not a party. This discovery would include interrogatories, production requests, requests for admissions, and perhaps most importantly, Rule 30(b)(6) depositions of representative federal agency witnesses.

Object at depositions if a Department of Justice (DOJ) or agency attorney tries to defend or to ask questions — particularly if the DOJ objects after the outside lawyer has appeared as the attorney defending the deposition, or tries to ask questions after the relator's attorney has done so. The DOJ lawyer can observe but not participate. Seek a protective order if necessary. 31 U.S.C. § 3730(c)(4) gives the Government the right to copies of deposition transcripts when it has not intervened, but does not even give the DOJ the right to be present at, much less participate in, depositions.[4] Move to compel if the relator's counsel objects to discovery requests on the grounds that he or she lacks access to federal documents or witnesses.

Seek to hold relator's counsel to the unique ethical standards for government lawyers, making the lawyer subject simultaneously to the ethical duties of every jurisdiction where the lawyer "engages in that attorney's duties," in addition to the ethical duties imposed by local rules of the court where the case is pending. 28 U.S.C. § 530B(a) (the so-called McDade Amendment). These duties are sometimes conflicting. Will McDade apply to relator's attorneys? Yes, if the statute is applied literally. There are no cases. Think how McDade might apply to a relator's attorney whose offices are located in State X (and thus, works on your case there) while appearing as the attorney for the Government (as the attorney for different relators) in federal courts in a dozen other states.

Caveat: Will this approach induce the United States to reconsider its decision not to intervene? Will the judge allow a reconsideration of the non-intervention decision if not made for the purposes of settlement? Last, consider the state of your city's (and your office's) relations with your U.S. Attorney's Office when deciding to take the steps outlined here.

Notes

1. *See* Patient Protection and Affordable Care Act, Pub.L. 111–148, 124 Stat. 119, amending, among other things, 31 U.S.C. § 3730(e)(4)(A)(i)-(iii) (2010). "The major changes effected by the 2010 amendments to the FCA are to clarify that the public disclosure bar only applies if the 'criminal, civil, or administrative hearing' at which disclosure occurred was a federal proceeding and to make the bar applicable only if the United States government or its agent was a party to that hearing." U.S. v. Smith & Nephew, Inc., 749 F. Supp. 2d 773, 781 (W.D. Tenn. 2010).

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