# International Municipal Lawyers Association
# 2012 Annual Conference
# Austin, Texas

# Municipal Conflicts of Interest in Waterloo Region and Across Canada

Eric M. Davis
Associate
Miller Thomson LLP
Waterloo, Ontario

© 2012 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2012 Annual Conference, held October 21-24, 2012 in Austin, TX. IMLA assumes to responsibility for the policies or positions in the report or for the presentation of its contents.

## Table of Contents

Introduction ..... 3

Legislative Context ..... 3

Direct Pecuniary Interest ..... 4

Indirect Pecuniary Interest ..... 4

Deemed Interest ..... 4

Exceptions ..... 4

Penalties ..... 6

Inadvertence or Error in Judgment ..... 7

Selected Case Law from Other Canadian Jurisdictions ..... 9

Nova Scotia ..... 10

Manitoba ..... 11

British Columbia ..... 12

Conflicts in Practice ..... 14

Potential Solutions ..... 14

Conflict of Interest Commissioner ..... 14

Recommendations from City of Mississauga Judicial Inquiry ..... 15

Conclusion ..... 16

## Introduction

On June 15, 2011, the Council for the Regional Municipality of Waterloo (the "Region") voted 9-2 to build an $818-million rail transit system, the largest public works project ever undertaken by the Region. The decision to construct a light rail transit system was only arrived at after years of debate. All levels of regional government – both upper-tier and lower-tier municipalities – voted on the project in some capacity.

It was during these debates that several Regional Councillors as well as Councillors for the Cities of Kitchener and Waterloo declared conflicts of interest. In total, four (4) out of sixteen (16) Regional Councillors declared conflicts, five (5) out of ten (10) City of Kitchener Councillors declared conflicts and five (5) out of eight (8) City of Waterloo Councillors declared conflicts.

The Councillors' reasons for declaring conflicts ranged from owning property near the proposed rail line to being an employee of one of the local universities which might benefit from the creation of a light rail transit system which would be accessible on or near campus.

The large number of Councillors declaring that they had a conflict of interest highlights the problems with Ontario's *Municipal Conflict of Interest Act*[1] (the "Act"), namely:

1. it is not entirely clear when a Councillor has a conflict of interest, as each situation is very fact specific and as certain exceptions under the Act can apply;

2. the penalties under the Act are harsh and some are mandatory; and,

3. there is no independent, third party to proactively adjudicate whether or not a Councillor has a conflict.

## Legislative Context

According to the Act there are two (2) types of conflicts: (1) a direct pecuniary interest; and, (2) an indirect pecuniary interest.

The term "pecuniary" is not defined in the Act, though the term generally means "consisting of or pertaining to money". As well, the terms "direct" and "indirect" are not defined.

---

[1] R.S.O. 1990, c. M.50

***Direct Pecuniary Interest***

A direct pecuniary interest arises where a Councillor stands to gain or lose as a result of voting on a particular question. For example, if a Councillor owns a construction company that bid on a project for their municipality, they should not be involved in Council's decision as to who should be awarded the contract. They would have a direct pecuniary interest in the outcome of that decision.

***Indirect Pecuniary Interest***

In relation to an indirect pecuniary interest, one must look at the Act. Section 2 of the Act states that a Councillor has an indirect pecuniary interest if:

(a) they are "a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public" that has a pecuniary interest in a matter;

(b) they have "a controlling interest in, or [are] a director or senior officer of, a corporation that offers its securities to the public" that has a pecuniary interest in a matter;

(c) they are a "member of a body" that has a pecuniary interest in a matter; or,

(d) the Councillor "is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter".

For example, if a Councillor's employer has a pecuniary interest in a matter, that Councillor would have an indirect pecuniary interest and should declare a conflict of interest pursuant to section 2.

***Deemed Interest***

Section 3 of the Act further expands potential conflicts. It states that a pecuniary interest, direct or indirect, of a parent, spouse or child of the Councillor shall, if known to the Councillor, be deemed to be also the pecuniary interest of that Councillor.

***Exceptions***

Though one might have a direct or indirect pecuniary interest in a matter, there are several exceptions under the Act. Section 4 of the Act states that the Act does not apply to a pecuniary interest in any matter that a Councillor may have:

(a) as a user of any public utility service supplied to the Councillor by the municipality or a local board;

(b) by reason of having an interest in farm lands that are exempted from taxation for certain expenditures under the *Assessment Act*;

(c) by reason of the Councillor having a pecuniary interest which is an interest in common with electors generally; or,

(d) by reason only of an interest of the Councillor which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Councillor.[2]

What is not entirely clear, however, is when these exceptions would apply. For example, "interest in common with electors generally" is defined by the Act to mean "a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part". But what exactly does that mean?

In the case of *Greene and Borins, Re*[3], Council voted on development proposals for lands located 220 feet from properties owned a Councillor's father. The Divisional Court held that the properties were close enough to the proposed development area that they could be affected by the development. The Councillor's pecuniary interest was held not to be an interest with electors generally, as his father's parcel "was of physical size and location as to readily lend to redevelopment. This is clearly to be distinguished from the interests of individual homeowners in the area." The Councillor was found to have contravened the Act and his seat was declared vacant.

In contrast, in *Ennismore (Township), Re*[4] the municipality had undertaken water and sewer needs studies in a certain area. Subsequently, the Township brought an application under the Act to determine whether or not a member of Council with a commercial establishment in the study area could participate in the decision to build a water supply system within that area of the municipality. The fact that the Council member had a commercial establishment in the study area did not make his pecuniary interest different in kind from the other affected electors. Therefore, the Court ruled that the member was not prohibited from participating in and voting upon any questions concerning servicing within the study area.

---

[2] This is not the entire list of exceptions under s. 4 of the Act.

[3] (1985), 50 O.R. (2d) 513 (Div. Ct.)

[4] (1996), 31 M.P.L.R. (2d) 1 (O.C. (Gen. Div.))

Similarly, when precisely is a Councillor's interest so "remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member"?

In *Whiteley v. Schnurr*[5] the municipal Council was dealing with an application by a local university for an Official Plan Amendment ("OPA"). The Councillor was one of 5,000 employees of the university. If approved, the OPA would benefit the university's heritage trust fund. Although the Councillor conceded that, as an employee, he had an indirect pecuniary interest in the university's application, he was successful in arguing that his vote on the university's application for an OPA would not reasonably have been regarded as being influenced by his status as an employee. His interest was held to be remote and insignificant.

## Penalties

Where a Judge determines that a Councillor has contravened the Act, the Judge, according to section 10(1) of the Act:

(a) *shall* declare the Councillor's seat vacant; and,

(b) *may* disqualify the Councillor from being a Councillor for seven (7) years thereafter; and,

(c) *may*, where the contravention has resulted in personal financial gain, require the Councillor to make restitution to the party suffering the loss, or, where such party is not readily ascertainable, to the municipality.

Therefore, if a Councillor fails to declare a conflict, beyond the public humiliation of being found to have contravened the Act, they would automatically lose their seat and could be disqualified from seeking elected office for the next seven (7) years.

Conflicts have such significant consequences, many Councillors would rather just declare a conflict than potentially be challenged for violating the Act.

[5] [1999] O.J. No. 2575 (O.S.C.J.)

**Inadvertence or Error in Judgment**

Despite the harshness of the potential penalties, a member can be saved by s. 10(2) of the Act, which states:

> Where a judge determines that a member or a former member while he or she was a member has contravened subsection 5(1), (2) or (3), if the judge finds that the contravention was committed through **inadvertence** or **by reason of an error in judgment**, the member is not subject to having his or her seat declared vacant and the member or former member is not subject to being disqualified as a member, as provided by subsection (1). [Emphasis added.]

This section has been used often by Councillors who have clearly violated the provisions of the Act, yet do not want to have their seats be declared vacant.

- ***Forbes v. Trask***[6]

The respondent, Ross Trask, was not only the Reeve of the municipal Council, but also operated a road construction business that had done some road surfacing work for the Township. In questioning whether his work had been approved by Council, an investigation by staff subsequently concluded that it had been properly approved.

However, at a subsequent Council meeting, the Deputy Reeve rose to complain about the minutes, as he was not satisfied with the wording used by staff in reporting back to Council. The Reeve then declared a conflict of interest and moved his chair back from the Council table – but did not leave.

As the discussion became heated, the Reeve walked to the back of the Council chamber where he stood while the debate continued.

When the Deputy Reeve argued that the wording in the resolution from the minutes was wrong – that the road work in question had not been authorized by Council – the Reeve shouted information from the back of the Council chamber to "correct an incorrect statement".

The Judge ruled:

> I would think that an elected official, faced with the prospect of a conflict situation, should probably absent himself from the physical realm of the ongoing discussion where his physical presence, in a visual sense, could not be seen to

[6] (1991), 4 M.P.L.R. (2d) 34 (O.C. (Gen. Div.))

> have any persuasive effect on the remaining members of the quorum. To push one's chair back from the debating table a foot or two while others debated the interests of the party in conflict, would, in my view, scarcely remove a person from the real arena of influence...(in addition) the words that I find were uttered forcefully and with a view to correcting a statement then made by one of the debating Councillors (Deputy Reeve) he took part in the going discussion in a way that, if not intended to influence the voting, most certainly would be seen to others to do just that...I am satisfied that the respondent, Reeve Trask, contravened...the Act.

However, the Judge found that the Reeve's contravention should be characterized as a bona fide error in judgment and one that should be forgiven to the extent allowed. Reeve Trask's seat was not declared vacant and he was not disqualified as a member of Council.

- ***Begin v. McInnis***[7]

Councillor McInnis was a chartered accountant. One of his clients owned two limited companies. The client, through his companies, applied for an amendment to the Official Plan. The Councillor voted for the amendment. The vote would have been a tie if he had not voted.

When participants at the public meeting suggested the Councillor had a conflict of interest because companies he worked for could benefit financially from the amendment, he denied it and based his decision on the rules of his profession. He stated he had read the legislation and attended seminars respecting it, but in his interpretation, the Act did not apply.

The judge found that it was obvious that a chartered accountant for a company that prospers would financially benefit both directly and indirectly from the success achieved. The Court also held that, at the very least, he should have obtained legal advice when challenged by the participants.

Ultimately, the judge could not find inadvertence or a bona fide error because, in not seeking legal advice, the respondent was deliberately and willfully blind. The Councillor's seat was declared vacant.

---

[7] [1991] O.J. No. 499 (O.C.J. (G.D.))

- ***Mondoux v. Tuchenhagen***[8]

A Councillor of the City of Thunder Bay expressed an *interest* in a tax sale property to be disposed of by the City by tender. His interest was expressed via an email to a City staff member, in which he also requested a copy of the advertisement for the property.

The Court held that his interest crystallized upon him sending the email and he thereafter had a pecuniary interest in the matter. When the matter subsequently came before Council and he did not declare a conflict, the application judge and, on appeal, the majority of the Divisional Court held that he had violated the Act.

The majority held that held that the defence of "error of judgment" was not available. It stated:

> In one sense, any contravention of a statute based on deliberate action can be said to involve an error of judgment. A criminal act, for example, involves a serious error in judgment. The purpose of this second branch of this saving provision in subsection 10(2) of the Act must be to exonerate some errors in judgment which underlie contraventions of the Act, but obviously not all of them. The Legislature must have intended that contraventions of s. 5 which result from honest and frank conduct, done in good faith albeit involving erroneous judgment, should [not] lead to municipal council sets having to be vacated. Municipal councils require the dedicated efforts of good people who will give of their time and talent for the public good. What is expected and demanded of such public service is not perfection, but it is honesty, candour and complete good faith.

As he was no longer a Councillor, he was disqualified from being a member of council for four years.

## Selected Case Law from Other Canadian Jurisdictions

Throughout Canada, legislating rules around municipal conflicts of interest takes many forms.

Nova Scotia's *Municipal Conflict of Interest Act* (the "NS Act") and Manitoba's *The Municipal Council Conflict of Interest Act* (the "Manitoba Act") are both strikingly similar to the Act. Perhaps unsurprisingly, the case law outlined below for the NS Act and the Manitoba Act are reminiscent of Ontario's case law on the subject.

---

[8] 2001 ONSC 5398 (Ont. Div. Ct.)

However, British Columbia's *Community Charter* is somewhat different (perhaps more in text than in thrust). It sets out restrictions on:

- participation in Council decisions if a member of Council is in conflict;
- using the member's office to influence a decision of an officer, employee or delegate if the member has a financial interest in the decision;
- using the member's office to influence decisions made by another body or person if the member has a financial interest in the decision;
- using confidential information gained in office to further the member's or former member's financial interest; and,
- accepting fees, gifts, or personal benefits that are connected with the performance of their duties of office.

A summary of some selected cases from Nova Scotia, Manitoba and British Columbia are outlined below to illustrate the similarities and differences in the various legislative regimes.

***Nova Scotia***

- ***Stubbs v. Greenough***[9]

An application was brought by Alderman Stubbs of Dartmouth City Council against Alderman Greenough for an order declaring the latter's seat vacant as a result of alleged breaches of the Act in that Alderman Greenough had: 1) an interest in a matter before Council; 2) called Council members respecting same; 3) participated in Council meetings dealing with the matter; and 4) conversed with Council members following meetings where the matter was decided.

Greenough supported a change in the City's policy regarding servicing of certain lots because it would benefit lots owned by him. Prior to the policy being discussed by Council, he contacted various Aldermen, told them that he had a conflict of interest, yet still asked them to consider the policy when it came before Council.

[9] (1984), 25 M.P.L.R. 26 (N.S.S.C. (Trial Division))

Greenough argued that he did not make the calls to the other Aldermen with the conscious intention of soliciting support. The evidence at the application suggested that he did nothing other than indicate his conflict and ask if there were questions he could answer prior to the meeting.

The court decided that the application should be dismissed, notwithstanding a finding that there was a contravention of the Act. Although Greenough did not intend to do so, he violated clause 6(1)(d) of the Act in that he failed to refrain from attempting *in any way* before the meeting to influence the decision of the Council with respect to the matter.

When he spoke at a meeting where the matter was being considered, he did so in response to a request from the Chair. Although his intention and his words may have been innocent, any comment by an Alderman who had a declared conflict and was in conflict, would violate the provisions of the Act.

He was found to have violated clause 6(1)(b) of the Act by failing to withdraw from his place, even though he did not vote, once the motion was no longer procedural.

The court determined that Greenough's actions had occurred through inadvertence or bona fide error in judgment. He was quite open in everything he did and was not attempting to deliberately defy the Act in any of the violations found.

***Manitoba***

- ***Synchyshyn v. Tiller***[10]

The municipality of Clanwilliam decided to acquire a gravel pit. In discussions with the owner of the land to be acquired, the Reeve (Tiller) determined that the owner would sell if she could also sell an adjoining piece of land. The Reeve's grandfather had homesteaded that land and the Reeve agreed to purchase it, in part, to enable the municipality to acquire the pit lands.

When the matter of the purchase came up on the Council's agenda, the Reeve declared his interest although he continued to participate in the proceedings. Council passed a resolution authorizing acceptance of the offer to sell.

[10] [2000] M.J. No. 281 (Man. C.A.)

The Reeve was found to have a personal economic interest in the transaction relating to the gravel pit, even though he maintained that he believed that all he was doing was facilitating the municipality's purchase of the gravel pit. He was afforded the defence available under s. 22 of the Manitoba Act, which exempted persons who committed a violation unknowingly or through inadvertence.

- ***Cornwallis (Municipality) Acting Clerk and Manager v. Selent***[11]

Selent was a Councillor for the Rural Municipality of Cornwallis. He also owned a strip mall in the municipality and carried on a convenience store and gas bar business at the mall.

A development application was submitted to the municipality for the creation of a recreation centre across the street from the strip mall. Selent did not declare a conflict of interest prior to the municipality's approval of the development and he voted on the application.

The motions judge found that Selent had breached the provisions of the Manitoba Act and ordered his seat on Council to be vacated. Selent appealed on the ground that his acting in a position of conflict arose from inadvertence.

His appeal was dismissed by the Manitoba Court of Appeal. Selent was found to be fully aware of the possibility that he was acting in a conflict of interest. He was also aware of his obligations to refrain from acting in a conflict position. He did not act through inadvertence in voting on the proposed recreation centre development.

***British Columbia***

- ***Fairbrass v. Hansma***[12]

The Mayor of Spallumcheen owned a parcel of land within the township. His two sons owned a larger adjacent parcel. An Official Community Plan amendment was proposed for the township which would not have changed the applicable zoning, but would facilitate subdivision of parcels of a certain size, if sought by the respective owners.

---

[11] [1998] M.J. No. 454 (Man. C.A.)

[12] [2010] B.C.J. No. 1242 (B.C.C.A.)

The amendment would have affected the parcel held by the Mayor's sons, but not the parcel held by the Mayor himself. Prior to the Council discussion and vote, the Mayor obtained a legal opinion stating that no conflict of interest arose as any benefit accruing to the sons was too remote to constitute a benefit to the Mayor. Consequently, the Mayor participated in the discussion and vote, though the proposal was ultimately defeated.

Regardless, 39 electors sought the Mayor's disqualification on the basis of a conflict of interest.

The chambers judge ruled that the electors did not prove that the Mayor had a direct pecuniary interest in the outcome, as any future subdivision scenarios involving the Mayor were speculative. As to the indirect pecuniary interest based on the sons' holdings, there was no evidence of a financial relationship with the Mayor or any intertwining of his financial affairs with his sons.

The mere fact of the Mayor's relationship with his sons was insufficient to infer a conflict. In any event, the Mayor had relied on the legal opinion in good faith and thus had a defence. The appeal was dismissed.

- ***Conibear v. Tahsis (Mayor)***[13]

In March 2010, a woman named McGrath approached the Village of Tahsis about scheduling a music festival. McGrath was the mother of a 14-year old daughter. The Mayor's son was the father. The relationship between McGrath and the son was a short one, and before March 2010, the Mayor had only seen McGrath twice in the last 14 years.

The Village Council considered the music festival proposal. The Mayor advised Council of her connection to McGrath and said that she did not consider herself to be in a conflict as she had no personal or business relationship with McGrath. The music festival was approved by Council by a vote of 3-2.

The petitioners opposed having the music festival. They claimed that the Mayor was in a conflict of interest because her granddaughter would benefit from any funds that McGrath received from the festival.

The Mayor was not found to even have an indirect pecuniary interest in the outcome of the vote on the festival proposal or in the contract with McGrath.

---

[13] [2010] B.C.J. No. 1407 (B.C.S.C.)

## Conflicts in Practice

Currently, in Ontario, if a municipal Councillor thinks that they might have a conflict in relation to a particular matter, their only course of action is to retain a lawyer (usually at their cost) and seek a legal opinion as to whether or not they have a conflict.

Unless there is an obvious conflict of interest (or lack thereof), any legal opinion received by a Councillor is likely to be filled with caveats and equivocations, as nothing is ever certain.

The risk of not declaring a conflict and being found to have violated the Act is so great that it will always be easier to simply declare a conflict, even when a Councillor's potential conflict is questionable.

Keep in mind that, if a Councillor does not declare a conflict of interest and is challenged, even if they are ultimately found to have not violated the Act, they will still likely have to pay significant legal costs to defend themselves in Court, not to mention suffer the public humiliation of being accused of a conflict of interest.

Using the light rail transit example for Waterloo Region, it is questionable whether every single Councillor who declared a conflict during the debate actually had a pecuniary interest pursuant to the Act, but why would any of them risk being challenged? For example, one Councillor was an employee of one of the local universities which might benefit from the creation of a light rail transit system which would be accessible on or near campus. Would that Councillor's alleged conflict not be caught by one of the exceptions (e.g. too remote or insignificant)?

Without an ability to proactively determine whether or not one has a conflict, very few Councillors would ever be willing to take the risk.

The end result is Councillors sitting on the sidelines instead of representing the will of their constituents.

## Potential Solutions

### *Conflict of Interest Commissioner*

Several municipal Councils in Ontario, including some in Waterloo Region, have called upon the provincial government to create a municipal conflict of interest commissioner who would consider potential conflicts (in advance) which would be binding and final.

Unlike federal or Ontario politicians, municipal Councillors do not have an officer they can approach to rule on potential conflict cases. They only know for sure if they have a conflict when someone challenges them in Court. As discussed above, that forces Councillors to declare conflicts even in cases where any actual conflict is questionable.

When Waterloo Region was debating light rail transit, for example, a commissioner could have addressed any potential conflicts in advance. Once a determination had been made by the commissioner, there would be no question as to whether or not a Councillor had a conflict and no need for anyone to challenge the Councillor in Court. It would provide a degree of certainty for municipal Councillors which is presently absent. It would also hopefully allow more Councillors to participate in debates.

***Recommendations from City of Mississauga Judicial Inquiry***

Recently, the City of Mississauga went through a Judicial Inquiry involving conflicts of interest and the report of the Inquiry dated October 3, 2011 (the "Report"), found that the Act had several shortcomings.

Commissioner Cunningham found that the "municipal accountability regime, which includes the [Act], has not kept pace with the evolution of the *Municipal Act*, *2001*". He suggested several ways to improve the Act, including:

1. Creating a preamble to the Act which would set out broad overarching principles that would assist members of Council to understand their role in promoting public confidence in municipal government;

2. Adding a statement within the Act to the effect that the interests of spouses, parents, children, siblings and other relatives are deemed to also be the interest of the member;

3. Extending the scope of the Act to include private interests more broadly – from "pecuniary interest" to "private interest" – which would likely also require a "materiality threshold";

4. Amending the Act so that it clearly applies to all meetings attended by members of Council in their official capacities;

5. Making no sanction mandatory and allowing lesser sanctions (e.g. suspension, probation with oversight, removal from committee membership, a reprimand or requiring a formal apology);

6. Allowing individuals or organizations "demonstrably acting in the public interest" to bring applications under the Act; and,

7. Allowing the Integrity Commissioner to investigate and to report on matters covered by the Act.

## Conclusion

In Ontario, as with many other provinces, it is not entirely clear when a Councillor has a conflict of interest, as each situation is very fact specific.

As the potential penalties under the current Act are quite harsh, many Councillors will declare a conflict of interest and refrain from participating even when their alleged conflict is questionable.

A way to address that situation is to provide a variety of potential penalties (none of which are mandatory) and to allow the pro-active adjudication of potential conflicts by creating a municipal conflict of interest commissioner.

Constituents expect that, where possible, Councillors are at the table, debating the issues and representing them, not sitting on the sidelines for fear of breaching the Act.