

Ethics Presentation

Summary--Municipal Conflict of Interest Act

1. Covers municipalities, school boards, and municipal commissions, local boards (villages) and committees. (Definitions, S.2)
2. Covers members and former members. (Definitions, S.2)
3. **PECUNIARY INTERESTS**

DIRECT PECUNIARY INTEREST OF THE MEMBER: a pecuniary interest means monetary benefits that will be received or could be received, either in cash or as an increase in asset value and it can also mean the avoidance of cash payments or a decrease in asset value.

INDIRECT PECUNIARY INTERESTS (S.3) include interests of a:

- Partner
- Associate
- Employer
- Company in which the member is an officer
- Private company in which member is a shareholder, director or senior officer
- Publicly traded company in which member has a substantial interest or in which the member is a director or senior officer
- Body, incorporated or not, of which the member is a member, that has an interest in any matter in which the council, etc., is concerned (e.g. volunteer associations) (and note that this is any interest, not necessarily a pecuniary interest).

DEEMED PECUNIARY INTERESTS (S.4) include Pecuniary Interests of a:

- Spouse (including "common law" spouse) (Definition S.2)
- Son)
- Daughter) - of a member
- Father) - of a member's spouse
- Mother) - spouses of any of these people
- Brother)
- Sister)
- +anyone else who resides in the same house as the member,

if the member knew or should have known of the person's pecuniary interest.

4. **Interests Excluded from the Requirements in the Act (S.5):**

- interest as an elector (5(a))
- interest in receiving common services (5(b))(e.g. water)
- ownership of municipal debenture (5(c))

- deposit for service (5(d))
- by reason of being eligible for election or appointment to position being considered (5(e),(f))
- as director or officer of a municipal corporation (5(g),(h))
- compensation as member or appointee (5(i))
- interest in common with all electors (5(j)) (for e.g. attracting new industry, paying taxes)
- remote or insignificant interest (5(k)).

The general rule is that if you have to ask yourself whether the Act might apply, it probably does. *Seek independent legal advice.*

5. **Procedure (S.6)**

- no voting or discussion
- declare interest and withdraw (from table in public, from room, if closed)
- declaration to be recorded

6. **Consequences**

- unless inadvertence or *bona fide* error in judgment, seat forfeited
- potential disqualification for up to ten years
- requirement for restitution
- penalty up to \$25,000.00
- council's action voidable (may be declared invalid)

Note: *bona fide* error in judgment requires an active consideration of the problem and a decision made in good faith (as would be judged by an objective observer);

even when action excused by court, member typically pays costs (about \$3,000.00 minimum);

responsibility for decision that of individual, not council, mayor, warden or chair, municipal/village solicitor, CAO or clerk.

Appendix "B"

Case Law - Municipal Conflict of Interest Act

There is a diverse body of case law (court decisions) interpreting the various Provincial Municipal Conflict of Interest Acts across Canada. Below is a summary of the only reported Nova Scotia case and a sampling of court rulings from other Provinces. These court decisions should assist you in understanding the answers to the case study.

Eileen Stubbs v. John A. Greenough (1984), 25 M.P.L.R. 26 (Nova Scotia Supreme Court (Trial Division))

Chief Justice Glube considered the first (and only) application brought under the Nova Scotia Municipal Conflict of Interest Act. The application was brought by Alderman Stubbs of Dartmouth City Council against Alderman Greenough, a fellow Council member, for an order declaring the latter's seat vacant as a result of alleged breaches of the Act in that he 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 had sought to have the City's policy regarding servicing of certain lots changed because it would benefit lots owned by him. Prior to the policy being discussed by council, he contacted various aldermen and told them that he had a conflict of interest and asked them to consider the policy when it came before council. Greenough argued that he did not make the calls to the other aldermen with the conscious intention of soliciting support. The evidence suggested rather 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 his 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, violated the provisions of clauses 6(1)(c) and (d) of the Act. At a subsequent meeting, the procedural motion and the discussion related to procedure and not to the policy. His participation in the discussion and the vote was, therefore, not in violation of the Act. However, it would have been prudent for him to avoid any participation in the discussion of the notice of motion regardless of the perceived procedure of violation. He also voted on a subsequent motion to allow the item to be added to the agenda by a two-thirds vote.

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.

It is interesting to note that the court rejected the argument that the Act violates the Charter of Rights and Freedoms. Section 6 of the Act was considered to be a reasonable restriction for the protection of society, which is demonstrably justified in a free and democratic society, and therefore, did not violate the Canadian Charter of Rights and Freedoms. The Court found that the Act is designed to prevent the abuse of power by elected persons and to eliminate any appearance of such abuse or corruption.

Greenough also unsuccessfully argued that he fell within the exemption contained in clause 5(1)(j) of the Act. The court found though, that he did not have an interest in common with electors generally. Rather, he only had an interest in common with some of the lot owners of the area in question. The court also noted that there was no attempt to influence the decision of council after the meeting and a discussion held after the meeting did not violate the Act.

Finally, the court determined that Greenough's actions had occurred through inadvertence or bona fide error in judgement. He was quite open in everything he did and was not attempting to deliberately defy the Act in any of the violations found. Subsection 10(1), therefore, gave the Court discretion to relieve against forfeiture of office and no order was made to declare his seat vacant. However, the Judge found that this was an appropriate case to bring to court, and Greenough was ordered to pay the plaintiff's costs.

Edward v. Wilson et al. (1980), 14 M.P.L.R. 128 (Supreme Court of Ontario, Divisional Court)

The Respondents (Wilson, et al.) were members of the Cobourg Town Council and either owned or were associated with businesses located in the Town's Downtown Business Improvement Area. They voted against two proposals for a large shopping mall in the western limits of the Town, and the proposals were defeated. An application before the County Court pursuant to the (Ontario) Municipal Conflict of Interest Act for a declaration that the respondents had contravened section 2(1) of the Act was dismissed and an appeal was subsequently filed.

The appeal court dismissed the appeal. The appeal court rejected the finding of the trial judge that while the respondents had an indirect pecuniary interest, they had not contravened the Act because their interest was held in common with other taxpayers. Instead, the appeal court found the respondents interest was not shared with all taxpayers and did not merely differ in degree from the interest all taxpayers had in the drastic effect which the Mall would have on the social and economic life of the community.

However, the appeal court agreed with the trial judge that the respondents contravened the Act due to a bona fide error in judgement. The respondents, therefore, were not subject to having their seats declared vacant. In this case the Council had requested an opinion from their solicitor as to the conflict of interest of members of the Council. The solicitor's opinion was that the interests of those members of Council who were also members of the Downtown Business Improvement Area were too remote to constitute a legal conflict of interest. The respondents had relied in good faith on this legal opinion and had the opinion been otherwise, they would not have voted on the matter. The respondents had also openly expressed their views on the Mall in the last election campaign and

their votes at Council were amply justified by independent reports prepared by consultants for the Council. All these points were relevant to a finding of bona fides. An error in judgment can arise from a mistake of fact or law, although whether an error has occurred in good faith or honestly, which is what bona fides means, is itself a question of fact. Costs were not awarded. (Source: case headnotes.)

Minto and D'Arcey (1991) Ontario Court of Justice (General Division), Goderich, File No. 107-1990. (Source: _____ Municipal World 1991)

The Council of the Township of Howich having decided to construct new municipal offices called for tenders. A local contractor, Landmark Builders Limited ("Landmark"), contacted the defendant who was a Councillor and the sole proprietor of Gerald D'Arcey Construction to request a quotation for septic work as part of the Town Hall construction project. When the tenders were presented to Council the tender for Landmark was the lowest, which included the quote from D'Arcey. Four companies in total that tendered on the project asked for quotations from D'Arcey. A resolution was passed at Council to award the tender to Landmark. At the time of the vote the defendant D'Arcey did not know that his name appeared on four of the nine tenders submitted. Subsequently, D'Arcey entered into a contract with Landmark to do the septic work that would realize a net profit of \$300.

An application was brought alleging that D'Arcey had a direct pecuniary interest in the matter and had failed to disclose his conflict of interest. The Judge found that when Landmark was found to have submitted the lowest tender, "common sense would seem to indicate that before voting he should have asked to see the tender documents to ascertain if in fact he was shown as a subcontractor. His failure to do so was tantamount to saying: 'I may have a pecuniary interest in this tender; I could find out if in fact I do; I choose not to find out, and will vote on it anyhow.' That in my view amounts to wilful blindness." D'Arcey was, therefore, found to have had a direct pecuniary interest in the contract which he failed to declare, particularly given his years of Council experience and knowledge of the Act.

The Judge did not declare D'Arcey's Council seat vacant, because the violation had occurred through inadvertence. The Judge believed that D'Arcey had no intention to violate the Act. However, legal costs were awarded against D'Arcey.

Forbes and Trask (1991) Ontario Court of Justice (General Division) (Source: Municipal World, 1991)

The applicant, Forbes, the owner of Forbes Sand and Gravel, alleged that the respondent Reeve, Trask, while chairing meetings of Council twice contravened the Act. At a Council meeting the Reeve declared a conflict of interest on a matter raised by the Deputy Reeve which concerned the payment of an account to the respondent's company for roadwork that was done without Council's authorization. Notwithstanding, the respondent later participated in a discussion of this matter at a subsequent Council meeting by shouting information from the public seating area of the Council chamber which challenged and repudiated an assertion made by the Deputy Reeve in the course of the discussion from which the respondent had just declared a conflict of interest moments earlier. Initially, the respondent had only moved his chair back from the Council table, and did not leave for

the public seating area until the council debate became heated. At a subsequent Council meeting, the respondent asked that the minutes of the earlier Council meeting be amended to reflect his interjection. The minutes were amended as per the Reeve's request.

The Judge ruled:

It seems to me that interpretation of (the Act) requires that any municipally elected official must exercise a level of constraint much greater than that of the average citizen...The obvious purpose of the legislation is to safeguard the public purse, not only from greed-inspired conflict, but from carelessly occasioned conflict as well...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 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...when Mr. Trask requested that his interjection of September 24 be noted by an amendment to the minutes, I fail to see how this could be found to be a breach of (the Act). Firstly, there was no further vote on any matter of pecuniary interest to Mr. Trask contemplated...Secondly, the request sought by Mr. Trask (and achieved) was aimed at ensuring that the events of September 24th were accurately and completely recorded...in fact, to the contrary, it acknowledges his involvement.

The Judge found though, that the earlier violation of the Act,

...was clearly an error in judgement, which...should be characterized as a bona fide error in judgement and one that should be forgiven to the extent allowed...Reeve Trask's seat will not be declared vacant and he will not be disqualified as a Member of Council.

The respondent Trask was ordered to pay legal costs (party and party).

Wiggins et al. v. MacDonald (1991) (Ont. Dist. Ct.) (Source: Municipal World 1991)

Reeve MacDonald carried on business as a general contractor involved in constructing roads. His company rented to the village virtually all the paving equipment used by the village. His company owned business premises in the village.

Reeve MacDonald voted on the following motions: A motion to call for tenders to do paving using rental equipment. A motion to install power and water to serve his company's property and property owned by his sons. A motion not to object to severance of three properties which the Reeve was purchasing. A motion for road construction in front of the Reeve's property. The possible purchase of a backhoe which would replace rental equipment then rented from the Reeve. At trial, the Reeve

indicated that until the application, he was unaware of the existence of the Municipal Conflict of Interest Act and he explained how in each case he had voted for the interests of the village not his own interests. The Reeve's seat was declared vacant and costs were awarded against him. (He was re-elected in the by-election to fill the vacancy.)

Begin et al. v. McInnis (1991) (Ont. Ct. of Justice (Gen. Div.)) (Source: Municipal World, 1991)

Councillor McInnis was a Chartered Accountant who had a client who 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 he had an interest, because companies he worked for could benefit financially from the amendment, he denied it basing his decision on the rules of his profession. He stated he had read the legislation and attended seminars respecting it, but in his interpretation, it did not apply. The judge found that it was obvious that the chartered accountant for a company that prospers would financially benefit both directly and indirectly from the success achieved. At the very least he should have obtained legal advice when challenged by the participants. The judge could not find inadvertence or bona fide error because, at the very least, in not seeking legal advice, the respondent was deliberately and wilfully blind. The councillor's seat was declared vacant. The judge did not put a time period on the vacancy but left it to the electors whether or not the councillor would be re-elected.

Kay v. Ferguson (1991) (Ont. Ct. of Justice (Gen. Div.)) (Source: Municipal World, 1991)

The respondent, Councillor Ferguson, owned a construction company which was involved in road construction in the municipality. He participated in meetings held in January 1991 concerning the construction. The applicant brought the application in May 1991. The applicant was present at at least one of the meetings in January. The judge held that the applicant had brought the application more than six weeks after he knew that Act may have been breached. Due to the six weeks limitation period, the application was dismissed.

Danby v. Foote (1993) (Ont. Ct. of Justice (Gen. Div.)) (Source: Municipal World, 1993)

Reeve Foote declared an interest and withdrew from consideration of the future dump site. Reeve Foote owned land near the proposed site and had obtained legal advice that he had an interest. An elector applied for a declaration that the Reeve did not have an interest. The judge found that Reeve Foote did have a direct pecuniary interest and because of the proximity of his property, it was not an interest in common with electors generally. The judge awarded the respondents costs, if asked, on a solicitor and client basis.

Re Tuckersmith Township (1986), 34 M.P.L.R. 104 (Ont. Dist. Ct.)

All municipal councillors were in a potential conflict of interest situation in voting for a land fill site. The Council applied to a judge for a declaration enabling the members to vote. The judge awarded the declaration because not to do so would have resulted in inability to locate the land fill. As well, ultimate approval lay with the Department of the Environment, not the Council.