



Municipal Conflict of Interest

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BACKGROUND & PURPOSE

Background

- Ontario's *Municipal Conflict of Interest Act* ("MCIA") was originally enacted in 1972
- MCIA codifies provisions found in previous versions of the *Municipal Act*, dating back to 1849
- legislation has received substantial judicial consideration
- MCIA is applicable to members of a municipal council and to members of "local boards" (broadly defined in s. 1 of the MCIA)
 - not applicable to municipal staff – applies only to "members" (i.e. elected or appointed officials)

Purpose

Moll v. Fisher
(1979), 8 M.P.L.R. 266 (Ont. Div. Ct.):

“The obvious purpose of the [Municipal Conflict of Interest] Act is to prohibit members of councils and local boards from engaging in the **decision-making process** in respect to matters in which they have a **personal economic interest**... There is no need to find corruption on his part or actual loss on the part of council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then regardless of his good faith or the propriety of his motive, he is in contravention of the statute.”

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DECLARATION OF OFFICE

Declaration of Office

Municipal Act, 2001, s. 232

- in order to take a seat at council, a member must solemnly promise and declare four oaths including the following:
 3. **I will disclose any pecuniary interest, direct or indirect, in accordance with the *Municipal Conflict of Interest Act*.**

Member's Obligations under MCIA

Personal Obligation

- obligation to abide by the MCIA is personal to the member

Cooper v. Wiancko
(2018), 73 M.P.L.R. (5th) 212 (Ont. S.C.J.):

“...the decision to exercise the obligations set out in s. 5 are characterized as **a matter of personal judgment for each councillor.**”

CONFLICT OF INTEREST

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Conflict of Interest

- *common meaning:*
 - “a situation in which a person has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties as, say, a public official, an employee, or a professional”
- *MCIA meaning:*
 - direct, indirect or deemed *pecuniary* interest

Conflict of Interest

Cooper v. Wiancko
(2018), 73 M.P.L.R. (5th) 212 (Ont. S.C.J.)

“What constitutes a sufficient pecuniary interest to trigger s. 5 of the MCI Act **will not necessarily be demarcated by a bright line.**”

PRINCIPLES

Statutory Principles

Principles – s. 1.1

1. the importance of integrity, independence and accountability in local government decision-making
2. the importance of certainty in reconciling the public duties and pecuniary interests of members
3. members are expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny
4. there is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise

PECUNIARY INTEREST

Pecuniary Interest

- pecuniary = financial

Mondoux v. Tuchenhausen
(2010), 79 M.P.L.R. (4th) 1 (Ont. S.C.J.)

- a pecuniary interest is one “concerning or consisting of money . . . an interest that has a **monetary or financial value**”: three types in MCI A: direct, indirect or deemed
- positive (gain) or negative (loss)
- arises in a matter before council or committee for consideration or before municipal staff for a decision or recommendation

Direct Interest

- a *direct* pecuniary interest is one that unequivocally or expressly has an impact on a member's finances, economic state or property/asset value

Rivett v. Braid

(2018), 73 M.P.L.R. (5th) 249 (Ont. S.C.J.)

“The term ‘direct’ is not defined in the MCI A. Giving the word its plain and ordinary meaning, I find that it must refer to a situation in which the member could experience an immediate, in the sense of close, non-deviated or traceable financial or economic impact, positive or negative.”

Indirect Interest

- s. 2 of MCIA - where a member:
 - is a director or senior officer of a public or private company
 - is a shareholder of a private company
 - has a controlling interest in a public company (>10%)
 - is a “member of a **body**”
 - not a defined term but should be interpreted “broadly”
– *Orangeville (Town) v. Dufferin (County)*
 - is a partner
 - is an employee

Deemed Interest

- s. 3 of MClA:
 - a direct or indirect interest of a:
 - spouse
 - child (regardless of age)
 - parent

“if known to the member” is *deemed* to be the member’s own interest

DUTIES OF MEMBER

Duties of Member

When present at a meeting where matter considered

- s. 5 of MCIA:
 - where a member has a pecuniary interest in any matter and is present at a meeting of the council at which the matter is the subject of consideration, the member *shall*:
 - *disclose* the interest and the general nature prior to any consideration of the matter
 - not* take part in any discussion or vote
 - not* attempt to influence the voting in any way

Duties of Member

No Influence of Municipal Officers or Employees

- s. 5.2(1) - where a member has a pecuniary interest in any matter that is being considered by an **officer or employee** of the municipality or local board, the member is not permitted to use his or her office to influence any decision or recommendation that results from consideration of the matter
 - expands MCIA *beyond* legislative and deliberative meetings of councils, committees and local boards
 - preclusion is not applicable where the power to suspend the remuneration of a councillor is delegated to a person or body

EXCEPTIONS

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Exceptions

- nine *specific* exemptions and two *general* exemptions from the requirements in ss. 5 and 5.2 are set out in s. 4 of MCIA:
 - (a) as user of public utility and subject to similar conditions as other persons;
 - (b) entitlement to any service, subsidy, loan or benefit common to other persons;
 - (c) purchase or ownership of debenture;
 - (d) returnable deposit with municipality;
 - (e) interest property affected by *Drainage Act* works or local improvements;

Exceptions

- (f) interest in exempted farm lands;
- (g) eligibility for election or appointment to fill vacancy;
- (h) director or senior officer of municipal corporation or appointee to board, commission or other body;
- (i) any allowance, remuneration, salary or benefit that member may be entitled to by reason of being a member or as a member of a volunteer fire brigade;
- (j) interest in common with electors generally;**
- (k) remote or insignificant interest.**

Exception - Interest in Common with Electors

- s. 1 of MCIA:

“interest in common with electors generally” means 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*

- an interest in common generally does *not* always mean the entire municipality
- *query*: a difference in **nature / kind** or **degree**?

Exception - Remote or Insignificant Interest

- the relationship between the member and the subject matter must be so indirect or trivial that it leads to the conclusion that potential personal gain was not a motivating factor in the member's decision making
- test – ***Whiteley v. Schnurr* (1999), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.)**:

“Would a reasonable elector, being apprised of *all* the circumstances, be more likely than not to regard the interest of the councillor as likely to influence the councillor's action and decision on the question?”

Exception - Remote or Insignificant Interest

- **remoteness** – relates to the immediacy and potential of the financial or economic interest
 - the fact that the value of the pecuniary interest is particularly small does not relieve a member from compliance with the MCI: *D'Arcey v. Mino* (1991), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.)
- **significance** – relates to the **importance** of the matter
 - *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1 (Ont. S.C.J.)

Partial Exception - Code of Conduct Report

Limited Exception re Suspension of Remuneration

- s. 5(2.1) - where the matter under consideration at a meeting is whether to suspend the remuneration paid to the member for a contravention of the code of conduct:
 - the member is able to take part in the discussion of the matter, including making submissions to council, and may attempt to influence the voting on any question in respect of the matter
 - the member is not permitted to **vote** on the matter
 - the member is able to attend a closed meeting during which the matter is under consideration

DISCLOSURE

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Duty of Disclosure

Where and When

- duty arises *at the meeting* at which the pecuniary interest is to be discussed
- member must disclose:
 - the interest
 - the general nature of the conflict
- absence from a meeting is not a declaration (the member should declare the conflict at the next meeting at which he or she is present)

Written Statement of Disclosure

Written Statement re Disclosure - s. 5.1

- where a member has declared a pecuniary interest, the member is also required to file a *written statement* of the pecuniary interest and the nature thereof with the clerk or secretary
 - statement to be filed at the meeting or as soon as possible afterwards

Registry

Registry - s. 6.1

- every municipality is required to establish and to maintain a publicly accessible registry of:
 - a copy of each statement of disclosure
 - each declaration recorded in meeting minutes
- the City has established and maintains a current registry of [Statements of Pecuniary Interest and General Nature Thereof](#) for all written statements required to be filed pursuant to s. 5.1 of the MCIA

ADVICE

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Integrity Commissioner Advice

Express Authority for Advice to Members

- duties and responsibilities of an Integrity Commissioner under s. 223.3(1) of the *Municipal Act, 2001* include advising upon:
 6. Requests from members of council and of local boards for advice respecting their obligations under the *Municipal Conflict of Interest Act*.
- prior to the explicit authority being implemented by Bill 68, most Integrity Commissioners had read in the power to provide advice to members to prevent contraventions

Integrity Commissioner Advice

In Writing

- requests for advice from members and responses from the Integrity Commissioner must be **in writing**

Request for advice shall be in writing

223.3 (2.1) A request by a member of council or of a local board for advice from the Commissioner under paragraph 4, 5 or 6 of subsection (1) shall be made in writing.

Advice shall be in writing

(2.2) If the Commissioner provides advice to a member of council or of a local board under paragraph 4, 5 or 6 of subsection (1), the advice shall be in writing.

MEMBER'S OBLIGATIONS

Member's Obligations

1. Disclosure – s. 5(1)(a):

- members must disclose any direct, indirect or deemed *pecuniary* interest prior to consideration of matter
- disclosure should include the following two components:
 - identify the type of pecuniary interest that the member has in all circumstances (direct, indirect, deemed)
 - describe sufficient facts to provide some context for the general nature of the interest at hand
- written disclosure now required

Member's Obligations

2. No Participation & No Vote – s. 5(1)(b):

- a member is obligated to not participate in the decision-making process once the member's interest has been disclosed
- a member shall not:
 - take part in discussion, or
 - vote

Member's Obligations

3. No Influence – s. 5(1)(c):

- a member declaring an interest cannot in *any way*:
 - attempt to influence voting
 - either before, during or after the meeting

Member's Obligations

4. **Exit *Closed* Meeting** – s. 5(2):

- if the conflict arises at a closed or *in-camera* meeting, a member is also required to leave the meeting
- this is good practice even if the meeting is not closed as it visibly demonstrates that the member is making no attempt to influence the discussion or the outcome of the voting

Member's Obligations

5. **File Written Statement** – s. 5.1:

- member must file a written statement of disclosure and its general nature with the clerk at the meeting at which disclosure is made

6. **No Influence on Employees** – s. 5.2:

- member cannot use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter by an officer, employee or other body

QUORUM

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Quorum

- s. 7 of MCIA – quorum deemed constituted
 - where a number of members are disabled from participating due to MCIA, “the remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two”
 - if less than 2 members, council or local board may apply to a judge for an order that council or local board may consider matter
 - judge may order that ss. 5, 5.1. and 5.2 do not apply and allow all members to vote (subject to conditions)

ALLEGED CONTRAVENTIONS

Alleged Contravention

Applicants

- s. 8(1) – an application to a judge to determine whether a council member breached the MCIA may be brought by:
 - an elector
 - a person “demonstrably acting in the public interest”
 - the original version of Bill 68 proposed to permit “any person” to bring an application - amended at Standing Committee
 - a municipal integrity commissioner

Alleged Contravention

Application Period

- s. 8(2) – an application may only be made within **six (6) weeks** after the applicant became aware of the alleged contravention
- *Hervey v. Morris* (2013), 9 M.P.L.R. (5th) 96 (Ont. S.C.J.): “reasonable subjective belief”
- *MacDonald v. Ford* (2015), 41 M.P.L.R. (5th) 175 (Ont. S.C.J.): “onus is on the applicant to establish that he or she satisfies this criterion for an application”

Alleged Contravention

Ultimate Limitation Period

- s. 8(6) – no application may be made after the **6th year** anniversary of the alleged contravention no matter when the applicant acquired a “reasonable subjective belief” of a possible contravention
 - *MacDonald v. Ford* (2015), 41 M.P.L.R. (5th) 175 (Ont. S.C.J.) - “genuine conventional limitation period” which sets out an “absolute limitation period”

Alleged Contravention

Election Blackout Period

- s. 8(5) – an Integrity Commissioner cannot bring an application to a judge during an election period (between nomination day and voting day)
 - added to Bill 68 by Standing Committee
 - preclusion does not apply to an elector or to a “person demonstrably acting in the public interest”
 - Integrity Commissioner must terminate inquiry if not completed before nomination day (but inquiry can be revived if the applicant or member requests – although ultimate decision is that of Integrity Commissioner)

Alleged Contravention

Inquiry by Integrity Commissioner

- s. 223.4.1 of *Municipal Act, 2001*: an application may be made to an Integrity Commissioner to conduct an inquiry as to whether there has been a contravention of ss. 5, 5.1 or 5.2 of the MCIA
 - applicant = an elector or a person demonstrably acting in the public interest
 - inquiry must be completed within 180 days
 - upon completion of the inquiry, Integrity Commissioner *may* apply to a judge under s. 8 of MCIA
 - municipality is responsible for costs of the application [s. 223.4.1(18)]

PENALTIES FOR CONTRAVENTION

Penalties for Contravention

- s. 9(1) of MCIA:
 - expanded range of penalties for contravention of MCIA
 - *any or all* of the following may be imposed:
 - 1. reprimand
 - 2. suspension of remuneration to member for up to 90 days
 - 3. **removal** from office
 - 4. **disqualification** for up to seven years
 - 5. restitution of any personal financial gain

Considerations re Penalties

- in exercising his or her discretion to impose a penalty, the judge may consider under s. 9(2) among other matters, whether the member:
 - (a) took reasonable measures to prevent the contravention
 - (b) disclosed the pecuniary interest and all relevant facts known to him or her to an integrity commissioner in a request for advice and acted in accordance with the advice, if any, provided to the member by the integrity commissioner
 - (c) committed the contravention through inadvertence or by reason of an error in judgment made in good faith

Penalties - Removal from Office

Three Recent Successful IC Applications to Court

- *Budarick v. Townships of Brudenell, Lyndoch and Raglan (Integrity Commissioner)*, 2022 ONSC 640 (Div. Ct.); affirming 2021 ONSC 7636
- *Espanola (Integrity Commissioner) v. Van Alstine*, 2022 ONSC 2881
- *Elliot Lake (Integrity Commissioner) v. Patrie*, 2023 ONSC 223

Consequence of Contravention

- s. 12 of MCIA:
 - a member's failure to comply with ss. 5, 5.1 or 5.2 does not in itself invalidate any proceedings in the matter
 - however, the proceedings are *voidable* at the instance of the municipality or of the local board
 - limitation – two years from the date of the passing of the by-law or resolution authorizing the matter
 - proceedings will *not* be voided if to do so would adversely affect the rights of any person acquired under or by virtue of the proceedings who acted in good faith and without actual notice of the failure to comply with ss. 5, 5.1 or 5.2

APPEALS

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Appeals

- s. 11 of MClA contains a narrow as-of-right appeal to the Ontario Divisional Court from an *order* under s. 9:

11 (1) An appeal lies from **any order** made under s. 9 to the Divisional Court in accordance with the rules of court.

(2) The Divisional Court may give any judgment that ought to have been pronounced, in which case **its decision is final**, or the Divisional Court may grant a new trial for the purpose of taking evidence or additional evidence and may remit the case to the trial judge or another judge and, subject to any directions of the Divisional Court, the case shall be proceeded with as if there had been no appeal.

CONCLUSIONS

Conclusions

Greene v. Borins
(1985), 28 M.P.L.R. 251 (Ont. Div. Ct.)

“As has been previously said by this Court, each conflict of interest case must largely **stand on its own facts.**”

Conclusions

- a conflict of interest under the MCI A is not nearly as broad as general public likely thinks it is
- *pecuniary* (i.e. financial) interest is key
- positive personal duty on members to declare a pecuniary interest and then recuse themselves from involvement
- large number of exemptions: s. 4 and s. 5(2.1)
- significant sanctions (including loss of office)
- saving provisions for taking reasonable steps to prevent contravention; for following written advice of IC; for acting inadvertently or by a good faith error in judgment
- abundant and, at times, contradictory judicial decisions

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