

# **The *Municipal Conflict of Interest Act*: Considerations for Councillors<sup>1</sup>**

**By: Stephen J. D'Agostino<sup>2</sup>**

## **1. GENERAL FRAMEWORK**

The *Municipal Conflict of Interest Act*<sup>3</sup> (“Act”) places a significant burden and risk upon local representatives. The standard of care in the Act is greater than that placed on elected representatives at the federal and provincial levels. Since its original proclamation in 1972, the Act has been tested in the Courts on numerous occasions. Often, the context for the dispute involves circumstances outside of the Act; the remedies of the Act providing a convenient arsenal for strategic advantage. The purpose of this review is to provide councillors with a basic understanding of the Act, and some insight into a strategic defense.

The Act follows a simple model. Generally, if there is a “matter” before Council that touches on the councillor’s “direct or indirect pecuniary interest”, then there is a duty on the councillor to refrain from participating in the decision-making process related to the matter.<sup>4</sup> Unfortunately, when dealing with conflict matters, this simple framework has been complicated by statutory exceptions, inclusions, and judicial interpretations.

## **2. IMPORTANCE OF DOCUMENTED COMPLIANCE**

In conflict of interest cases there is a significant emphasis on paperwork. Declarations of conflict are recorded by the Clerk. The Act permits the Court to adjudicate on conflicts of interest by way of an “Application”.<sup>5</sup> According to the

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<sup>1</sup> While the focus of this article is on councillors, the Act also applies to councillors of “local boards” as defined by the Act. Note that the definition of the local board is quite expansive and covers most municipally appointed decision makers. However, the Courts have read the definition quite narrowly.

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<sup>3</sup> *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50

<sup>4</sup> *Municipal Conflict of Interest Act*, s. 9

<sup>5</sup> *Municipal Conflict of Interest Act*, s. 9

Rules of Civil Procedure<sup>6</sup>, Applications are paper-oriented lawsuits since they anticipate that evidence to will be filed in advance by way of affidavits, and sworn cross-examinations. This process is meant to be expeditious but can in fact take several years. Normally, the Court does not hear oral evidence unless a trial has been ordered based on factual disputes that require the Court to make findings of credibility. As a result, it is only natural that conflict of interest cases will focus on “official” paper such as meeting minutes, correspondence, and staff reports. These are uncontrovertable documents that speak for themselves. As a result, good “defensive” practice means that councillors need to ensure that their compliance with the Act has been properly documented and that their efforts to comply with the Act are preserved.

Not only does documented compliance provide good evidence for the defense of a conflict action, but it serves to deter potential opponents from starting an application in the first place since they see the councillor’s good conduct on the record.

Declarations of interest generally occur at the beginning of a meeting. Once made, the declaration including the nature of the conflict is recorded by the Clerk and the councillor ceases to participate in accordance with the Act<sup>7</sup>. Since defending against allegations of conflict of interest means ensuring documented compliance, councillors must carefully scrutinize the agenda of all meetings in advance as well as those that will be missed. A careful review of agendas will permit a declaration at the correct time, and before discussion begins on an item.

The duty of the councillor is to both declare the conflict at the meeting and disclose its general nature. As a result, councillors who have declared a conflict are advised to carefully review minutes of the meetings at which they made the declaration prior to their approval. If the declaration has not been recorded, or has not been recorded properly, then it will appear to the Court that the declaration was not made in compliance with the Act.

### 3. WHO, WHAT, AND WHEN

The meetings at which a councillor must declare a conflict include regular, special, and committee meetings of the respective council or local board. Local boards are defined in the Act<sup>8</sup>. It is noteworthy that the Courts have ruled on a

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<sup>6</sup> Ontario Civil Practice 2006, Rule 14.05

<sup>7</sup> *Municipal Conflict of Interest Act*, s. 5(1)(b) and (c). As well, note s. 6 which requires that the declaration of interest including the general nature thereof be recorded by the Clerk in the minutes.

<sup>8</sup> *Municipal Conflict of Interest Act*, s. 1

number of occasions that the Act does not apply to subcommittees<sup>9</sup>. However, it is wise to do so since it is a requirement of many procedural by-laws and can be important evidence of the councillor's good intentions should there be a subsequent attack. As well, it is open to argument that participation at Committee violates the councillor's obligation not to attempt to influence Council.<sup>10</sup>

When considering whether a potential conflict exists, it must be remembered that the conflict may pertain to the councillor's spouse, same-sex partner, child, or parent and still require a declaration since their interest is deemed to be the interest of the councillor<sup>11</sup>. These family relationships are defined by the Act to include ties beyond genetic<sup>12</sup> relationships. Adopted children and a person whom a parent has demonstrated to treat as a child of their family are included. Similarly, a parent includes a person who has demonstrated an intention to treat a person as a member of his or her family notwithstanding that person is not the genetic parent of the councillor. As a result, councillors have a strategic obligation and may have a legal one to ensure that they have an understanding of the affairs of their parents, children, and partners as they are defined in the Act.

The Courts have considered pecuniary interest on a number of occasions and have determined that it means a financial interest. However, it does not matter if the effect on the councillor's interest is positive or negative as long as there is an effect.<sup>13</sup> In determining what amounts to a pecuniary interest, the Courts have looked for a connection between the matter and the individual's pecuniary interest. For example, a zoning approval including the councillor's land would directly affect the councillor's pecuniary interest.<sup>14</sup>

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<sup>9</sup> *Alcock v. McDougald* [2004] O.J. no. 4581, heard August 26, 2004 in which the Court determined that the intent of the Act is to require conflicts of interest be declared at Council meetings where binding decisions are made. Relied upon *Mangano v. Moscoe* (1991), 4 O.R. (3d) 469.

<sup>10</sup> *Municipal Conflict of Interest Act*, s. 5(c)

<sup>11</sup> *Municipal Conflict of Interest Act*, s. 3.

<sup>12</sup> *Municipal Conflict of Interest Act*, s. 1. See definition of child, parent, and spouse.

<sup>13</sup> *Re Greene and Borins* (1983) 50O.R. (2d) 513 at 522.

<sup>14</sup> *Campbell v. Dowdall* [1992] O.J. No. 1841, September 3, 1992 where the Court said, "A pecuniary interest is particular kind of interest. In *City of Edmonton v. Purves* (1982) 18 M.P.L.R. 221, at 232 Moshansky J. turns to the Shorter Oxford English Dictionary definition of "pecuniary" as "of, belonging to, or having relation to money". While it is difficult if not impossible to say with any certainty what monetary or money-related consequence the disposition of the top-soil removal application could save for Mr. Dowdall, nevertheless, he has a connection to the land in question and it is a money-related connection. Mr. Dowdall was, at the time the matter came before Council, agent for a principal who was trying to sell building lots. If the lot in question was sold, Mr. Dowdall or his employer would receive a direct financial benefit. I think there is a sufficient link between the "matter" and the "pecuniary interest" Mr. Dowdall had in the lot in question to conclude that he had a pecuniary interest, at least an indirect one, in the matter of permitting the owner to proceed to remove the top-soil from the building lot."

The scope of potential conflicts that must be declared is further complicated by the fact that it is not only the direct pecuniary interest but also the indirect pecuniary interest that generates a conflict. The Act specifically provides that an indirect pecuniary interest exists where the councillor (remembering that the councillor's interest includes parent, partner, and child) is a shareholder, director, or officer of a corporation, or is a member of body that has a direct pecuniary interest in the matter. As well, the Act captures as an indirect pecuniary interest a councillor who is a partner of a person or is in the employment of a person or body that has a direct pecuniary interest in the matter.<sup>15</sup>

As can be seen from the breadth of potential conflicts, and the inclusion of the interest of individuals with whom the councillor might not have daily contact, it is important that councillors undertake documented efforts to inform themselves of potential pecuniary interests of all relevant persons or bodies. Although this could be a daunting task, one approach might be to document every person, body, etc. who could potentially create a conflict for the councillor, and then write to each to advise them of the councillor's obligations under the Act. The letter would also request that they advise the councillor whenever they are aware of a potential pecuniary interest before council. Such a letter serves several purposes including providing the councillor with advance warning of potential conflicts so that the Act can be complied with, or evidence of the councillor's attempt to be informed should a conflict arise through inadvertence. The Act provides significant benefits to councillors who are found to have contravened the Act but who have tried in good faith to comply.<sup>16</sup>

The Act contains provisions that clarify the scope of a pecuniary interest by excluding interests that are deemed to be insignificant. These interests include matters such as:

- a) the councillor uses a public utility service provided by the municipality or local board,
- b) the councillor has purchased a debenture of the municipality or local board, and
- c) the councillor is a director or officer of a corporation incorporated for the purpose of carrying on business of behalf of the municipality or local board.

Regard should be had to section 4 of the Act for a full list of exemptions.

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<sup>15</sup> *Municipal Conflict of Interest Act*, s. 2

<sup>16</sup> See *Municipal Conflict of Interest Act*, s. 10(2) which permits a Judge to find that a conflict was made through inadvertence or error in judgment; thus, not subjecting the councillor to having his or her seat declared vacant.

#### 4. ASK THE COURT IN ADVANCE

Given the complexity of conflict of interest, the extreme breadth of matters that may be the subject of the Act, and the consequences of being wrong, councillors may wish to ask the Court in advance whether or not they have a conflict.

Rule 14.05 of the Rules of Civil Procedure provides a mechanism that permits the Court to be asked for its opinion concerning the interpretation of the Act to a given set of facts. As is the case with all Applications, the facts cannot be controversial. This approach has been used on at least one occasion in order to test whether a conflict exists without risk of losing the councillor's seat.<sup>17</sup> In order to be practically useful, it is important that the Court be told all the facts in order to ensure that the councillor's actions are not subsequently challenged based upon some additional factual circumstance.

#### 5. STEPS TO DOCUMENTED COMPLIANCE

Upon discovering a conflict, the Act directs the councillor to disclose the interest and the general nature of it to the meeting prior to its consideration at the meeting. Since most procedural by-laws provide for declarations of interest as an agenda item, that is the appropriate time to make a declaration. Councillors who arrive late may declare a conflict at any time prior to the matter being considered. From a defensive point of view, declarations recorded outside of their normal agenda sequence are a potential source of difficulties as these declarations run the risk of being overlooked during subsequent litigation. Councillors should be vigilant to ensure that their declarations, including the nature of the declaration are properly recorded in the proper location of the minutes when approving the minutes of meetings since these minutes provide the councillor's best defense.

The Act imposes upon a councillor who has declared a conflict the obligation not to take part in discussions or votes concerning any question in respect of the matter.<sup>18</sup> As a result, councillors are well advised to abstain from any related motion, even motions to adjourn a matter. In addition, councillors are directed not to attempt "in any way whether before, during, or after the meeting" to influence the voting on any question related to a matter. As a result, we believe it to be prudent that councillors declare a conflict during subcommittee meetings and refrain from participating in the item even though subcommittees are not technically subject to the Act. That way, the councillor can create a record that the councillor's obligations under the Act were respected at an early date. As

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<sup>17</sup> *Halton Hills v. Equity Waste Management* [1995] O.J. No. 3787, November 27, 1995

<sup>18</sup> *Municipal Conflict of Interest Act*, s. 5

well, being seen to declare undermines criticism that the councillor attempted to influence Council. It is equally important to refrain from entering into informal discussions with other councillors.

Additional requirements are imposed for in-camera or closed meetings.<sup>19</sup> The Act requires that when a meeting is not open to the public, the councillor is required to leave the meeting during which the matter is under consideration in addition to the councillor's other responsibilities under the Act. From a strategic point of view, the councillor ought to always leave the meeting so as to avoid any criticism that they attempted to influence the outcome of discussion or of vote. Where a councillor leaves the room, the departure ought to be reflected in the meeting minutes.

A councillor that remains in the room after declaring runs the risk of being drawn into a conflict of interest. For example, the Court considered a case involving a councillor who declared a conflict and was then asked a question in Council about the contract that was the subject of the conflict. The councillor answered the question and was then found to be in conflict.<sup>20</sup> The Court has also found that where a councillor declares a conflict, but then subsequently utters the words "that's not right" then the councillor would be found to have attempted to influence the outcome of a vote and was therefore in conflict.<sup>21</sup>

Being absent from the entire meeting at which a matter giving rise to a conflict is being considered does not relieve the councillor of the obligation to disclose. The Act provides that where a councillor is absent from the meeting, the councillor is required to disclose the interest and otherwise comply at the first meeting attended by the councillor after the meeting giving rise to the conflict.

While not appearing expressly in the Act, it is important to note that a councillor must declare a conflict at each meeting at which the matter is being considered. It is not sufficient to rely on one declaration to cover a number of meetings.<sup>22</sup>

## 6. POWER OF THE COURT

The consequences of non-compliance with the Act can be severe. Where a Judge determines that there has been a contravention of the councillor's duty, the Judge is required to declare the councillor's seat vacant and may disqualify the councillor from running for re-election during a period of not more than 7 years.

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<sup>19</sup> *Municipal Conflict of Interest Act*, s. 5(2)

<sup>20</sup> *Verdun v. Rupnow* 30 O.R. (2d) 675, where the Court determined that "receiving communications was not a conflict of interest, however, answering a question was."

<sup>21</sup> *Forbes v. Trask* [1991] O.J. No. 311, February 21, 1991

<sup>22</sup> *Municipal Conflict of Interest Act*, s. 5(2)

In addition, where the Court determines that there has been personal financial gain, it may require the councillor to make restitution to any party suffering the loss or to the municipality. It is only if the Court determines that the contravention was committed through inadvertence, or by reason of an error in judgment that the Court is relieved of the requirement to declare the seat vacant. Documented attempts to proactively comply with the Act would be a persuasive argument to demonstrate inadvertence. Proving inadvertence or an error of judgment depends in part upon demonstrating the councillor's good faith.

Unlike many Court matters, the Act provides for some finality. Only Orders that have the result of vacating the councillor's seat, disqualifying the councillor from future election, or restitution may be appealed to Divisional Court.<sup>23</sup> In other words, if a councillor is successful at first instance, the matter is over.

## 7. INSURANCE

Many municipalities and local boards protect their councillors through policies of insurance or by-laws which have the effect of indemnifying the councillor for the cost and expenses incurred as a result of proceedings under the Act. It is important to note that the Act precludes indemnification or insurance where the councillor has been found to have contravened the duties set out in section 5 of the Act.<sup>24</sup> Insurance and indemnification by-laws are an important consideration given the significant costs that can arise in a Court matter.

## CONCLUSION: SEVEN THINGS YOU CAN DO

The *Municipal Conflict of Interest Act* is clear and harsh. From a public policy point of view, it must be since it controls the actions of elected representatives who hold the public trust. However, such legislation is open to strategic misuse. As a result, councillors must be mindful of the Act's requirements at all times and take steps to protect themselves. This article has outlined a number of techniques including:

- 1) The importance of proactively determining when the councillor and the councillor's family have an interest which would bring the councillor into conflict, and documenting those efforts using a due diligence letter;
- 2) Careful review of agendas to ensure that the councillor is aware of matters before they come up;

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<sup>23</sup> *Municipal Conflict of Interest Act*, s. 11

<sup>24</sup> *Municipal Conflict of Interest Act*, s. 14

- 3) The use of Rule 14 of the Rules of Civil Procedure to seek the Courts interpretation in advance where appropriate;
- 4) Careful review of minutes to ensure a declaration of conflict, including the nature of the conflict has been properly documented in the proper location in the minutes;
- 5) Making a declaration at Subcommittee even if the Act does not apply;
- 6) Always leave the meeting room after declaring a conflict of interest and ensure the departure is documented in the minutes; and
- 7) Ensure that there is insurance and an indemnity by-law in place to reimburse the councillor.

Even the most careful councillor is likely to face allegations of conflict over time. However, if the councillor undertakes a program of due diligence and documented compliance, the chances of success in Court will be significantly improved.