

Municipal Conflict of Interest of Act: considerations for trustees

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What this presentation covers

- **Strategies** for avoiding conflict of interest
- **How** to ensure your declaration is properly documented
- **What** to do if you find you have a conflict
- **How** do you determine if you have a conflict in a tough case

The framework of the Act

Matter Before Board,

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Direct or Indirect Pecuniary Interest

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Duty of Member – Section 5 of Act

Extract: s. 5 Duty of Member

Duty of Member

When present at meeting at which matter considered

5. (1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, in any matter and is present at a meeting of the council or local board at which the matter is the subject of consideration, the member,
- (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof;
 - (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
 - (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.

Where member to leave closed meeting

- (2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration.

When absent from meeting at which matter considered

- (3) Where the interest of a member has not been disclosed as required by subsection (1) by reason of the member's absence from the meeting referred to therein, the member shall disclose the interest and otherwise comply with subsection (1) at the first meeting of the council or local board, as the case may be, attended by the member after the meeting referred to in subsection (1). R.S.O. 1990, c. M.50, s. 5.

Extract: Interest of persons deemed that of member

3. For the purposes of this Act, the pecuniary interest, direct or indirect, of a parent or the spouse or any child of the member shall, if known to the member, be deemed to be also the pecuniary interest of the member. R.S.O. 1990, c. M.50, s. 3; 1999, c. 6, s. 41 (2); 2005, c. 5, s. 45 (3).

Extract: Indirect pecuniary interest

2. For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

(a) the member or his or her nominee,

(i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,

(ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or

(iii) is a member of a body,

that has a pecuniary interest in the matter; or

(b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter.

R.S.O. 1990, c. M.50, s. 2.

Extract: Who may apply to judge

9. (1) Subject to subsection (3), an elector may, within six weeks after the fact comes to his or her knowledge that a member may have contravened subsection 5 (1), (2) or (3), apply to the judge for a determination of the question of whether the member has contravened subsection 5 (1), (2) or (3).

The framework of a good defense

- Documented compliance

Why focus on documented compliance

- The Act does
- Contemplates declarations being recorded

Extract: Disclosure to be recorded in minutes

6. (1) Every declaration of interest and the general nature thereof made under section 5 shall, where the meeting is open to the public, be recorded in the minutes of the meeting by the clerk of the municipality or secretary of the committee or local board, as the case may be.

Idem

(2) Every declaration of interest made under section 5, but not the general nature of that interest, shall, where the meeting is not open to the public, be recorded in the minutes of the next meeting that is open to the public.

Why focus on documented compliance

- Legal challenges are made by way of Court Application
- Court Applications by their nature are paper based
- Evidence is restricted to affidavits, transcripts and documents

What does it mean

- Documented compliance means more than just following the Act
- It means taking steps to ensure that your efforts to comply are recorded accurately in minutes
- It means recording and preserving due diligence efforts

Documenting compliance with s. 5

- If present at open meeting, prior to consideration of the matter, disclose the interest and general nature thereof
 - don't talk or vote
 - don't attempt to influence voting
 - leave the room so you appear to be complying
- Ensure the minutes reflect the declaration and the fact you left the room.

Documenting compliance with s. 5

- If present at closed meeting, leave the room
- Then make sure the minutes reflect the declaration as well as your departure

Documenting compliance with s. 5

- If absent from meeting, disclose interest at next meeting
- Ensure the minutes document the declaration

Be Pro-active

make sure you know everything

- Write to everyone whose interest is deemed to be yours
 - Put them on notice of your obligations under the Act
 - Ask them to put you on notice of matters that will be going to the Board
 - Remember that it could be as simple as being a sub trade to a tender
 - Could be an bill that needs Board approval

Be Pro-active declare early and often

- Make a declaration at Committee even if the Act might not apply
- Make sure it is documented
- Declare at each and every meeting the item comes up

Be Pro-active foresight and hindsight

- Carefully review agendas to ensure that you are aware of matters before they come up
- Careful review of minutes to ensure a declaration of conflict, including the nature of the conflict have been properly documented in the proper location in the minutes

Be Pro-active be sure!

- When in doubt get a legal opinion
- When your lawyer is in doubt they can use Rule 14 to ask the Court
- Remember, there is no legal penalty for declaring a conflict of interest, but it could save your seat!

Other Important Provisions

- Power of the court
- Inadvertence or error
- Closed meetings
- Duty when absent from meeting
- Limitation on insurance

Extract: Power of judge

- 10.** (1) Subject to subsection (2), where the judge determines that a member or a former member while he or she was a member has contravened subsection 5 (1), (2) or (3), the judge,
- (a) shall, in the case of a member, declare the seat of the member vacant; and
 - (b) may disqualify the member or former member from being a member during a period thereafter of not more than seven years; and
 - (c) may, where the contravention has resulted in personal financial gain, require the member or former member to make restitution to the party suffering the loss, or, where such party is not readily ascertainable, to the municipality or local board of which he or she is a member or former member.

Extract: Inadvertence or error

(2) Where the 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

Extract: Where member to leave closed meeting

(2) Where the meeting referred to in subsection (1) is not open to the public, in addition to complying with the requirements of that subsection, the member shall forthwith leave the meeting or the part of the meeting during which the matter is under consideration.

When absent from meeting at which matter considered

(3) Where the interest of a member has not been disclosed as required by subsection (1) by reason of the member's absence from the meeting referred to therein, the member shall disclose the interest and otherwise comply with subsection (1) at the first meeting of the council or local board, as the case may be, attended by the member after the meeting referred to in subsection (1).

Extract: Insurance

14. (1) Despite section 279 of the *Municipal Act, 2001*, the council of every municipality may at any time pass by-laws,
- (a) for contracting for insurance;
 - (b) despite the *Insurance Act*, to enable the municipality to act as an insurer; and
 - (c) for exchanging with other municipalities in Ontario reciprocal contracts of indemnity or inter-insurance in accordance with Part XIII of the *Insurance Act*,

to protect a member of the council or of any local board thereof who has been found not to have contravened section 5, against any costs or expenses incurred by the member as a result of a proceeding brought under this Act, and for paying on behalf of or reimbursing the member for any such costs or expenses. R.S.O. 1990, c. M.50, s. 14 (1); 2002, c. 17, Sched. F, Table.