A Primer on Municipal Conflict of Interest

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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• Ontario’s Municipal Conflict of Interest Act (“MCIA”) was originally enacted in 1972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

• there are no regulations under the MCIA

• 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)
Other Jurisdictions

• Ontario’s MCIA is typical of conflict of interest legislation in other Canadian jurisdictions
  • Alberta – Part 5 of Municipal Government Act
  • B.C. – Part 4, Division 6 of Community Charter
  • Manitoba – Municipal Council Conflict of Interest Act
  • Saskatchewan – Municipalities Act and Cities Act
  • Nova Scotia – Municipal Conflict of Interest Act
  • New Brunswick – Section 207 of Municipalities Act
  • P.E.I. – Section 23 of Municipalities Act
  • Nfld & Labrador – Section 207 of Municipalities Act, 1999
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.”
Purpose

• MCIA sets out a framework for when participation in local government decision-making is appropriate

• legislative goal is to protect the public interest by prohibiting any member from having any “involvement” in any matter being considered by council or local board if the member has a pecuniary interest in the matter

• the 19th century principle of disqualification replaced by the dual concepts of disclosure and abstention by members on a case-by-case basis

• obligation on member to comply with MCIA
Declaration of Office

• an elected, acclaimed or appointed member of council must declare an oath of office under s. 232 of the Municipal Act, 2001

• in order to take their seat at council, a member must solemnly promise and declare four oaths including:

  3. I will disclose any pecuniary interest, direct or indirect, in accordance with the Municipal Conflict of Interest Act.

• obligation to abide by the MCIA is personal to the member
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
  
  - no definition of “direct” or “indirect” in the MCIA
Pecuniary Interest

• pecuniary interest only

• pecuniary = financial

  • a pecuniary interest is one “concerning or consisting of money . . . an interest that has a monetary or financial value”: Mondoux v. Tuchenhagen (2010), 79 M.P.L.R. (4th) 1 (Ont. S.C.J.)

• direct, indirect or deemed

• positive or negative
Direct Interest

- a *direct* pecuniary interest is one that expressly or unequivocally has an impact on the individual member’s finances, economic prospects or property value

- impact may be positive (i.e. the member stands to **gain** financial) or negative (i.e. the member is able to avoid a **loss**)

Indirect Interest

- s. 2 of MCIA - where a member (or their “nominee”):
  - 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 MCIA:

- 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
Duty of Member

- 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
Duty of Member

• duty under s. 5 of MCIA arises in respect of “any matter”

• “matter” = something upon which there can be meaningful discussion or debate and the prospect of some decision being made

• “matter” = a real matter; a legal, lawful or valid matter
Exceptions

nine *specific* exemptions and two *general* exemptions from the requirements in s. 5 are set out in s. 4 of MCIA:

(a) as user of public utility;

(b) entitlement to any service, subsidy, loan or benefit common to other persons;

(c) purchase or ownership of debenture;

(d) 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 to fill vacancy;

(h) director or senior officer of municipal corporation;

(i) regarding allowance, remuneration, salary or benefit for being a member;

(j) interest in common with electors generally;

(k) remote or insignificant interest.
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.


  “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.”
Remote or Insignificant Interest

• the question of remoteness or insignificance does not relate to the quantum at issue

• the fact that the value of the pecuniary interest is particularly small does not relieve a member from compliance with the MCIA: *D’Arcey v. Mino* (1991), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.)

• the question relates to the *importance* of the matter to the member: *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1 (Ont. S.C.J.)
Duty of Disclosure

- 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

- disclosure must be precise

- disclosure must be made even if member is voting against their own interest

- 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)
Requirements (I)

Four 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
2. Non-Participation – 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
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
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
Record of Disclosure

• s. 6 of MCIA:

  • clerk or board secretary is required to record in minutes of the meeting (both open and closed)

    • the declaration of the conflict

    • that the member left the meeting

  • if member is absent from meeting, member must declare conflict at next attended meeting
Quorum

- s. 7 of MCIA – quorum deemed constituted
  - where 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
Assessment Analysis

Do I have a direct, indirect or deemed pecuniary interest in a matter being considered at a meeting?

No: Consider the Matter

Yes:

Are there any exemptions in section 4 that may apply?

Yes: Consider the matter.

No:

Before the meeting: Do not attempt, in any way, to influence the voting

At the meeting: Prior to consideration of the matter, disclose the pecuniary interest and the general nature thereof

After the meeting: Do not attempt, in any way, to influence the vote

Alleged Contravention

- s. 9(1) - an elector must bring an application before a judge of the Superior Court of Justice within 6 weeks of the conflict having come into his or her knowledge:
  - onus is on the elector bringing application to explain when he or she acquired knowledge of the alleged contravention
  - burden shifts to respondent member to prove that elector had actual, or ought to have had, knowledge prior to 6 weeks
  - s. 9(1) – not a genuine limitation period:
    - temporal condition precedent or qualifying criterion: *MacDonald v. Ford* (2015), 41 M.P.L.R. (5th) 175
Alleged Contravention

- enforcement is only by *private* application by an elector
  - no ability for a municipal council to bring an application against a member or to fund the application of a private elector
- action can be brought against current or former members
- ultimate limitation period of *six (6) years* from date of contravention to bring an application – s. 9(3)
Prospective Relief

- no express provision in MCIA that allows a member to bring an application for a declaration that they have no pecuniary interest

- the courts have entertained such applications under the auspices of the *Rules of Civil Procedure*:
  - *Lastman v. Ontario (A.G.)*
  - *Craig v. Ontario (A.G.)*
  - *Ferri v. Ontario (A.G.)*

- all three involved deemed pecuniary interests of family members and the remote and insignificant exemption
Penalties for Contravention

• s. 10(1) of the MCIA provides that a member (or former member) who has been found to have contravened the statute may be subject to the following sanctions:
  • seat vacated (automatic if breach of MCIA is found to have occurred without excuse)
  • disqualification from holding office as a councillor for up to 7 years
  • restitution of financial gain, if applicable
  • a member cannot be suspended
Saving Provisions

- s. 10(2) of MCIA - a breach of the statute by a member may be excused if the contravention is a result of:
  - “inadvertence” or
  - “error in judgment”

- saving provisions will apply so that:
  - member’s seat will not be vacated
  - member or former member will not be disqualified
  - restitution may be ordered if gain resulted to member or former member from contravention
s. 11 of MCIA contains a narrow as-of-right appeal to the Ontario Divisional Court from an order under s. 10:

11 (1) An appeal lies from any order made under section 10 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.
Consequence of Contravention

- s. 12 of MCIA:
  - a failure to comply with ss. 5(1), (2) or (3) does *not* of 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 (2) 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 s. 5
A Complete Code?

• ss. 13 and 15 of the MCIA:

13. Proceedings to declare a seat vacant or to disqualify a member or former member for conflict of interest, or to require a member or former member to make restitution where a contravention has resulted in personal financial gain, shall be had and taken only under this Act.

15. In the event of conflict between any provision of this Act and any provision of any general or special Act, the provision of this Act prevails.
A Complete Code?

- introduction of First Reading version of predecessor of *Municipal Conflict of Interest Act, 1972*:

  “This is an important piece of legislation which embodies a new code to govern the entire field relating to conflicts of interest as they may arise in relation to members of municipal council and local boards.”


  “The *Municipal Conflict of Interest Act* is a specialized statute and comprises a complete code dealing with conflicts of interest.”
Mississauga Judicial Inquiry

- judicial inquiry requested by Mississauga City Council pursuant to s. 274 of Municipal Act, 2001
- two broad areas to be investigated:
  - Enersource Hydro Mississauga shareholder agreement
  - conflict of interest involving Mayor’s son and failed attempt of his company to acquire 8.5 acres of land in Mississauga city centre in order to develop a hotel, convention centre and condominium development
- *Updating the Ethical Infrastructure* was released on October 4, 2011
Mississauga Judicial Inquiry

• Justice Cunningham’s report:
  • “…the *Municipal Conflict of Interest Act* (MCIA) does **not** constitute a complete codification of the law governing conflicts of interest for members of municipal council. The common law also applies. The MCIA is restricted to pecuniary interests of members of council in the deliberative and legislative contexts but the common law is much broader and recognizes conflicts of interest involving non-pecuniary interests.”

  • Mayor McCallion did not breach her statutory duties under MCIA but she did have a **real personal conflict of interest** and breached her **common law obligations**
Justice Cunningham’s “Ruling on Conflict of Interest” (July 8, 2010) – Appendix J:

“Councillors (and staff) are not to use their office to promote private interests, whether their own or those of relatives or friends. They must be unbiased in the exercise of their duties. That is not only the common law, but the common sense standard by which the conduct of municipal representatives ought to be judged.”
Saskatchewan Inquiry/Investigation

• judicial inquiry/investigation made pursuant to ss. 396 and 397 of the Saskatchewan Municipalities Act

• did the reeve of Rural Municipality of Sherwood No. 159 act in a conflict of interest in advancing a high-density residential project where he and his wife owned 467 acres and his cousin owned 107 acres even though he complied fully with the pecuniary interest declaration and recusal requirements of the Municipalities Act?

• Final Report of the Inspection and Inquiry into the R.M. of Sherwood No. 159, Vol. 1 was released on February 4, 2015
Saskatchewan Inquiry/Investigation

- Barclay J. determined that Reeve Keith Eberle behaved unethically in promoting the development of the community where he and his family had substantial landholdings.
- The reeve breached his common law conflict of interest obligations which are much more expansive than the statutory prohibitions.
- Barclay J. relied upon and quoted extensively from Justice Cunningham’s Judicial Inquiry Report in Mississauga.
- Reeve Eberle was removed from office and replaced by the provincial government.
Conclusions

• a conflict of interest under the MCIA 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

• large number of exemptions

• significant sanctions (including loss of office)

• saving provisions for inadvertence and error in judgment

• abundant & at times, contradictory judicial decisions

• be mindful of *common law* conflict-of-interest obligations
This presentation may contain general comments on legal issues of concern to organizations and individuals. These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.

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