

AIRD & BERLIS LLP
Barristers and Solicitors

***Municipal Conflict
of Interest Act***

Leo F. Longo

Town of Collingwood

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Brockfield Place, 181 Bay Street, Suite 1800, Toronto, ON M5L 2T9

Background

- *Municipal Conflict of Interest Act* (“MCIA”) was originally enacted in 1972
- legislation has received substantial judicial consideration
- no regulations under the MCIA

Purpose

- MCIA sets out a framework for when participation in local government decision-making is appropriate
- legislative goal is to protect the public interest
- intent – to prohibit any member of municipal council or a local board (including school board) having a pecuniary interest in a matter being considered by council from having any “involvement” in the matter

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

- pecuniary interest only
- pecuniary = financial
 - “consisting, exacting or belonging to money, finances or assets”
- direct, indirect or deemed
- positive or negative
- captures unexpected scenarios

Direct Interest

- a *direct* pecuniary interest is one that expressly or unequivocally has an impact on a member's finances or property value
 - member has the interest personally
- impact may be positive (gain) or negative (loss)

Indirect Interest

- defined in s. 2 of MCI A - where a member is or has:
 - director or senior officer of a public or private company
 - shareholder of a private company
 - controlling interest in a public company (>10%)
 - “member of a body” [“body” is not a defined term]
 - partner
 - employee

Deemed Interest

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

is deemed to be the member's own interest

NOTE: siblings not mentioned!

MCIA Exceptions

- nine specific exemptions and two general exemptions 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;

MCIA Exceptions (cont.)

- 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.

Duty of Disclosure - Timing

- duty arises *at the meeting* at which the pecuniary interest is to be discussed
- member must disclose:
 - an interest exists; and
 - the general nature of the 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:

- members must disclose any direct, indirect or deemed *pecuniary* interest prior to consideration of matter
- pecuniary equate to a financial or economic interest

Requirements (II)

2. Non-Participation:

- a member is obligated to *not* participate in the decision-making process once the member's interest has been disclosed

- a member shall not:
 - a) take part in discussion, or
 - b) vote

Requirements (III)

3. No Influence:

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

Requirements (IV)

4. Exit *Closed* Meeting:

- if the conflict arises at a closed session 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

- clerk or board secretary is required to record in minutes of the meeting (both open and closed):
 - all declarations of interest made;
 - the general nature of the interest; and
 - that the member left the meeting [if applicable].
- if member is absent from meeting, member must declare interest at next attended meeting

How and When to Disclose

- must disclose at any regular or special meetings
- generally at the start of any meeting, not just the first meeting
- on any related motions

Alleged Contravention

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

Penalties for Contravention

- a member who has been found to have contravened the MCIA may be subject to the following sanctions:
 - seat vacated (automatic if breach of MCIA is found to have occurred)
 - disqualification from holding office as a council member for up to 7 years
 - restitution of financial gain, if applicable
- a member cannot be suspended

Saving Provisions

- s. 10 of MClA contains provisions that excuse a contravention of the statute by a member if the contravention is due to:
 - “inadvertence” or
 - “an error in judgment”
- saving provisions will apply so that:
 - member’s seat will not be vacated
 - member will not be disqualified
 - restitution may be ordered if gain resulted from contravention

Conclusions

- conflict of interest in MCIA is not nearly as broad as the general public likely thinks it is
- *pecuniary* interest is key
- positive duty on members to declare interest
- large number of exemptions
- significant sanctions (including loss of office)
- saving provisions for inadvertence and error in judgment
- abundant & at times contradictory caselaw

Some Tips (I)

Demonstrate MCIA compliance and good faith by:

- being informed of the affairs of your:

- spouse
- children
- parents
- corporations
- partners
- employers

to the best extent possible to identify any pecuniary interests

- reading the MCIA

Some Tips (II)

- as Town counsel, A&B is not able to provide MCIA advice to individual council members
- best to line up a lawyer now who is willing to be “on call” to provide you with counsel respecting any MCIA question that might arise during your 4 year term
- get written evidence of any provided legal advice/opinion
- read your meeting agendas in advance of meeting
- nothing “shameful” or “demeaning” about declaring an interest