
ADVISORY BULLETIN

REGARDING CONFLICT OF INTEREST

Bruce P. Elman LL.D.
Integrity Commissioner
15 March 2021

PURPOSE OF THE BULLETIN

- [1] This Bulletin is intended to assist Council Members (“Members”) in understanding their obligations regarding conflict of interest under the recently adopted **Code of Conduct – Council, Committees and Local Boards (2020)** (hereinafter “**Code of Conduct**”) the Town’s *Procedural By-Law*, and the *Municipal Conflict of Interest Act* (hereinafter “*MCIA*”).
- [2] The Integrity Commissioner is a confidential resource available for clarification and advice on conflicts of interest. Pursuant to sections 6.2.2 and 6.2.3 of the **Code of Conduct**, the Integrity Commissioner may provide oral and written advice to Members concerning the interpretation of, and compliance with, the **Code of Conduct** and the *MCIA* as well as other ethical questions facing Members.

THE CODE OF CONDUCT

- [3] Members must always adhere to the entire **Code of Conduct**. However, the following part is particularly relevant to the rules surrounding conflict of interest:
- a. Section 7.5 (Conflict of Interest)

PROCEDURAL BY-LAW

- [4] Members must always adhere to the entire *Procedural By-Law* (By-law No. 2014-91). However, the following parts are particularly relevant to the rules surrounding conflict of interest:
- a. Section 1.0 (Definitions)
 - b. Section 5.0 (Agendas and Supporting Materials)
 - c. Section 9.0 (Disclosure of Pecuniary Interest)

MUNICIPAL CONFLICT OF INTEREST ACT

- [5] Members must always adhere to the entire *MCIA*. Members should read and become familiar with the provisions of the *MCIA* in their entirety in order to better understand issues surrounding conflict of interest.

RELEVANT LEGISLATION & POLICIES

- [6] In addition to the **Code of Conduct**, the *Town's Procedural By-law*, and the *MCIA*, the Members are governed by the *Municipal Act 2001*, the *Municipal Elections Act*, the *Municipal Freedom of Information and Protection of Privacy Act*, and the *Criminal Code of Canada*.

CONFLICT OF INTEREST

- [7] Generally, a conflict of interest exists when an individual is, or could be, influenced, or appears to be influenced by a pecuniary (financial) interest when carrying out their public duty (See **Code of Conduct**, section 7.5.3).
- [8] The general guidelines on Conflict of Interest are found in section 7.5.1 of the **Code of Conduct**. It states that when a Member has a direct or indirect pecuniary interest in a matter, the Member "shall not use his or her office in any way to attempt to influence any decision or recommendation that results from consideration of the matter."
- [9] The *MCIA* endorses the following principles in relation to the duties of Members of Councils, Local Boards, and Committees:
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. (See *MCIA*, section 1.1).
- [10] Pecuniary interests can be direct or indirect (See *MCIA*, section 5(1); *Procedural By-Law*, section 9.1; and **Code of Conduct**, section 7.5.1).

- [11] Indirect pecuniary interests can occur in three instances:
- a. If 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 (See *MCIA*, section 2(a)(i));
 - ii. Has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public (See *MCIA*, section 2(a)(ii)); or
 - iii. Is a Member of a body that has a pecuniary interest in the matter (See *MCIA*, section 2(a)(iii));
 - b. The Member is a partner of a person or is in the employment of a person that has a pecuniary interest in the matter (See *MCIA*, section 2(b)); or
 - c. The Member has an interest via their family, if a parent, spouse or child of the Member has a pecuniary interest which is known to the Member, (See *MCIA*, section 3).
- [12] There are a number of very specific exceptions in section 4 of the *MCIA* which will permit a Member to participate in decisions even though he or she may have a pecuniary interest. In these instances, the Member is not deemed to have a pecuniary interest. Before determining whether any of these exceptions apply, the Member should consult the Integrity Commissioner.
- [13] There are two exceptions of which Members should take note. A Member may be deemed not to have a pecuniary interest in these instances:
- a. by reason of the Member having a pecuniary interest which is an interest in common with electors generally (See *MCIA*, section 4(j)) or
 - b. by reason only of an interest of the Member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Member (See *MCIA*, section 4(k)).
- [14] The first of these exceptions – the Member having a pecuniary interest which is an interest in common with electors generally – is relatively straightforward. Here, the Member needs to simply show that his or her pecuniary interest is no different than other electors – not necessarily all electors but a significant number of them. For example, a Member is not disqualified from voting merely because he or she possesses an interest in common with other ratepayers in the area. (See *Gammie v. Turner* 2013 ONSC 4563 (S.C.J.)).

- [15] The second exception – an interest of the Member is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Member – is more complicated. For an interest to be remote or insignificant, 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 process.
- [16] The question of remoteness or insignificance does not relate to the amount of money at issue; the question relates to the importance of the matter to the Member. (See *D’Arcey v. Mino* (1991), 4 M.P.L.R. (2d) 26 (Ont. Gen. Div.) and *Magder v. Ford* (2012), 5 M.P.L.R. (5th) 1 (Ont. S.C.J.).
- [17] The test for this exception (section 4(k) and for the exception under section 4(j)) was provided in *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.”
- [18] Both of these exemptions involve circumstances in which a reasonable person, fully informed of the facts, viewing the matter realistically and practically, and having given the matter thorough consideration, would conclude that the pecuniary interest would not have affected the Member’s ability to make an impartial decision. (See *Gammie v. Turner* as noted earlier).
- [19] A further note here: A Court or an Integrity Commissioner would have to look at all of the circumstances including such factors as good faith, motive, and so forth, in making a decision on a Complaint brought against a Member.

DUTY OF MEMBER

- [20] Where a Member 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 (See *MCI*A, section 5(1)(a));
 - b. shall not take part in the discussion of, or vote on any question in respect of the matter (See *MCI*A, section 5(1)(b)); and

c. shall not attempt in any way whether before, during, or after the meeting to influence the voting on any such question (See *MCIA*, section 5(1)(c)).

[21] Where the above meeting is not open to the public, in addition to complying with the requirements above, the Member shall leave the meeting or the part of the meeting during which the matter is under consideration (See *MCIA*, section 5(2)).

[22] Absence from a public meeting where the matter is discussed does not relieve a Member from disclosing the interest. If absent from the meeting, the Member is required to disclose the pecuniary interest at the first meeting attended by the Member, after the meeting in which the matter is discussed (See **Code of Conduct**, section 7.5.5 and *MCIA*, section 5(3)).

[23] It is important that Members refrain from declaring a pecuniary conflict where a conflict does not exist within the terms of the *MCIA*. Some measures have been instituted in an attempt to discourage improper declarations of pecuniary interest. First, within 30 days of disclosing an interest publicly, the Member shall submit the interest in writing to the Clerk on a Pecuniary Interest Disclosure Form (See **Code of Conduct**, section 7.5.7); and, second, each municipality is required to establish and maintain a registry of conflict of interest statements by Members, which will be available for public inspection (See *MCIA*, section 6.1).

SANCTIONS

[24] Penalties for Contravention of the *MCIA* may be significant: A Member (or former Member) who has been found to have contravened the *MCIA* may have his or her seat vacated. This is automatic if breach of *MCIA* is found to have occurred without excuse. The Member can, also, be disqualified from holding office as a Councillor for up to 7 years. The Member may have to make restitution of financial gain, if applicable (See *MCIA*, section 9(1)).

[25] Under the **Code of Conduct**, the sanctions are the usual ones under section 8.1.1 of the **Code**: (i) A reprimand; and (ii) Suspension of the remuneration paid to the Member (where applicable) in respect of his or her services as a Member for a period of up to 90 days. Other actions may be taken for remedial purposes.

DEFENCES/EXCUSES UNDER THE *MCIA*

- [26] Under section 9(2) of the *MCIA*, a breach of the statute by a Member may be excused if the Member or former 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 from the Commissioner under the *Municipal Act, 2001* and acted in accordance with the advice, if any, provided to the Member by the Commissioner; or
 - c. committed the contravention through inadvertence or by reason of an error in judgment made in good faith.

These provisions may also be applied so that a Member's seat will not be vacated, and Member or former Member will not be disqualified.

ROLE OF THE INTEGRITY COMMISSIONER

- [27] Complaints may be brought to the Integrity Commissioner under **Complaint Protocol** which is **Appendix A** to the **Code of Conduct**. Further, an elector may petition the Integrity Commissioner to apply to a judge for a determination of whether a Member has breached the *MCIA*.

FURTHER INFORMATION

This Advisory Bulletin is intended to provide general information. To rely on the advice of the Integrity Commissioner with respect to specific situations, Members of Council must seek written advice consistent with the provisions of Section 6.2.2 of the **Code of Conduct**.

If you have any questions or wish to seek written advice on this matter, please contact:

Office of the Integrity Commissioner
271 Sandwich Street South
Amherstburg, Ontario N9V 2A5
Tel: (519)-736-0012
Email: integrity@amherstburg.ca