MUNICIPAL CONFLICT OF INTEREST LAW:
A LAW IN CONFLICT BASED ON INTEREST

ONTARIO BAR ASSOCIATION –
"COUNSEL AT MUNICIPAL COUNCIL"
DECEMBER 10, 2009

Barnet H. Kussner
Partner
WeirFoulds LLP

Introduction

Members of municipal councils and local boards are only human. As humans, they suffer from the same frailties as the rest of us and, as such, they are often subject to various external pressures that might influence their decisions on matters which come before them for consideration, decision or approval.

These pressures can include interests of a financial nature, on the one hand, and interests of a non-financial nature, on the other. Both types of interest can result in a particular bias or prejudgment on the part of the member, to the extent that both can give rise to a personal stake in the outcome. However, the characterization of the nature of the interest – specifically, whether it is financial or non-financial in nature – will have a significant impact on the member's legal duties and obligations; the nature of the remedy available to an aggrieved party who alleges a breach of those duties and obligations; and more particularly, the extent of any personal liability or penalty on the part of the member.

In all of these respects, the law respecting financial and non-financial interests on the part of municipal councillors has evolved in two radically different directions. Personal financial interests on the part of municipal councillors fall under the rubric of "conflict of interest" and, for the most part, are dealt with pursuant to provincial statutory regimes which regulate and prohibit municipal conflicts of interest. Under these statutory schemes, a municipal councillor who is found to have participated before council in a matter in which he/she has a personal financial interest, faces potential personal

sanctions – specifically, having his/her seat declared vacant and being declared ineligible to run for office for a period of time. However, there is typically no provision in these statutory schemes for setting aside the council decision itself, other than by voluntary action on the part of the council.

By contrast, where a municipal councillor participates in a matter in which he/she has a non-financial interest, the matter is governed by the common law relating to bias. The issue is typically determined on the basis of a standard which is much more relaxed than the "reasonable apprehension of bias" standard that applies in the judicial and quasi-judicial contexts; moreover, as a general matter, the remedy available to an aggrieved party is typically limited to an order remitting the matter back to the council or local board so that a new decision can be made, rather than any sanctions against the individual councillor.

Is there a rational basis for these significant differences in how the law treats financial interests on the part of a municipal councillor, as opposed to non-financial interests? Or are these differences the product of a process of evolving legal standards by which one regime evolved seemingly without any coordination or rationalization with its counterpart regime?

The answer, as strange as it may seem, is a combination of both. To understand how and why that is the case, it is necessary to analyze the two regimes in greater detail.

The Law Respecting Financial Interests on the Part of Members of Municipal Councils and Local Boards

The *Municipal Conflict of Interest Act*[1] is a comprehensive code governing conflicts of interest on the part of members of council and local boards in the Province of Ontario. However, the underlying intent of the Act is limited to ensuring that a member does not benefit *financially,* either directly or indirectly, as a result of his involvement in a matter that comes before the council or local board of which he is a member. Where an alleged interest cannot be characterized as one which has a financial component, the Act is simply not engaged at all.

In this respect, the Act is a statutory codification of the earlier common law rule respecting conflicts of interest on the part of members of municipal councils and local boards. In the leading common-law case of *Re L'Abbé and the Corporation of Blind River*[2], the Ontario Divisional Court expressed the rule as follows:

> Now, the interest or bias which disqualifies is one which exists separate and distinct as to the individual in the particular case – not merely some interest possessed in common with his fellows or the public generally… This may be a direct monetary interest, or an interest capable of being measured pecuniarily, and in such case that a bias exists is presumed.
>
> No better expression of it can be found in this regard than in the language of a very learned and distinguished Speaker in the House of Commons in 1811. Mr. Speaker Abbott said: "The rule was very plain: if they opened their journals they would find it established 200 years ago, and then spoken of as an ancient practice, that a personal interest in a question disqualified a member from voting. But this interest, it should

[1] R.S.O. 1990, c. M.50, as amended (the "Act")
[2] (1904), 7 O.L.R. 230 (Div. Ct.)

> be further understood, must be a direct pecuniary interest and separately belonging to the person whose votes were questioned, and not in common with the rest of His Majesty's subjects, or on a matter of state policy…[3]

This common-law rule has also been characterized in another leading early case as "a general rule of law that no member of a governing body shall vote on any question involving … his pecuniary interest, if that be immediate, particular and distinct from the public interest"[4].

With the enactment of specific legislation dealing with municipal conflicts of interest, courts continued to recognize the need for a personal financial interest on the part of the member, either direct or indirect, in order to warrant invocation of the prohibition against participating in matters before council. As stated by a panel of the Ontario Divisional Court in an early case which came before it under the Act:

> The obvious purpose of the 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. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest….
>
> This enactment, like all conflict-of-interest rules, is based on the moral principle, long embodied in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, enjoins holders of public offices within its ambit

---

[3] *ibid.* at 223-4, 231

[4] *Re Blustein and Borough of North York* (1967), 61 D.L.R. (2d) 659 (Ont. H.C.) at 661-662, appeal dismissed, *loc. cit*. at 664 (C.A.); leave to appeal refused, *loc. cit*. at 664 (S.C.C.)

> from any participation in matters in which their economic self-interest may be in conflict with their public duty. The public's confidence in its elected representatives demands no less.[5]

Accordingly, the Act is a statutory codification of the principle that elected or appointed municipal officials must never engage in conduct which has even the potential to affect matters in which they have a financial interest – regardless of their motives or whether the outcome was actually affected. The standard has been held to be a very high one, and Courts have repeatedly emphasized that the public interest in ensuring that members of council do not act in their own self-interest demands no less.[6]

Until fairly recently, other than where conduct on the part of a municipal councillor also engages criminal or quasi-criminal issues, the Act has been regarded as the only enforcement mechanism for dealing with conflicts of interest. The sole remedy provided under the Act in respect of an alleged conflict of interest is for an individual elector of the municipality to commence a civil proceeding by applying to a judge of the Superior Court for a determination of whether the member has contravened the Act. Where the judge determines that a contravention has occurred, the Act prescribes two principal penalties – one mandatory, and the other discretionary. Specifically, the judge "shall…

---

[5] *Re Moll and Fisher* (1979), 96 D.L.R. (3d) 506 (Ont. Div. Ct.) at 508-509

[6] *See, for example, Re Moll and Fisher, supra; Re Greene and Borins* (1985), 50 O.R. (2d) 513 at 521-522 (Div. Ct.); and *Sheehan v. Harte* (1993), 15 M.P.L.R. (2d) 311 at 315 (Ont. Gen. Div)

declare the seat of the member vacant" and "may disqualify the member… from being a member during a period thereafter of not more than seven years".[7]

Section 5(1) of the Act stipulates what a member cannot do in circumstances where he has a pecuniary interest in a matter that comes before the council or local board of which he is a member. It states as follows:

> 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.
>
> (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.[8]

The Act does not define the term "pecuniary interest", and the standard to be applied cannot be neatly captured in a set of criteria. In one relatively recent case, the Ontario Superior Court stated that the standard generally consists of the following considerations:

---

[7] *Municipal Conflict of Interest Act*, s. 10(1)
[8] *Municipal Conflict of Interest Act, supra* at ss. 5(1) and (2)

> Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor? It is an objective test not reliant on subjective feelings. It relates to the potential for enrichment or for economic loss, directly or indirectly, through an official position in a club or association, not merely to whether the council member has another moral or political responsibility to a group other than the municipal council.[9]

Moreover, as a general matter it is of no consequence to the determination of pecuniary interest whether a matter affects the member in a positive or negative manner. This is in large part a reflection of the underlying principle that an elected official must be free to make a decision with neither fear of loss, nor hope of personal gain, arising from the decision. The official must also be free to vote on any such issue with no fear of being tarnished by public perception that his vote was in any way influenced by any personal financial interests. The Supreme Court of Canada has defined this conflicting interest as one "so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty".[10]

Accordingly, interests embodying public duties are not subject to the statutory prohibitions under the Act where they do not also involve personal interests – precisely because, in such circumstances, there is no potential for conflict between the public interest and a member's own personal interest. In order for a member to be precluded by the Act from participating with respect to a matter before the Council, there must be a pecuniary interest held by that particular member which is different in kind, not merely in degree, from any pecuniary interest held by electors affected by the matter generally. In

---

[9] *Tolnai v. Downey*, [2003] O.J. No. 1578 (S.C.J.) at para. 25
[10] *Old St. Boniface Residents Association Inc. v. The City of Winnipeg and the St. Boniface-St. Vital Community Committee* (1990), 75 D.L.R. (4th) 385 (S.C.C.) at 408

this respect, it is not the "matter" which is the key issue in determining whether there is an interest in common, but rather it is the issue of a pecuniary interest in the matter.[11]

The need for a personal interest on the part of a member of council in order to warrant invocation of the prohibition against participating in a matter before the council, has also been recognized by the Supreme Court of Canada. In *Old St. Boniface Residents Association v. City of Winnipeg,* that Court drew a distinction between "partiality by reason of prejudgment on the one hand and by reason of personal interest on the other". In reference to the latter, the Court made it clear that it is a personal interest on the part of a councillor which is the foundation for municipal conflict of interest legislation:

> It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest…[12]

By these words, the Supreme Court emphasized that a municipal conflict of interest arises where it would be apparent to a reasonable observer that the exercise of a councillor's public duty is being influenced not by what he considers to be in the public interest, but rather by his own personal interest, either in whole or in part. Conversely,

---

[11] See, for example, *Blyth v. Northumberland (County)* (1990), 75 O.R. (2d) 576 at 587-8; *Re Ennismore (Township)* (1996), 31 M.P.L.R. (2d) 1 (Ont. Gen. Div.) at 6-7, 10

[12] *Old St. Boniface Residents Assn. v. Winnipeg (City), supra at 408-409*

where there is no evidence or suggestion that a member of council has a personal interest separate and distinct from what is considered to be the public interest, it follows that there can be no concern on the part of a reasonable observer that there is anything influencing the exercise of his public duty beyond the public interest alone.

Accordingly, from its earliest inception, the law respecting conflicts of interest in the municipal context has developed for the purpose of ensuring that a member of a municipal council acts solely with a view to what he or she reasonably considers to be in the public interest of the constituents whom he or she was elected to represent, rather than with a view to furthering his or her own *personal financial interest*, whether direct or indirect (such as through a specified family member or other entity by which the member has an interest). Where the interests of the member in a given matter are entirely coincidental with the public interest ─ and there is no suggestion of any personal financial gain on the part of the member ─ it follows that there is no scope for potential conflict so as to warrant protection of the public and potential sanctioning of the member, and thus no rationale to prevent the member from participating in the matter.

By the same token, however, where there is, on an objective basis, evidence that a member of council has a pecuniary interest in a matter before the council, the Courts typically take a very strict approach to the determination of whether the member has contravened the Act. Among other things, the determination of whether a member has a pecuniary interest in a matter falls to be determined without reference to its financial significance or insignificance. Simply put, it is not the amount of money or value of the

transaction that determines the existence of an interest. At best, that determination is relevant only to considerations that might apply once the threshold determination of a pecuniary interest has already been made, such as whether the pecuniary interest is "remote or insignificant" under subsection 4(k) or whether a member in breach of the Act should be excused on grounds of inadvertence or error in judgment under subsection 10(2).

Accordingly, unless the member can establish that his/her conduct falls within one of the built-in exceptions in section 4 so that it is deemed to constitute a breach of section 5, or he/she can show that any breach was inadvertent or a *bona fide* error in judgment under section 10, the member is liable to having his/her seat declared vacant as a mandatory penalty, and being ineligible to run for office for up to seven years (as a discretionary penalty). In addition, even if the breach is excused as inadvertent or an error in judgment, the member is often still liable for costs based on the mere finding of contravention.[13]

However, just as the Act provides for potentially severe sanctions as against a municipal councillor who is found to have participated before council in breach of its prohibitions, it is extremely limited in terms of the opportunity it affords to undo the actual council decision itself. In effect, the Act removes that decision entirely from the control of the Court or the aggrieved party, and leaves it up to the council to decide whether the decision ought to be revisited. Section 12 of the Act provides as follows:

---

[13] See, for example, *Jaffary v. Greaves*, 2008 CanLII 36159 (Ont. S.C.J.)

> 12. The failure of any person to comply with subsection 5 (1), (2) or (3) does not of itself invalidate any proceedings in respect of any such matter but the proceedings in respect of such matter are voidable at the instance of the municipality or of the local board, as the case may be, before the expiration of two years from the date of the passing of the by-law or resolution authorizing such matter unless to make void the proceedings 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 subsection 5 (1), (2) or (3).[14]

The net result is that even where an aggrieved party is adversely impacted by the actual council decision, and is wholly successful in obtaining a determination that the decision was the product of a flawed process in which a councillor acted in breach of the Act, the council has the ultimate discretion to decide whether the decision itself should be set aside. In many cases, this effectively leaves the aggrieved party without any recourse as far as the party's ultimate interests are concerned.

The Law Respecting Non-Financial Interests on the Part of Members of Municipal Councils and Local Boards

In contrast to the relatively strict and rigid statutory regime governing financial interests on the part of municipal councillors, as set out above, the law respecting non-financial interests on the part of municipal councillors has evolved in a radically different direction. Among other things, this legal regime is one which is based wholly on principles of common law, rather than a statutory scheme; it imposes a much higher burden of proof on the part of an aggrieved party, although it does not necessarily require proof that there be a personal stake in the outcome on the part of the municipal

---

[14] *Municipal Conflict of Interest Act*, s. 12

councillor; and it typically does not result in any sanction or penalty on the part of the individual councillor himself.

Interestingly, the current legal standard for disqualifying bias on the part of a municipal councillor was first articulated by the Supreme Court of Canada in the *Old St. Boniface* case cited above – the same case which articulated the law respecting financial and non-financial interests as being two branches of the same law of "partiality". It is in this respect that the two different branches can be said to have evolved – at least in more recent times – on a coordinated basis, at the highest judicial level. By the same token, however, the distinction which was drawn by that Court had the effect of importing the traditional legal standard for disqualifying bias – specifically, reasonable apprehension of bias – into the law respecting financial interests on the part of a municipal councillor, and, at the same time, introducing the more relaxed standard (at least from a municipal councillor's perspective) of "amenable to persuasion" into the law respecting non-financial interests on the part of a municipal councillor.

In *Old St. Boniface*, the Court began its analysis by noting that municipal councillors – like candidates for any public office - often campaign, and are elected, on the basis of the views they have articulated and positions they have taken on particular issues. That, of course, is an inherent and expected part of the democratic process. On that basis, to impose upon a municipal councillor the same "reasonable apprehension of bias" standard which applies to decision makers in the judicial and quasi-judicial contexts would be unreasonable and irreconcilable with the inherent nature of the political process.

Accordingly, the Court proceeded to state as follows:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.[15]

The implications arising from the *Old St. Boniface* case were certainly clear in respect of decisions made by municipal councils when acting in a legislative capacity – including decisions made under the *Planning Act*, in which the legislative nature of the decision is expressly mandated by statute.[16] What was less clear, however, was the extent to which the analysis would apply to decisions made by municipal councillors when acting in a quasi-judicial capacity, such as a hearing to determine whether to issue or renew a business licence.

---

[15] *Old St. Boniface Residents Assn. v. Winnipeg (City), supra at 409*
[16] *Planning Act*, R.S.O. 1990, c. P.13, as amended, section 61

Those doubts were laid to rest in a decision of a panel of the Divisional Court rendered not long after *Old St. Boniface*. In *Mariano v. City of Mississauga*, the Divisional Court held that when acting as a licensing tribunal, members of a municipal council must act fairly in holding the hearing – including, among other things, affording an applicant the opportunity to know the case he or she has to meet, to call evidence and cross-examine witnesses, and to make submissions. At the same time, however, the duty of fairness imposed upon a municipal council considering a licence application is *not* analogous to the procedural obligations imposed upon a judicial or quasi-judicial body. On the contrary, so long as the council members afford procedural fairness to the applicant and are amenable to persuasion, the requirements of procedural fairness will be satisfied.[17]

As a practical matter, the consequences of decisions such as *Old St. Boniface* and *Mariano* for an aggrieved party who seeks to set aside a council decision on grounds of non-financial bias are clear. In essence, such a party would bear the onus of proving that a councillor's mind was so closed that he was incapable of being persuaded to change it. Typically this will require a candid admission from the member himself, or something tantamount to an acknowledgement to that effect. Moreover, even if there is conflicting evidence, courts will generally give the member of council the benefit of any doubt.

Can the Differences be Rationally Justified?

As a matter of policy, the rationale for having differing legal standards apply to bias by reason of a financial interest on the part of a municipal councillor, on the one hand, and

---

[17] *Mariano v. Mississauga (City)* (1992), 8 O.R. (3d) 657 (Div. Ct.) 664-667

bias by reason of a non-financial interest, on the other, is readily apparent from the *Old St. Boniface* decision itself. The decision-making process at the municipal level, no more and no less than at other levels of government, contemplates and expects members of council to hold opinions – even firmly held ones – on matters which come before the council for consideration. Accordingly, it would be irreconcilable with the nature of that process to hold councillors to the judicial standard of not having any pre-conceived views or preferences as to the perceived outcome, and equally difficult to impose different standards depending on the nature of the decision being made (i.e., legislative vs. quasi-judicial). So long as the member of council does not have a closed mind on the matter and is capable of being persuaded, the public's reasonable expectations arising from the nature of the political process are met.

By contrast, there is no such 'middle ground' when it comes to interests which are financial in nature. Members of council are not expected to have a personal stake in the outcome of a matter which comes before council. Unlike a non-financial interest ─ which generally connotes a pre-judgment, as opposed to a personal interest in the outcome ─ a financial stake, by its very nature, automatically engenders some degree of doubt as to whether the member is basing his decision solely on what he perceives to be in the best interests of the public (or at least some segment thereof), as opposed to what is in his <u>own</u> interest, in whole or in part.

In this regard, and subject to the built-in exceptions in the Act such as remoteness/insignificance or an interest in common with electors generally, as a policy matter one can readily accept a 'zero tolerance' approach to partiality by reason of a

personal financial interest. However, the certainty afforded by this approach is somewhat clouded by the fact that a personal stake in the outcome of a matter is often no less a factor influencing a councillor's decision merely because it does not have a financial dimension to it. For example, a councillor may well have a personal stake in an issue of general policy (such as the construction of new roads or the establishment of dedicated bicycle lanes within the municipality) even if it involves no direct or indirect linkage to a personal financial interest.

What is also less certain is the rationale for having dramatically different remedies in the case of bias by reason of a financial interest, on the one hand, and bias by reason of a non-financial interest, on the other. Clearly, the difference cannot be justified on the basis that a financial interest which gives rise to a breach of the Act typically involves one or more individual councillors, as opposed to the entire council; the law of bias is no different at least as it applies in the judicial or quasi-judicial context, by which a disqualifying bias on the part of a single member of a tribunal can be sufficient to invalidate the decision of the entire tribunal.[18]

The difference also cannot be justified on the basis of a differential impact on the aggrieved party. Typically, a party who is aggrieved by a council decision on the basis of a financial interest on the part of an individual councillor may well be motivated by a desire to seek justice (or perhaps retribution) as against the individual councillor, but is no less aggrieved by the ultimate council decision than a party who alleges disqualifying bias on non-financial grounds. Likewise, a party who is aggrieved by a council decision

---

[18] See, for example, *Save our St. Clair Inc. v. Toronto (City)*, 20056 CanLII 40558 (O.S.C.D.C.)

on the basis of non-financial bias may well be motivated principally by a desire to undo the ultimate decision, but to the extent that party also seeks justice as against one or more individual councillors, typically no such remedy is available.

In the final analysis, one is hard-pressed to come up with a clear and cogent basis for the different remedies available to an aggrieved party under the two different branches of the law of bias in the municipal context. It is perhaps for this reason that in more recent years, aggrieved parties in both spheres have looked to alternative means of enforcing their right to a decision which is free from partiality on either ground.

Increasingly, this has included resort to municipal integrity commissioners who are empowered under the *Municipal Act*[19] to conduct inquiries or consider complaints against members of council based on alleged breaches of codes of conduct, and who are vested with wide-ranging powers to recommend specific remedies which are more tailored to the specific circumstances. In other instances, there have been complaints made to municipal ombudsmen appointed under the *Municipal Act* as an alternative to costly and protracted conflict of interest proceedings. While this trend may well continue in the future, these alternatives obviously have their own limitations to the extent that it is ultimately up to the council itself to decide whether to appoint an integrity commissioner or ombudsman, or whether to take any action arising from the involvement of an integrity commissioner or ombudsman.

---

[19] S.O. 2001, c. 25, as amended, sections 223.3-223.18

Beyond that, what the future holds for the law of bias in the municipal context – and specifically, whether there will be any legislative or judicial initiative to revisit the state of the law, with a view to its development on a more coherent and consistent basis – is something which remains to be seen.