

**The Search for A Meeting of Minds in The Interpretation of
Ontario's *Municipal Conflict of Interest Act***

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Introduction

In Ontario, conflicts of interest at the municipal level are governed by the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, as amended (the "Act"). The fundamental purpose of the Act, as noted by Robins J. in probably the most-often quoted of all of the judicial statements about the Act from *Moll v. Fisher* (1979), 23 O.R. (2d) 609, 8 M.P.L.R. 266 (Ont. Div. Ct.) (at p. 612), 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."

Over the years, the Act has generally operated fairly well in proceedings that have been commenced against council members pursuant to its provisions.

In the large majority of cases, the Act has been invoked against a member who is alleged to have contravened s. 5 (the operative prohibition section of the Act) by taking part in discussion or voting at a council or local board meeting respecting a matter while failing to disclose his or her pecuniary interest in the matter.

From time to time, however, cases have arisen in which a key issue is whether or not, and the extent to which, the prohibitions in s. 5 apply to activities of a member of a council or local board which occur outside of, before or after, a formal meeting of the council or board itself.

As discussed below, the purposes of the Act and the nature of its subject-matter have provided sufficient authority for the courts to secure substantial implementation of its intent. At the same time, however, from the point of view of a member of council — particularly where the member lacks the benefit of immediate legal advice to ascertain his or her responsibilities, as is often the case — areas of ambiguity in the Act continue to cause confusion and uncertainty.

The purpose of this paper is to seek to clarify the intent and effect of the Act and to remove this confusion once and for all.

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The Evolution of Ontario Law Relating to the Application of the Act to Meetings of Committees

In a number of decided cases, Ontario courts have addressed issues involving the duties of a member of a municipal council or local board under the Act in a context other than attendance at a formal meeting of the council or board itself.

As will be seen, court treatment of the applicability of the Act to those in attendance at committee meetings, has evolved during the course of a number of court decisions. While there has been no definitive judicial determination on this point, it is reasonable to conclude that the requirements of s. 5 of the Act apply to a member of a municipal council or local board who is present at a meeting of a committee of the council or local board.

In chronological order, the following are the relevant court decisions leading to this conclusion:

1. *Craig v. Florence* (1982), 133 D.L.R. (3d) 638 (Ont. Co. Ct.)

A council member assisted clients of his sign business to make applications to City committees for minor variances to the City sign by-law. The member, not a member of the Planning and Development Committee, appeared before it representing a business client. When the committee's recommendation got to council, the member declared an interest and refrained from participating in the discussion and voting on it.

The Court held that the member had a pecuniary interest in the matter. The Act applies in respect of a meeting of a committee of a council whether or not the individual in question is a member of that committee. The member was found to have contravened the Act.

2. *Sharp v. McGregor* (1988), 64 O.R. (2d) 449, 38 M.P.L.R. 315 (Ont. Div. Ct.)

The member of council appeared before a local committee of adjustment on behalf of clients seeking a minor variance. He was not a member of the committee. He declared his interest at the council meeting at which the relevant agenda of the committee was presented.

The Court held that a committee of adjustment is a "local board", as defined in the Act. The legislation is directed to individuals who are members of a council or of a local board. Here, since the member was not a member of the local board, and the council had no appellate jurisdiction over it, the member was not in contravention of the Act.

3. *Forbes v. Trask* (1991), 4 M.P.L.R. (2d) 34 (Ont. Gen. Div.)¹

¹Additional reasons at (1991), 4 M.P.L.R. (2d) 34 at 44 (Ont. Gen. Div.).

The member had left the council table, having disqualified himself from remaining at the council meeting during its discussion of a matter in which he had a pecuniary interest. However, he remained in the room. From the public gallery, he made a forceful interjection, with a view to correcting a statement of fact made by a member at the meeting in respect of the issue.

The Court held that the legislation must be construed broadly and in a manner consistent with its purpose. Section 5 requires strict adherence to its three rules of behaviour. The member contravened s. 5(1)(b) of the Act.

The Court held that a second act by the member, a request made at the next meeting of the council that the minutes of the previous meeting reflect his outburst, did not contravene the Act, but was simply a request to ensure that the meeting be accurately and completely recorded.

4. *Mangano v. Moscoe* (1991), 4 O.R. (3d) 469, 6 M.P.L.R. (2d) 29 (Ont. Gen. Div.)

The member was in attendance at a meeting of a sub-committee of a standing committee of the municipality. The subject-matter was the selection, by lot, from among applicants for street vending licences. The member's daughter was among the applicants for a licence.

The Court held that the Act is a penal statute which ought to be strictly construed. If there is a reasonable interpretation which will avoid a penalty, the Court should adopt that construction. Here, the sub-committee was not an autonomous decision-making or action-taking entity. If the Legislature wished to catch an activity lower than a meeting of a council, it should have established in the legislation that all levels of meeting, including those of sub-committees, were to be caught. Neither a committee of the council nor a sub-committee of that committee is a "committee" within the meaning of the definition of "local board" contained in s. 1 of the Act.

5. *Van Schyndel v. Harrell* (1991), 4 O.R. (3d) 474, 6 M.P.L.R. (2d) 25 (Ont. Gen. Div.)

The member was employed as a purchasing and stores controller by a cement company, which was connected to Canada Building Materials, engaged in the sale of aggregates similar to those extracted by a gravel pit in the City, which was trying to obtain the transfer of a gravel pit licence from the City so that the gravel pit could be sold as a licensed pit. The member participated in the review of the matter by a standing committee, casting the deciding vote in a decision recommending against the transfer. The member did not, however, attend the subsequent meeting of City Council where the recommendation was supported.

The Court held that the definitions of "council" and "local board" do not include a standing committee, only a committee of the whole council. Since the member

was not present when the City Council convened to discuss a vote on the matter, he did not contravene the Act.

6. *Westfall v. Eedy* (1991), 6 O.R. (3d) 422, 7 M.P.L.R. (2d) 226 (Ont. Gen. Div.)

The Court held that a LACAC, "a local architectural conservation advisory committee", established under the *Ontario Heritage Act*² to recommend to a municipal council whether or not a property should be designated under that Act, is not a "local board" of a municipality because its function is only to advise and assist the municipal council and be consulted by it. It has no power to designate a property itself. A member of the committee therefore did not breach the Act by his attendance at a meeting where the designation of his property was being considered, even though the designation resulted in his receiving grants from the Province. The Court also held that it had not been shown that the designation of a property under the *Ontario Heritage Act* in itself involves a pecuniary interest, in that there was no evidence to indicate that the market value of the designated property would necessarily increase because of the designation.

7. *Sims v. Fratesi* (1996), 36 M.P.L.R. (2d) 294 (Ont. Gen. Div.)³

The council met in camera, with a consultant in the chair, for the purpose of interviewing its Mayor in respect of his application to become the City's Chief Administrative Officer. The Court, citing the decision of Robins J. in *Moll v. Fisher* that "legislation of this nature must, it is clear, be construed broadly and in a manner consistent with its purpose", held that the purpose of the legislation is to prevent members from improperly using their elected office to influence other members of council for their benefit. At the outset of the meeting, the Mayor declared his pecuniary interest in the subject-matter under consideration, and then spoke, primarily in response to questions from other members, in support of his candidacy for the position. The Court held that the meeting was a "meeting of council", in response to the argument that the meeting was not a "meeting of council" but of a committee of the whole council, and, following the decision in *Craig v. Florence*, held that the prohibitions in the Act apply to any member of council who is present at a committee meeting, whether or not he is a member of that committee, specifically disagreeing with the decision in *Mangano v. Moscoe* to the contrary. The Mayor was held to have attempted to influence the vote on a matter by the council of which he was a member and, consequently, was found to have contravened the Act.

²R.S.O. 1990, c. O.18.

³Additional reasons at 1997 CarswellOnt 631 (Ont. Gen. Div.).

8. *Audziss v. Santa* (2003), 66 O.R. (3d) 444, 39 M.P.L.R. (3d) 201 (Ont. S.C.J.)⁴

The member was the subject of an application to the City for a compliance audit of his campaign expenses. A special meeting of city council was held for the purpose of receiving a report from the City Clerk with respect to the application and to establish a date for it to be heard by the council. The member spoke at the meeting and made a number of suggestions with respect to the procedure to be followed in dealing with the application. At the meeting at which the council considered and dealt with the application, the member at the outset disclosed his interest and left the meeting. The member also, through a posting on his website and a two-page article in his newspaper, gave background information about his accusers, listed his alleged actual campaign costs, and invited those challenging him to come forward and present their case before the council. The Court, citing court decisions emphasizing the need for strict construction of the Act as a penal statute, held that the discussions held at the meeting were purely procedural, there was no discussion as to the substantive issue and no vote was taken. The member's statements were held to have touched upon only procedural matters, and he "*did not state or infer that there were no difficulties with his expenses, so that it cannot be said that he was attempting to influence the council*". The Court held that a reasonable interpretation of the Act presented an ambiguity that must be interpreted in as favourable a manner as possible to the person liable to the penalty. Consequently, it was held that the member did not contravene the Act, or, in the alternative, that any such contravention was committed through an error in judgment.

9. *Alcock v. McDougald* (2004), 7 M.P.L.R. (4th) 123 (Ont. S.C.J.)

The member participated at meetings of five standing committees of the council with respect to a matter in which he had a pecuniary interest. The Court, following the line of "strict authority" cases, especially the decision in *Mangano v. Moscoe*, held that the intent of the Act is to record declarations by members when attending meetings where binding decisions are being made, and that "*other forms of committees or meetings do not require a council member to declare a conflict of interest since they serve to provide information or recommendations to council or the committee of the whole, where a binding decision will be made*". The Court dismissed the application for a declaration that the member had contravened ss. 5(1) and (3) of the Act.

10. *Woodcock v. Moore*, 2006 CarswellOnt 4191, [2006] O.J. No. 2835 (Ont. S.C.J.)

⁴Additional reasons at (2003), 44 M.P.L.R. (3d) 86 (Ont. S.C.J.).

The Court adopted the decision in *Alcock v. McDougald*, holding that the Act is not directed at circumstances that relate to the provision of information or recommendations to bodies that make ultimate decisions. The application involved the alleged failure by the member to disclose his connection to a company owned by his son which sold advertising space to the commissioner of development services for the City. Although the member was a member of the economic development advisory committee and the development services committee, there is no statement in the short Court decision suggesting that the member had attended a meeting of either committee with respect to the matter.

11. *Jaffary v. Greaves* (2008), 47 M.P.L.R. (4th) 1 (Ont. S.C.J.)⁵

In this recent well-articulated judgment, the Court, referring to the words of Robins J. in *Moll v. Fisher*, “*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*”, held that for the purposes of the Act, “meeting of council” in s. 5(1) includes a member’s attendance at a meeting of a standing committee. The participation by the member in this case was held to constitute attendance at a meeting of council where the issue in which he had a financial interest was the subject of consideration and as such a violation of s. 5(1)(c). The member, a director of a development company, wrote a letter to the Town requesting waiver of a municipal development fee to be paid by the company and appeared twice before the council’s administration and finance committee with his request. He also attended two council meetings where the matter was on the agenda. At each attendance before either the committee or council, the member declared his interest and absented himself from the vote.

The letter was addressed to the attention of the Mayor, who was also a member of the committee, and was also delivered by the member to the committee at the time of his attendance. The Court held that both the letter and the attendances before the committee were attempts to influence the committee members before the council meeting. The Court, referring to the “*artificiality of drawing a distinction between participation at the committee level and participation at the full council level*”, held that the member’s participation in the deliberations of the committee “*constituted attempts to influence the voting of members of council just as they would have been had he participated in the same way at a full council meeting*”.

In addressing the “strict interpretation” approach, the Court adopted the principle that the correct approach is a contextual one based upon a neutral reading of the words in order to determine a meaning compatible with the real intention of the Legislature. “*Historically, the rule of strict construction drew its justification*

⁵Additional reasons at (2008), 47 M.P.L.R. (4th) 15 (Ont. S.C.J.).

from a time when courts had to temper extremely severe penal legislation.” “The rule of strict construction as applied to penal statutes has been much relaxed” The Court also stated that the rule of strict construction of penal statutes appears to conflict with s. 12 of the former *Interpretation Act*, that “every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”, but “where an equivocal word or ambiguous sentence leaves reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself.” The first endeavour is to determine the sense in which the Legislature used the word from the context in which it appears. In all cases, “the real intention of the legislature must be sought, and the meaning compatible with its goals applied”.

The Court held that the member’s actions in this case had violated the Act, but since it also held that the breach occurred as a result of both inadvertence and error in judgment, declined either to declare his seat vacant or to disqualify him from continuing to sit as a member.

In my view, this judgment will be accepted by future courts as convincing authority for its conclusions. It also constitutes an excellent resolution of the “strict construction” — “broad interpretation” issue.

Areas of Ambiguity in the Act

The principal ambiguity in the Act involves its application to a meeting other than a meeting of a council or local board.

The Act starts well, in s. 1, by stating that “meeting” includes meetings or types of meetings of various municipal bodies, but this attempt at clarity becomes lost when later provisions incorporate redundant and ambiguous phraseology, confused still further by ambiguity inherent in the words following “meeting” in s. 1.

That provision reads as follows:

“Meeting” includes any regular, special, committee or other meeting of a council or local board, as the case may be.

In my view, the use of “committee” as an adjective is one of the principal sources of confusion in the application of the Act. The provision would better serve its intended purpose if amended to read as follows:

“Meeting” includes any regular, special or other meeting of a council or local board, or of a committee of a council or local board, as the case may be.

The second principal problem in the application of the Act involves the unnecessary words “of the council or local board” in ss. 5(1) and 5(3). In each case, the

Act should simply use the word "meeting", uncomplicated by phraseology rendered unnecessary and redundant by the provision in s. 1 referred to above.

Assuming the above interpretations are accepted, proper elucidation and support are then provided for the requirement in s. 5(1)(c) that a member having a pecuniary interest in a matter not attempt in any way, whether before, during or after a meeting, to influence the voting on any question respecting a matter in respect of which the member has a pecuniary interest.

This clarification would involve specific acknowledgement that a member is required to make disclosure and refrain from debate in respect of a matter at both the committee and council levels of decision-making.

It would also help to resolve any confusion arising from the jurisprudence referred to above, producing a consistent and appropriate directive to members of council based upon the clear intent set out in the Act.

Conclusion

Despite the ambiguities in the Act, the decision in *Jaffary v. Greaves* would appear to represent an accurate statement of the law which would be expected to be adopted, or cited with approval, in future cases. Accordingly, members of municipal councils should proceed on the basis that the provisions of the Act do apply to attendance and participation in debate by members not only at council meetings, but at meetings of standing and special committees, and possibly even sub-committees.

More difficult issues arise with respect to activities by members of municipal councils in relation to matters in which they have an actual or deemed pecuniary interest, which might be alleged to involve an attempt to exert influence in pursuance of such interest through dealings at any time which may or may not involve actual or indirect attempts to affect a specific vote. For example, there is currently underway in the City of Mississauga a judicial inquiry into the City's business dealings, reported to involve conflict of interest allegations against Mayor Hazel McCallion, which are not necessarily related to actions taken directly related to council votes.

It must be anticipated that courts will continue to give serious consideration to, and apply, the provisions of the Act, including the prohibition against a member of a council who has a direct or indirect pecuniary interest in a matter, from attempting in any way, including before or after a meeting of the council or a committee of the council, to influence the voting on any such question.