

An Unprecedented Decision in Municipal Conflict of Interest Law — *Tuchenhagen v Mondoux*¹

By George Rust-D'Eye

Every municipal councillor and municipal legal advisor in Ontario should review carefully both the majority and dissenting judgments in this Divisional Court decision released October 26, 2011, particularly the decision of the majority as to when and how the councillor in this case was concluded to have acquired a pecuniary interest in the sale of a municipally-owned property.

The case is well worth reading in any event, due to the substantial number of issues and the wide range of principles of municipal conflict of interest law addressed, and the significant judgments quoted, by Lederer and Gordon JJ., for the majority, and J. Wilson J., in dissent.

The outcome of the case is to lower significantly the burden upon an applicant in an application under the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, as amended, in establishing a pecuniary interest on behalf of a respondent councillor.

To summarize, the decision of the Court dealt with a situation where a member of the Council of the City of Thunder Bay expressed an interest in a tax sale property to be sold by the City by tender. The essential facts, and the conclusion of the majority, are best summed up in the following quotation from the dissenting decision:

“... where a decision by council has been made to sell property by public tender, does an elected member of council have an ‘indirect pecuniary interest’ within the meaning of the MClA where he expresses interest by email to perhaps put in an offer on the property, requests a copy of the public advertisement, and sets up an appointment to view the property? Is this member in these circumstances required to declare a conflict of interest in a meeting when the issue of declaring the land surplus is considered?”

On the basis of the foregoing facts, the Respondent/Appellant Councillor Tuchenhagen was found by the applications judge, and, on appeal, by the majority of the Divisional Court, to have contravened the *Municipal Conflict of Interest Act*. Since he was no longer a member of Council at the time of the hearing of the application, the Court ordered him disqualified from being a member of council for four years, in order to prevent his running in the next election.

The Court held that the contravention was not committed through inadvertence or by reason of an error in judgment, and ordered costs of the appeal payable by the Appellant to the Respondent, in the amount of \$9,612.31.

The context of the decision includes the following findings of fact, essentially undisputed by the parties:

- Councillor Tuchenhagen was open with the City about his interest in the property;
- there is no evidence that he acted in bad faith;
- the City suffered no loss or prejudice, nor did any other party;
- there was no public policy prohibiting him from bidding on real estate declared surplus to the City's needs;
- there was no interference with the public tendering process;
- the Councillor had given the City 12 years of public service.

With respect to the conclusion that Councillor Tuchenhagen had a pecuniary interest in the sale of the property from the point in time at which he made an appointment to see it (the Council meeting in question occurred later on the day that he made the appointment and the day before he actually viewed the property), the following undisputed facts are also relevant:

- Councillor Tuchenhagen had not made a decision as to whether or not to bid on the property;
- he had made no commitment and invested no money;
- it was the policy and practice of the City to offer repossessed tax arrears properties by calling for public tenders;
- the Council decision to do so was unanimous;
- there was no suggestion that Councillor Tuchenhagen had any insider information, or acted in bad faith;
- Councillor Tuchenhagen had previously sought legal advice confirming that a member of council was not precluded from bidding on tax sale properties;
- there was no evidence to suggest that it occurred to him that he might have acquired a pecuniary interest by communicating that he might be interested in bidding, obtaining the advertisement and/or making an appointment to see the property;
- once the Councillor had put in a bid on the property (through a corporation which he owned), he declared an interest, and took no further part in Council consideration of any matter relating to the sale.

Particularly in view of the relative unusualness, and high authority, of Divisional Court decisions in the municipal conflict of interest law context, this decision, while it stands, should be regarded as a warning light to councillors who might even think about entering into a financial transaction with their municipality. In the words of the majority judgment:

“The question that must be asked and answered is ‘does the matter to be voted upon *have a potential* to affect the pecuniary interest of the municipal councillor? ... As soon as Robert Tuchenhagen saw himself as a potential buyer, he had become a person with a pecuniary interest. The e-mail he sent on

July 2, 2008 indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest.

Robert Tuchenhausen had been a member of the City Council for almost twelve years. He should have been aware of the need to avoid placing himself in a position of conflict. It is difficult to understand how, when, on July 2, 2008, he advised the Realty Department that he might be interested in making a bid, he would not see that he was demonstrating a personal pecuniary interest that would conflict with that of the municipality and the electors he served.”

With respect to the defence of inadvertence, the Court held as follows:

“This [his active role at Council prior to acquiring a pecuniary interest] was only exacerbated when, on July 21, 2008, he arranged to view the property as part of his consideration as to whether to make a bid and then, at the meeting of the Committee of the Whole that evening, failed to declare an interest. This is not inadvertence; it is fairly characterized as being willfully blind or reckless.”

As to the significance of the decision, and the danger signals raised, in the words of the dissenting judgment:

“... this extraordinarily broad interpretation of what constitutes an indirect pecuniary interest (the conclusion of the majority of the Divisional Court) appears to be without precedent and takes the conflict provisions to new heights. This extremely broad, novel interpretation of the scope of the MCI, which is a penal statute, should also be a factor in determining whether the saving provisions [inadvertence or error in judgment – MCI, s. 10(2)] should apply.”

Be warned!

AUTHOR

George Rust-D'Eye



George Rust-D'Eye is one of Canada's most experienced municipal law lawyers. In 2007, he was awarded the Ontario Bar Association's Award of Excellence in Municipal Law. George provides legal assistance to municipalities and other governmental institutions, as well as private sector clients. He has published several books and has written extensively for various legal and industry publications.

Contact George at 416.947.5080 or grustdeye@weirfoulds.com.

What we do . . .

Public/Private Partnership

- work individually or as a member of a team to provide advice and to negotiate and implement agreements between the public and private participants in partnering, privatizing and franchising ventures

Municipal Issues and Planning Approvals

- provide opinions and advice on a wide range of matters under municipal jurisdiction, including adult entertainment, licensing and policing
- assist clients to obtain approvals for official plans, rezonings, subdivisions, condominiums and condominium conversions, site plans and building permits, and liaise with municipal politicians and staff
- co-ordinate all aspects of approvals including surveys, consultants' reports, title searches, draft plan approvals; liaise with provincial review agencies and prepare and negotiate development and site plan agreements
- represent clients before municipal councils, licensing commissions, Committees of Adjustment, the Ontario Municipal Board, Joint Board and other administrative tribunals and courts
- bring and defend applications for judicial review, including constitutional and Charter challenges

Municipal Restructuring

- provide advice on implementing amalgamation and restructuring of municipalities and local boards, including public and private bills
- interpret government legislative initiatives and regulations and appear as counsel in related proceedings

Aggregate Resources

- obtain permits and approvals from local authorities and provincial agencies
- represent property owners and aggregate operators at hearings under provincial planning and aggregates legislation

Arbitration and Mediation

- initiate and represent parties in mediation and arbitration to resolve differences and maintain ongoing relationships
- we are committed to the effective use of alternative dispute resolution methods both as counsel and as mediators and arbitrators

Municipal Employment and Wrongful Dismissal

- represent individuals, officers and municipalities in employment and labour disputes

Expropriation and Taxation

- advise and represent clients (private and public) in expropriation proceedings and compensation claims before Inquiry Officers and the Ontario Municipal Board
- advise on property assessments and taxation and conduct appeals before assessment review boards
- provide advice and act as counsel on development charges, municipal finance, and service migration matters

Who we represent . . .

Our clients include corporate entities, individuals, ratepayer groups, developers, insurers and insureds, property owners, entrepreneurs, professionals, financial institutions, not-for-profit and religious organizations, municipal, provincial and federal governments, government agencies, boards and commissions.

How to reach us . . .

Barnet H. Kussner

Practice Co-Chair
T: 416-947-5079
E: bkussner@weirfoulds.com

Kim A. Mullin

Practice Co-Chair
T: 416-947-5066
E: kmullin@weirfoulds.com

ABOUT THIS NEWSLETTER

For over 150 years, the lawyers of WeirFoulds have been proud to serve our clients in their most difficult and complex matters. We are the firm of choice for discerning clients within our core areas of practice: (1) Litigation; (2) Corporate; (3) Property; and (4) Government Law. Within these core areas, as well as key sub-specialties, we address highly sophisticated legal challenges. We have acted in some of Canada's most significant mandates and have represented clients in many landmark cases. Reflecting the firm's focus, our lawyers are consistently recognized as leaders in their chosen areas of practice and in the profession at large. To learn more about our firm, visit www.weirfoulds.com.

Information contained in this publication is strictly of a general nature and readers should not act on the information without seeking specific advice on the particular matters which are of concern to them. WeirFoulds LLP will be pleased to provide additional information on request and to discuss any specific matters.

If you are interested in receiving this publication or any other WeirFoulds publication by e-mail, please let us know by sending a message to publications@weirfoulds.com.

© WeirFoulds LLP 2011