

# An Unprecedented Decision in Municipal Conflict of Interest Law – Tuchenhausen v Mondoux

November 10, 2011

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 MCIA 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 Tuchenhausen 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 Tuchenhausen 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 Tuchenhausen 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 Tuchenhausen 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 Tuchenhausen had any insider information, or acted in bad faith;
- ☐ Councillor Tuchenhausen 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 Tuchenhausen 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 MCIA, which is a penal statute, should also be a factor in determining whether the saving provisions [inadvertence or error in judgment MCIA, s. 10(2)] should apply.”***

Be warned!

[*Tuchenhagen v Mondoux*, 2011 ONSC 5398 (Div. Ct.), released October 26, 2011 (application for leave to appeal filed November 4, 2011)]

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