

ADVISORY BULLETIN

CONFLICTS OF INTEREST: EXCEPTIONS TO THE GENERAL FRAMEWORK

Table of Contents

	Page
I. Purpose of the Bulletin	1
II. Executive Summary	2
III. Analysis	3
1. Conflicts of Interest under the <i>Code</i> and the <i>Act</i> – the General Framework	3
2. Exceptions	4
i. Pecuniary interests that do not exceed the interest of an ordinary resident	4
ii. Interests of general application or that affect the Member as one of a broad class of the public	4
iii. Interests that are insignificant or trivial	6
V. Authorities	8

I. PURPOSE OF THE BULLETIN

Pursuant to the provisions of the *Municipal Council Conflict of Interest Act* (the “*Act*”) and the *Code of Conduct for Members of Council* (the “*Code*”) Members of Council are to avoid voting on, participating in the discussion of or influencing any matters in which they have a conflict of interest. When a Member has a conflict of interest they must disclose the general nature of their interest and recuse themselves by withdrawing from participating in the respective matter.

However, both the *Act* and the *Code* recognize that there are situations where, although the Member has an interest in a matter which could give rise to a conflict, it is appropriate for the Member to be excused from their obligation to recuse themselves. To this end, both the *Act* and the *Code* set out exceptions to the requirement that a Member not vote on, participate in the discussion of or influence a matter in which they have an interest.

These exceptions, particularly the exceptions for interests which a Member holds in common with other electors generally, reflect the principle that it is not necessarily desirable if debate on matters were restricted to those Members of Council who are “entirely disinterested, own no property and operate no business as this could deprive public debate of its vitality and make it less likely that measures of value to all would be proposed”.¹

¹ *Gammie v. Turner*, 2013 ONSC 4563

The purpose of this Bulletin is to provide guidance to Members with respect to determining whether their interest in a matter falls within one of the exceptions to the general rule such that the Member is still able to vote on, discuss or influence a given matter.

II. EXECUTIVE SUMMARY

- 1) The *Act* prohibits Members from voting on, participating in the discussion of or influencing matters in which they have either a **direct or indirect pecuniary interest**.
- 2) The *Code* requires Members to exceed the minimum obligations under the *Act*. A private interest which may give rise to a conflict of interest is defined in the *Code* to include any personal benefit “**whether or not pecuniary**”.
- 3) Under the *Act*, where a Member’s interest “**does not exceed the pecuniary interest of an ordinary resident in the matter**”, the Member shall be presumed **not** to have a direct or indirect pecuniary interest in the matter which could give rise to a conflict of interest.
- 4) The definition of “**ordinary resident**” depends on the nature of the matter. If the matter relates to the entire municipality, it refers to a resident of the municipality. If the matter relates to only a part of the municipality, it refers to a resident of that part of the municipality.²
- 5) Similarly, under the *Code*, where a Member’s interest is in “**a matter of general application**” or in “**a matter that affects the Member as one of a broad class of the public**”, their interest will not be considered to give rise to a conflict of interest.
- 6) When considering whether a Member has an interest that “**does not exceed the pecuniary interest of an ordinary resident**”, or is of “**general application**” or “**affects them as one of a broad class of the public**”, reference can be made to authorities which have considered Ontario’s equivalent statute, which contains a similar exception. Those authorities say that to fall within the exception, the Member’s interest must be **similar in kind** to that of the others who share their interest.
- 7) If the Member’s interest is **different in kind** than that of electors’ generally, their interest will not fall within the respective exception and will be considered to give rise to a conflict of interest.
- 8) Further, under the *Act* no Member shall be presumed to have a direct or indirect pecuniary interest or liability in a matter **unless the value of the pecuniary interest or liability is \$500 or more**.
- 9) Similarly, under the *Code*, where a Member’s private interest in a matter is “**trivial**”, it will not be considered to give rise to a conflict of interest. Whether a Member’s private interest is considered to be trivial will depend on the specific circumstances relating to the matter. Unlike the *Act*, the *Code* does not provide a minimum value with respect to defining private

² The *Act* at s.1(1) Definitions

interests. A private interest associated with even a relatively small dollar value, therefore, will not necessarily be considered “trivial”.

- 10) Whether a Member’s interest in a matter falls within the exceptions to the conflict of interest provisions under the *Act* or the *Code* is always going to be based on the facts associated with the specific situation. **Members are encouraged, therefore, to seek the Integrity Commissioner’s advice when determining whether they must recuse themselves from voting on, participating in the discussion of or attempting to influence a matter relating to their work as a Member of Council.**

III. ANALYSIS

1. Conflicts of Interest under the *Code* and the *Act* – the Basic Framework

Both the *Code* and the *Act* require that a Member of Council avoid acting in situations in which they have a conflict of interest. A Member is disqualified from voting on, participating in the discussion of or influencing a matter if their interest is so related to their exercise of a public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty.³

The *Act* is only concerned with pecuniary interests and liabilities, both direct and indirect. While a **direct pecuniary interest** arises in a situation where the Member receives monetary gain from participating in a matter, an **indirect pecuniary interest** is much broader and encompasses situations such as where the Member is a director or officer of a corporation which has a direct pecuniary interest.⁴ The provisions of the *Act* are to be given a broad and liberal interpretation, in light of the high standard of trust imposed upon elected officials.⁵

If the Member or any of their dependents has a direct or indirect pecuniary interest in a matter, the Member is required to disclose the interest, recuse themselves from voting on or participating in the discussion of the matter, and refrain from attempting to influence the matter.⁶ Breaching the provisions of the *Act* may lead to severe penalties, including removal from office.⁷ The *Act* is enforced by way of application to the Court of Queen’s Bench. It is, therefore, outside of the Integrity Commissioner’s jurisdiction to enforce.⁸

The conflict of interest provisions under the *Code* relate to “**private interests**”. A Member’s private interest is defined to include any personal benefit, whether or not pecuniary in nature.

A conflict of interest under the *Code* occurs where a Member exercises their duties of office while knowing that, in the performance of those duties, there is an opportunity to further their private interests. This can take the form of either a “**real**” or “**apparent**” conflict of interest:

³ *Old St. Boniface Residents Association Inc. v Winnipeg (City)*, [1990] 3 SCR 1170

⁴ *The Municipal Council Conflict of Interest Act*, C.C.S.M. c. M255 (the “*Act*”) at s.4

⁵ *Chan v Katz*, 2013 MBCA 90 (“*Katz*”); *Arbez v Johnson*, [1998] 8 WWR 505 (Man. C.A.) (“*Arbez*”).

⁶ The *Act* at s.5

⁷ The *Act* at s.18(1)

⁸ See Appendix B to the *Code of Conduct for Members of Council*, Part B Section 6(b) – “Complaints Outside Integrity Commissioner’s Jurisdiction”

- A real conflict of interest exists when the Member knows that they have a private interest that may influence the exercise of their duties of office.
- an apparent conflict of interest exists where it is objectively reasonable that the Member will be influenced by a private interest.⁹

A Member with a real or apparent conflict of interest must disclose the general nature of their interest and recuse themselves from voting on or participating in the matter. Failure to do so may lead to a finding by the Integrity Commissioner that the Member has breached the *Code*.

2. Exceptions

- i. **Pecuniary interests that do not exceed the interest of an ordinary resident; and**
- ii. **Interests of general application or that affect the Member as one of a broad class of the public**

Under the *Act*, a Member is presumed not to have a direct or indirect pecuniary interest in a matter, where their interest does not exceed the pecuniary interest of an “**ordinary resident**” in the matter.¹⁰

Similarly, under the *Code* a Member is considered not to have a private interest that gives rise to a conflict, where their interest is:

- in a matter of general application;
- in a matter that affects the Member as one of a broad class of the public.¹¹

When considering whether a Member has an interest that “does not exceed the interest of an ordinary resident”, “is of general application” or “affects them as one of a broad class of the public”, it is helpful to refer to authorities which have interpreted Ontario’s equivalent legislation which provides an exception for a pecuniary interest in a matter that a Member may have “in common with electors generally”.¹²

The authorities say that this exception will apply where a Member’s interest is **similar in kind** to as interests shared by others in the City (or neighbourhood of the City, as the case may be). Put another way, this exception arises where the electors in an area would generally be affected in the **same way** as the Member.¹³ If the Member’s interest is **different in kind** from that of others, it is not going to be captured by these exceptions and the Member must recuse themselves from the matter.

⁹ *Code of Conduct for Members of Council* (the “*Code*”) Part E, Rule 2

¹⁰ The *Act* at s. 4(5)(a) and (b)

¹¹ The *Code* Part C, Definitions

¹² *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50 at s. 4

¹³ John Mascarin, Legal Opinion re: Code of Conduct and Municipal Conflict of Interest Act Integrity Commissioner’s Investigation Reports, December 30, 2019 (“Mascarin Opinion”), citing *Greene v. Borins* (1985) 28 MPLR 251 (Ont. Div. Ct)

Examples:

#1: A Council Member is not prohibited from participating in a vote concerning a proposed subdivision in their neighbourhood unless the Member is affected by the proposed subdivision in a way that is different from the way their neighbours are affected.

For example, where the Member stood to receive a profit or suffer a loss from the proposed subdivision, their interest was considered to be different from that of the other residents of the neighbourhood and, therefore, outside the scope of the exception.¹⁴

#2: A Council Member who owned a business that sold ATVs actively lobbied for greater access to public roads for ATVs. It was alleged that the Member had a disqualifying conflict of interest in the matter because of his interest in selling more ATVs. The Integrity Commissioner in that case found that the Member's interest was one of a "general business uplift" that could affect a number of tourism and hospitality businesses in the municipality, and was an interest that the Member had in common with other business owners.

The Member was, therefore, not disqualified from voting on the matter. The Integrity Commissioner noted that if the municipality were considering regulating the business of selling and servicing ATVs, that would have a direct potential impact on the Member's business, and would take the Member's interest outside the scope of the exception.¹⁵

#3: A Council Member who belonged to a municipal Chamber of Commerce and owned a business and property within a local business improvement area, voted to approve a grant for a local festival. His interest in the festival grant was considered to be one that he shared with electors generally and he was not disqualified from participating in the discussion of the matter.¹⁶

#4: A Member's interest in the development of a recreational facility was determined to exceed the interests of the ordinary citizen in improving the business community, because the facility was in close proximity to a mall that he owned. It was determined that his interest was different than that of the ordinary resident because he could receive a direct influx of business and income.¹⁷ His interest fell outside the exception.

¹⁴ See e.g. *Davidson v Christopher*, 2017 ONSC 4047

¹⁵ Principles Integrity, Township of Clearview, Councillor Broderick Conflict of Interest and Code of Conduct Recommendation Report, September 1, 2020

¹⁶ *Gammie v Turner*, 2013 ONSC 4563

¹⁷ *Cornwallis (Municipality) v Selent*, [1998] 1 WWR 312 (Man. Q.B.)

iii. Interests that are insignificant or trivial

While the *Act* presumes that a **pecuniary interest that does not exceed \$500 is not significant**, the *Code* does not have a similar threshold dollar figure, given that the scope of “private interests” is wider than pecuniary interests and may include those interests that are not necessarily associated with monetary gain.

Under the *Code* a Member may participate in a matter, despite the existence of an interest, if their interest is considered to be “trivial”. In Ontario, the equivalent conflict of interest legislation does not stipulate a monetary threshold as the basis for an exception. It looks, instead, at whether a Member’s interest is “so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the Member”.

The Ontario case law on this topic is, therefore useful, in determining what type of interest is “trivial”.

An interest will be considered trivial, if it is so minor or inconsequential in its nature that it cannot reasonably be regarded as likely to influence the Member.¹⁸ This will be determined on an objective basis. For example:

“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 that councillor’s action and decision on the question. In answering the question set out in this test, such elector might consider whether there was any present or prospective financial benefit or detriment, financial or otherwise, that could result depending on the manner in which the member disposed of the subject matter before him or her.”¹⁹

Accordingly, while a Member’s pecuniary interest in a matter may be valued at less than \$500, it may not be considered to be “trivial” within the meaning of the exception provided for in the *Code*, if the matter is important to the Member.

Examples:

#1: A Member who had realized a profit of approximately \$300 was found to have had a direct pecuniary interest that was not so “insignificant” that it rendered the interest itself “insignificant” within the meaning of Ontario’s legislation. The court held that what one person considers to be an insignificant sum of money, might not be so to another. The standard is an objective one.²⁰

#2: The Mayor’s son was a partner at a law firm that acted for the city police board in a dispute involving city council. While the Mayor had a deemed pecuniary interest by virtue of his son’s employment, the court found that this interest was

¹⁸ Mascarin Opinion at pg. 14

¹⁹ Mascarin Opinion at pg. 15 citing *Whiteley v Schnurr*, (1999) 4 M.P.L.R. (3d) 309 (Ont. S.C.J.). See also *Ferri v Ontario (Attorney General)*, 2015 ONCA 683 and *Yorke et al v Harris*, 2020 ONSC 7361 at para. 70 for further examples

²⁰ *Mino v D’Arcey*, 1991 CarswellOnt 485 (Ont. C.J.)

remote and insignificant and not likely to influence him.²¹ He was not, therefore, considered to have an interest which disqualified him from being involved in the matter.

²¹ *Lastman v Ontario*, (2000) 47 OR (3d) 177 (Ont. S.C.)

V. AUTHORITIES

Code of Conduct for Members of Council

C. DEFINITIONS

...

"Dependant" means:

- (a) the spouse of a Member,
- (b) the common law partner of a Member, and
- (c) any child, natural or adopted, of the Member, who resides with the Member.

"Private Interest" includes any personal benefit, whether or not pecuniary, but does not include an interest:

- (a) in matters of general application;
- (b) in matters that affect a Member as one of a broad class of the public;
- (c) that concerns the remuneration and benefits of the Member as a Member of Council; or
- (d) that is trivial.

E. RULES OF CONDUCT

2. Conflict of Interest

- a. Members must not act in situations in which they have a real or apparent conflict of interest, whether during a meeting of Council or Committee of Council or at any other time while performing their duties of office.
 - i. A conflict of interest exists when a Member exercises their duties of office and at the same time knows that in the performance of those duties there is the opportunity to further their private interests.
 - ii. A **real conflict of interest** exists when a Member has knowledge of a private interest that is sufficient to influence the exercise of their duties of office.
 - iii. An **apparent conflict of interest** exists when there is a reasonable perception, which a reasonably well-informed person could properly have, that the Member's ability to perform any official duty or function must be influenced by their private interest.
- b. A Member is presumed not to have a private interest in any appointment to serve in their official capacity on any commission, board or agency, or in matters arising in relation to that commission, board or agency.
- c. A Member who has a conflict of interest with respect to any matter must refrain from influencing the matter and from discussing or voting on any decision with respect to the matter.
- d. Should a conflict of interest, real or apparent, arise with respect to a matter that will be discussed or determined at a meeting of Council or a Committee of Council, the Member must:

- i. Disclose the general nature of the Member's interest, and
 - ii. withdraw from the meeting without voting or participating in the discussion.
- e. Where a Member does not disclose a private interest under Rule 2.d. because they are not in attendance at the meeting at which the matter arose, the Member must disclose the general nature of their interest at the next meeting of the same body before which the matter arose.
 - f. Where, by reason of withdrawal from a meeting because of non-pecuniary interests, there would be fewer Members remaining than are needed to meet quorum, those Members who have withdrawn by reason of a non-pecuniary interest must disclose their interest, but may still vote in respect of the matter.

The Municipal Council Conflict of Interest Act, C.C.S.M. c. M255

Definitions

1(1)

In this Act,

"dependant" means

- (a) the spouse of a councillor,
- (a.1) the common-law partner of a councillor, and
- (b) any child, natural or adopted, of the councillor,

who resides with the councillor;

"direct pecuniary interest" includes a fee, commission or other compensation paid or payable to any person for representing the interests of another person or a corporation, partnership, or organization in a matter;

"ordinary resident" means

- (a) in the case of a matter which relates to an entire municipality, an ordinary resident of the municipality, and
- (b) in the case of a matter which relates to a part of a municipality, an ordinary resident of that part of the municipality;

Indirect pecuniary interest

4(1)

For purposes of this Act, but subject to this section, a person shall be presumed to have an indirect pecuniary interest in a matter where

- (a) the person, or a nominee of the person,
 - (i) holds a beneficial interest in, or a share warrant or purchase option in respect of, 5% or more of the value of the issued capital stock, or
 - (ii) is a director or officer, of a corporation which, or a subsidiary of which, has a direct pecuniary interest in the matter; or

(b) the person is

- (i) a partner of or employed by, or
- (ii) a guarantor or surety for, or
- (iii) a creditor of,

a person, corporation, partnership, or organization who or which, or (in the case of a corporation) a subsidiary of which, has a direct pecuniary interest in the matter.

Exception for indemnity or expenses

4(2)

For purposes of this Act, councillors shall be presumed not to have a direct or indirect pecuniary interest in any matter involving the indemnity, expenses or remuneration payable to councillors.

No pecuniary interest in certain transactions

4(3)

For purposes of this Act, a person, corporation, partnership, or organization shall be presumed not to have a direct or indirect pecuniary interest in respect of

- (a) any contract into which the person, corporation, partnership or organization enters with a municipality on terms common to contracts between other persons, corporations, partnerships, or organizations and the municipality
 - (i) for the supply, provision, or sale to the person, corporation, partnership, or organization of a utility, service, or article of merchandise administered, provided, or sold by the municipality,
 - (ii) for payment of sewer or water rates or rents, or the installation by the municipality of sewer or water connections or appliances, or
 - (iii) for the construction for the person, corporation, partnership, or organization and other persons, corporations, partnerships, or organizations of any local improvement by the municipality;
- (b) official notices or advertisements inserted by a municipality, or subscriptions held by a municipality, at normal commercial rates in or to a newspaper or other periodical publication of which the person, corporation, partnership or organization is the proprietor or in which he or it is otherwise interested;
- (c) holding bonds or debentures of the municipality;
- (d) reasonable compensation or expense money received for services as a volunteer firefighter or a driver or attendant of an emergency vehicle; or
- (e) reasonable compensation received for providing work, goods or services to the municipality in an emergency.

Presumption of indirect pecuniary liability

4(4)

For purposes of this Act, but subject to this section, a person shall be presumed to have an indirect pecuniary liability to another person or to a corporation, partnership, or organization where

(a) the person, or a nominee of the person,

(i) holds a beneficial interest in, or a share warrant or purchase option in respect of, 5% or more of the value of the issued capital stock, or

(ii) is a director or officer,

of a corporation which, or a subsidiary of which, has a direct pecuniary liability to the other person or to the corporation, partnership, or organization; or

(b) the person is

(i) a partner of or employed by, or

(ii) a guarantor or surety for, or

(iii) a creditor of,

a person, corporation, partnership, or organization who or which, or (in the case of a corporation) a subsidiary of which, has a direct pecuniary liability to the other person or to the corporation, partnership, or organization.

Interest or liability must be significant

4(5)

For purposes of this Act, and notwithstanding any other provision of this Act,

(a) where the direct or indirect pecuniary interest of any person, corporation, partnership, or organization in a matter does not exceed the pecuniary interest of an ordinary resident in the matter, the person, corporation, partnership, or organization shall be presumed not to have a direct or indirect pecuniary interest in the matter;

(b) where the direct or indirect pecuniary liability of any person to another person or to a corporation, partnership, or organization does not exceed the pecuniary liability of an ordinary resident to the same person or to the same corporation, partnership, or organization, the person shall be presumed not to have a direct or indirect pecuniary liability to the other person or to the corporation, partnership, or organization; and

(c) no person shall be presumed to have a direct or indirect pecuniary interest in any matter, or a direct or indirect pecuniary liability to another person or to a corporation, partnership, or organization, unless the value of the pecuniary interest or liability is \$500. or more.

Disclosure during meetings

5(1)

Where during any meeting there arises

(a) a matter in which a councillor or any of his dependants has a direct or indirect pecuniary interest; or

- (b) a matter involving the direct or indirect pecuniary interest of any person, corporation, subsidiary of a corporation, partnership, or organization to whom or which a councillor or any of his dependants has a direct or indirect pecuniary liability;

the councillor shall

- (c) disclose the general nature of the direct or indirect pecuniary interest or liability;
- (d) withdraw from the meeting without voting or participating in the discussion; and
- (e) refrain at all times from attempting to influence the matter.

Disqualification for violation

18(1)

A councillor who violates any provision of this Act is disqualified from office, and the councillor's seat on council becomes vacant, as of the time of the declarations referred to in clauses 21(1)(a) and 21(2)(a).

Municipal Conflict of Interest Act, R.S.O. 1990, c. M.50

Definitions

1 In this Act,

“interest in common with electors generally” means a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part;

4 Sections 5 and 5.2 do not apply to a pecuniary interest in any matter that a member may have,

...

(j) by reason of the member having a pecuniary interest which is an interest in common with electors generally;

Cases and Resources

- John Mascarin, Legal Opinion re: Code of Conduct and Municipal Conflict of Interest Act Integrity Commissioner’s Investigation Reports, December 30, 2019
- Principles Integrity, Township of Clearview, Councillor Broderick Conflict of Interest and Code of Conduct Recommendation Report, September 1, 2020
- *Old St. Boniface Residents Association Inc. v Winnipeg (City)*, [1990] 3 SCR 1170
- *Arbez v Johnson*, [1998] 8 WWR 505 (Man. C.A.)
- *Cornwallis (Municipality) v Selent*, [1998] 1 WWR 312 (Man. Q.B.)
- *Davidson v Christopher*, 2017 ONSC 4047
- *Re Ennismore (Township)*, (1996) 31 M.P.L.R. (2d) 1 (Ont. Gen. Div.)
- *Gammie v Turner*, 2013 ONSC 4563
- *Whiteley v Schnurr*, (1999) 4 M.P.L.R. (3d) 309 (Ont. S.C.J.)

- *Ferri v Ontario (Attorney General)*, 2015 ONCA 683
- *Yorke et al v Harris*, 2020 ONSC 7361
- *Mino v D'Arcey*, 1991 CarswellOnt 485 (Ont. C.J.)
- *Lastman v Ontario*, (2000) 47 OR (3d) 177 (Ont. S.C.)
- *Cooper et al v Wiancko et al*, 2018 ONSC 342
- *Chan v Katz*, 2013 MBCA 90

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