

Not Why I Ran for Office – The Perils of a Councillor Facing Allegations of Improper Conduct

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The two principal matters of concern to councillors in terms of potential for allegations of misconduct are the *Municipal Conflict of Interest Act* and their council's own code of conduct, if it has established one.

In terms of planning what to do, as with most things, it is not so much what you do after the incident has occurred, but what you do to avoid having it happen in the first place.

Every member of a municipal council must be aware of the rules governing his or her conduct as a member.

First of all, get a copy of each document and READ IT!

A copy of the *Municipal Conflict of Interest Act* is attached.

Always pay special attention in any situation in which your own interests, or those of people, corporations or bodies close to you, may be affected by debate or voting at council.

Pay special attention to issues of sensitivity and/or confidentiality, particularly reports, records or other documents marked "confidential", or of a nature generally considered sensitive or not appropriate to be dealt with at a public meeting or made a matter of public record, such as:

- legal advice;
- labour/employee relations and personnel matters;
- security of municipal property; and
- proposed or pending acquisition or sale of municipal land.

The issue of confidentiality is referred to first, due to the fact that the disclosure, use or misuse of confidential information is one of the most frequent issues arising in allegations of misconduct against councillors.

Municipal Conflict of Interest Act

The purpose of the Act is to prevent members of municipal councils, committees and local boards from having any involvement in consideration of a matter in which the member has any direct, indirect or deemed pecuniary interest.

Although the provisions of the Act are couched in vague terms, the results, from the point of view of a member, can be disastrous.

The Act may be brought to bear on any perceived or potential situation of conflict and, where a direct or indirect pecuniary interest

exists, proscribes any participation at all in debate or voting, as well as any attempt before, during or after the meeting to influence the vote.

The *Municipal Conflict of Interest Act* can be severe and arbitrary in its impact. It can destroy, and has destroyed, political careers. What should be of particular concern to members of councils, committees and local boards is the potential for a financial interest to be attributed to the member, even though the member him or herself does not have a direct interest. Such attributed interests are:

- indirect interests;
 - the interest of a corporation, including a public corporation in which the member holds a controlling interest, or a private corporation, of which the member is a shareholder, director or senior officer;
 - the interest of a body of which the member is a member ("body" is not defined);
 - the interest of a partnership of which the member is a partner;
 - the interest of the employer of the member;
 - the interest, direct or indirect, of a parent, spouse or child of the member, if known to the member.

All of the above interests are considered, for the purposes of the Act, to be the interest of the member which impose upon the member the responsibilities of disclosure, non-participation and prohibited conduct.

Section 4 of the Act lists a number of situations to which the requirements of section 5 do not apply, including:

- by reason of the member having a pecuniary interest which is an interest in common with electors generally; and
 - by reason only of an interest of the member which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

If you think that you may have an interest or conflict of interest affected by the Act:

- seek legal or other assistance right away;
 - although the municipality's lawyer doesn't act for you, he or she may assist in providing direction and other assistance;
 - if your municipality has an integrity commissioner whose responsibilities include providing advice to councillors, ask for his or her assistance;
 - the municipal clerk, a key official who has witnessed the results of councillor conflict of interest and legal advice provided at meetings, may be in a position to provide direction and advice based on experience.

IF YOU ARE IN DOUBT as to whether or not you have an interest in a matter PROCEED AS IF YOU DO HAVE SUCH AN INTEREST AND COMPLY WITH THE REQUIREMENTS OF SECTION 5 OF THE ACT.

There is no penalty for declaring that you may have an interest but are not sure, but that you intend to proceed as if you do have an interest. It is probably best to leave the meeting while the matter is dealt with by the council.

Section 5 of the Act provides:

(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.

Where the meeting is not open to the public, the member must also leave the meeting while the matter is under consideration.

Where the member is absent from the meeting, he or she must disclose the interest and otherwise comply with subsection 5(1) at the first meeting of the council or local board attended by the member.

The duty not to take part in the discussion precludes a member from saying or doing ANYTHING to affect the debate. In one case, a member who had made the declaration and disclosure and went to sit in the public gallery, was held to have breached the Act by volunteering factual information concerning an issue that had come up in the debate.

The Municipal Code of Conduct

Authority for a municipal council to establish a code of conduct for its members, and those of local boards, is contained in section 223.2 of the *Municipal Act* of Ontario.

Some municipalities had enacted such codes, often as part of a procedure by-law, prior to specific authority being created for that purpose.

The code of conduct represents the collective will of the council members as to the conduct expected of their members acting in their capacity as members, whether or not at a meeting of the council.

The objective of a code of conduct is that the elected representatives of the public serve, and are seen to serve, the public interest and their constituents in a responsible, lawful and diligent manner.

The most frequent types of provisions in municipal codes of conduct in Ontario are:

- restrictions on the use, disclosure and dealing with of confidential information;
 - restrictions on gifts and benefits that members may receive, possibly including reporting requirements;
 - controls on the expenses of members of council;
 - provisions with respect to the use of municipal staff and resources;
 - prevention of the improper use of influence and conduct involving a conflict of interest;
 - requirements to adhere to council's policies and procedures, comply with the procedure by-law and generally work on behalf of the electors in a conscientious and diligent manner.

Municipal councils also have the power, under section 223.3 of the *Municipal Act, 2001*, to appoint an Integrity Commissioner who reports to council and who is responsible for performing in an independent manner the functions assigned by the municipality with respect to the application of the code of conduct and generally procedures, rules and policies governing the ethical behaviour of members of council and local boards.

Probably the most important responsibilities of an Integrity Commissioner are to educate and advise the council and its members as to the requirements of the code of conduct and other legislation and policies which may impact on their role as councillors, where the council has authorized and directed the Commissioner to do so.

An Integrity Commissioner has such powers and responsibilities as may be assigned to him or her by the municipal council, which may

include the conduct of an inquiry to ascertain facts and provide an opinion as to whether or not a member of council has contravened the code of conduct.

In the conduct of an inquiry, the Integrity Commissioner may exercise such powers and duties as assigned by the council. The municipality or local board is required to give the commissioner such information as he or she believes to be necessary for the inquiry, and the commissioner is entitled to have free access to all books, accounts, reports, records and other papers belonging to the municipality believed to be necessary for the inquiry.

The Commissioner may decide to exercise the powers of a commission under the *Public Inquiries Act*.

A code of conduct cannot include an offence provision.

If an Integrity Commissioner reports to the municipal council that, in his or her opinion, a member has contravened the code of conduct, the council may impose:

- a reprimand;
- suspension of remuneration as a councillor for a period of up to 90 days.

Aside from those two specified sanctions, it is unclear what other penalties or requirements a council may impose upon one of its members following breach of the code of conduct. For instance, the council might require that the member apologize, or take such specific actions to rectify the consequences of the breach as are within the powers of the council to require.

It would not appear that a council would have the power to suspend a member from office, or from voting, or prevent a member from attending meetings of a body of which he or she is a member, at least in the absence of improper conduct at a meeting sufficient to authorize the head of council or other presiding officer to expel the member from the meeting.

Financial Costs to Members of Misconduct Proceedings

The costs of responding to conflict of interest proceedings or a code of conduct breach may be substantial, particularly the expenses for obtaining required legal advice and representation, but there are statutory provisions to mitigate such costs.

At the outset, it is necessary to make reference to section 448 of the *Municipal Act, 2001* which provides that no proceedings for damages or otherwise shall be commenced against a member of council for any act done in good faith in the performance or intended performance of a duty or authority under that Act or a by-law passed under it, or for any alleged neglect or default in the performance in good faith of the duty or authority.

Similarly, section 450 of the Act provides that no proceedings in negligence may be brought with respect to the exercise of discretionary power or the performance or non-performance of a discretionary function, if such involves a policy decision made in good faith in the exercise of discretion by the member of council.

Under section 283(1) of the *Municipal Act, 2001*, a municipality may pay the expenses of members of its council where such are incurred in their capacity as members or officers.

Typically, municipal councils adopt policies providing some financial support to members of council in respect of legal expenses incurred in defending themselves against charges arising out of the performance of their duties as councillors, where the member has been successful in his or her defence of the proceeding.

Section 14(1) of the *Municipal Conflict of Interest Act* authorizes municipal councils to pass by-laws for contracting for insurance or acting as an insurer to protect a member of council found not to have contravened section 5, against costs or expenses incurred by the member as a result of proceedings brought under that Act and for paying on behalf of or reimbursing the member for any such costs or expenses.

Although it appears that a member cannot be reimbursed for acting as an applicant in municipal conflict of interest proceedings, nevertheless, a court recently supported the power of a municipality to pay the legal costs of a councillor as plaintiff in a personal defamation action, where the attack on the councillor's reputation was considered by the council as likely to affect her ability to carry out her duties and to undermine public confidence in municipal government.

The Court also suggested that it expected that the municipality in question would arrange with the councillor to repay the municipal corporation out of costs or damages recovered by her in the action, if any. (See *Holyday v. City of Toronto et al* (2010), 256 OAC 109 (Div. Ct.), 74 MPLR (4th) 194.)

What To Do When an Allegation is Made

In general terms, the following will often be the best approach:

- obtain immediate legal and/or other advice as may be required;
 - be vigilant;
 - say as little as possible about the matter, except to the extent necessary;
 - obtain and review whatever is being said about you and search all media for coverage;
 - ascertain who else was in attendance at the meeting or other event where the misconduct is alleged to have occurred, and make a list of their names as possible witnesses;
 - obtain copies of reports, minutes, agendas, by-laws, certified copies of public documents and whatever other information or records you may need to support your case;
 - co-operate with the municipal solicitor and/or integrity commissioner in ascertaining facts involving the case;
 - bear in mind that it is political enemies who most frequently bring conflict of interest and other proceedings against members of municipal councils. It is for this reason, among others, why it is recommended that if you are in doubt, you should proceed on the basis as if you had a conflict or pecuniary interest in the matter.

In addition to the provisions referred to above, there are also other relevant legislative requirements, such as the provisions of the *Criminal Code of Canada* prohibiting an official from committing fraud or breach of trust; giving, offering, demanding or accepting a benefit in exchange for voting or other official act; attempting to affect municipal official action by suppression of the truth; and unlawfully and corruptly accepting a reward to show favour.

There are also common law principles against conflict of interest, the undue exertion of influence, and accepting gifts or benefits in exchange for a vote.

Conclusion

Fortunately, most members of municipal councils serve out their term without being subject to serious allegations of improper conduct or conflict of interest. In some cases, resignation, a compromise or settlement of claims may lead to resolution of such a matter. At the same time, it is always necessary to be vigilant, and to be aware of the responsibilities of municipal office.

[Please note that a copy of the Municipal Conflict of Interest Act is included in the PDF copy of this paper.]

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