Bill 68 May Change Duties And Obligations Concerning Conflicts Of Interest

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The *Modernizing Ontario's Legislation Act, 2016* passed third reading and received Royal Assent in Ontario's Legislature.

On May 30, 2017, the *Modernizing Ontario's Legislation Act*, 2016, also known as Bill 68, passed third reading and received Royal Assent in Ontario's Legislature. Bill 68's amendments to the *Municipal Conflict of Interest Act* are not yet in force at the time of this writing. Once declared in effect, these amendments will provide for significant changes to the law's approach on both actual and potential conflicts of interest by public officials.

Most notably, changes under Bill 68 provide a larger role for municipally-appointed Integrity Commissioners who will now act as a first point of contact for council and local board members who have concerns over the possibility of acting in contravention of the *Municipal Conflict of Interest Act*. In theory, changes arising from Bill 68 will reward members who seek direction from an Integrity Commissioner by reducing the likelihood of a severe penalty in the event that those members are found to have acted in conflict.

Notable amendments that will affect school boards include:

- The start date of trustees' term of office will change from December 1 to November 15 in the year of a regular election. This is intended to address the lag time from election dates (third week of October) to start date of the term of office;
- The *Municipal Act, 2001* and the *City of Toronto Act, 2006* are amended to provide for the appointment of Integrity Commissioners by municipalities. The role of these commissioners includes advising school board trustees with respect to their obligations under the *Municipal Conflict of Interest Act*, as well as any rules, policies, codes or other official documents governing trustees' conduct;
- Trustees who declare a conflict of interest are required to file a written statement disclosing their interest, including a description of its general nature;
- In turn, school boards are required to maintain registries where copies of such statements may be publicly accessed;
- An elector, an Integrity Commissioner of a municipality or a "person demonstrably acting in the public interest" is entitled to have a judge determine whether a trustee has acted contrary to the *Municipal Conflict of Interest Act*;

- Judges have new discretion to consider reasonable measures taken by trustees to prevent contravention of the *Municipal Conflict of Interest Act*, including consultation with an Integrity Commissioner when determining the type of penalty to be imposed in the event of contravention; and
- Corresponding to the above discretion to take mitigating factors into account, judges may now impose penalties short of outright removal for trustees found to have contravened the *Municipal Conflict of Interest Act*. Such lesser penalties would include reprimand and a suspension lasting up to 90 days.

The availability of advice from an Integrity Commissioner and judicial discretion to assign lenient penalties in appropriate instances may each be taken as welcome developments—especially so given the lack of certainty that often surrounds the determination of whether a *potential influence* rises to the level of a *conflict of interest*. Local board and council members are elected to serve their communities and generally feel strongly about doing so at every opportunity. The availability of advice from the Integrity Commissioner may provide these public servants with the benefits of increased certainty over how and when they can and cannot participate in their elected body's decision making, thus ensuring that their voters are served to the fullest extent.

When Bill 68's changes to the *Municipal Conflict of Interest Act* are brought into force on a date yet to be determined by Ontario's Lieutenant Governor, the operation of a number of its features remains to be determined through practice. These are discussed below.

1. One of the evident purposes of Bill 68 is to provide an increased role for Integrity Commissioners as resources for providing members with readily-available guidance concerning their obligations under the *Municipal Conflict of Interest Act*. What remains unclear is the form that such guidance will take – particularly, whether or not it will be formalized in a manner that could be scrutinized by a municipality, a local board or a reviewing court.
2. Bill 68 appears intended to facilitate greater transparency by allowing the public to view members' written statements of conflict and by allowing any person "demonstrably acting in the public interest" to apply to a judge to have a member declared in conflict. The downside of such transparency and increased access to judicial applications may be a resulting strain on scarce judicial resources as well as a possible increase in frivolous and vexatious accusations against council and local board members. Bill 68 appears to address this concern by providing that an application alleging conflict must be made by either an elector or a person demonstrably acting in the public interest. It remains to be seen, however, whether courts will adopt a strict or lenient view of what is required to demonstrate that an applicant is acting in the public interest.
3. Bill 68 requires a court to consider "reasonable measures" taken by members to avoid a conflict when determining whether a violation of the *Municipal Conflict of Interest Act* has occurred. In practice, however, the determination of what constitutes a reasonable measure may become challenging. One such challenge is the assessment of whether the intentions of local board members are relevant to the determination of what constitutes a reasonable measure to avoid conflict. Recent decisions regarding the *Municipal Conflict of Interest Act* reflect inconsistency in the courts' willingness to consider such intentions, with some courts holding them significant[1] while others hold them irrelevant.[2]

The above developments arising from Bill 68, particularly the new role of Integrity Commissioners in respect of the *Municipal Conflict of Interest Act*, are notable for all elected public officials as a sign of forthcoming changes in the regulation of conflicts of interest. At the same time, however, numerous features of this amendment to the law remain to be clarified through practice and possible judicial decisions yet to arise from its provisions.

[1] Michael Baillargeon v. Oliver Carroll, 2009 CarswellOnt 633 at para 77.

[2] See *Craig v Ontario*, 2013 ONSC 5349 at paras 42 to 44.

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