Municipal Conflict Of Interest Changes Now In Effect

March 20, 2019

he long-anticipated changes to the Municipal Conflict of Interest Act came into effect on March 1, 2019. The Modernizing Ontario's Legislation Act, 2016, also known as Bill 68, passed third reading and received Royal Assent in Ontario's Legislature on May 30, 2017. Bill 68 amended 16 pieces of legislation at that time and included changes to the Municipal Act, 2001 and the City of Toronto Act, 2006 that required municipalities to begin to appoint Integrity Commissioners. Bill 68 also made important amendments to the Municipal Conflict of Interest Act, but these latter amendments were not scheduled to come into effect until a much later date. The new legislation has introduced significant changes to the conflict of interest regime that applies to elected officials, such as school board trustees.

Legislation Overview

The Municipal Conflict of Interest Act is legislation that operates alongside school board codes of conduct. Its provisions govern the determination of when a trustee has entered a conflict of interest, and set out the legal recusal requirements and potential repercussions that apply if a conflict arises. The basic definition of a conflict of interest remains unchanged by the amendments under Bill 68. It remains the case that a conflict of interest arises where a trustee has a pecuniary interest in a matter that is before the board of trustees and that interest is not remote.

Under the Municipal Conflict of Interest Act, a pecuniary interest that gives rise to a conflict may take one of three forms:

- A direct pecuniary interest, which arises from the trustee themselves having a monetary or economic interest in a matter.
- An indirect pecuniary interest, which arises from the trustee being a shareholder, owner, part-owner, director, officer, or member of a corporation or body having a monetary or economic interest in a matter.
- A deemed pecuniary interest, which arises when the parent, spouse or child of the trustee has a direct or indirect pecuniary interest that is known to the trustee.

- The standard for finding a conflict of interest is strict in most cases. As noted by Ontario's Divisional Court in Re Moll and Fisher:[1]
- "Trustees, like Caesar's wife, must be, and appear to be, beyond temptation and reproach."
- As the court went on to state in that decision, the Municipal Conflict of Interest Act "enjoins holders of public offices within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty".[2]

  Where a trustee has any pecuniary interest in a matter to be discussed by the board of trustees, the Municipal Conflict of Interest Act enumerates mandatory measures to be taken by the trustee to recuse themselves. For example, trustees having a conflict of interest are required to disclose their interest prior to any consideration of the matter at a meeting, not take part in any discussion or vote concerning any question in respect of the matter, not attempt to influence such voting, and, in the special case of an in camera meeting, to leave the room where the meeting is held for the duration of the consideration.

Impact on School Boards

- While the amendments that came into force on March 1, 2019 will not change the Municipal Conflict of Interest Act's strict standard or its recusal requirements, school boards are required to adopt new procedures to administer these requirements and trustees who violate these standards will also be subject to new consequences.

  In brief, the changes that came into effect on March 1st include the following:
- Trustees who declare a conflict of interest are now required to file a written statement with the secretary of the school board disclosing the trustee's interest. This written statement must include a description of the general nature of the conflict of interest.
- In turn, the school board is required to maintain a registry where copies of such written statements may be accessed by members of the public.
- Any member of the public, in reviewing the information in the school board's public registry or from any other sources, is entitled to make an application to a court to determine whether any trustee has acted contrary to the Municipal Conflict of Interest Act. This is a departure from the legislation's previous provisions extending this right to only an individual who qualified as an elector of the trustee in question.
- Where an application is made to a court alleging that a trustee has violated the Municipal Conflict of Interest Act, the court will now have discretion to consider whether the trustee took reasonable measures to prevent the contravention, including considering whether the trustee consulted with an Integrity Commissioner. This amends the previous regime which called for courts to strictly consider contraventions as a "yes-no" issue without considering mitigating factors in cases where trustees acting in good faith may have nevertheless crossed the line.
- In line with the new discretion to take trustees' reasonable measures into account, courts will also have a new authority to impose a range of penalties for contraventions of the Municipal Conflict of Interest Act. This range of penalties runs from lesser penalties such as a reprimand and suspension of remuneration,

to more significant penalties such as declaring the trustee's seat vacant, disqualifying the trustee from running for re-election for up to seven years, and ordering financial restitution where the trustee has made a financial gain as a result of their contravention. Under the previous regime, only the more significant of these penalties were available and were applied to any circumstance where a trustee had violated the Municipal Conflict of Interest Act, regardless of any mitigating factors.

These new requirements are intended to promote greater public transparency in the disclosure of trustees' conflicts of interest, including through reduced penalties for trustees acting in good faith in the interest of such transparency. While it remains to be seen how courts will apply their new discretion under the Municipal Conflict of Interest Act, advice from legal counsel and Integrity Commissioners will take on new importance in helping protect trustees against the Act's most severe penalties.

Comment

To be prepared, school boards will need to adopt new processes, including considering how their registry of conflict disclosures will be maintained and how the public will be provided with access to these materials. School boards will also need clarity on how to access advice and guidance from an Integrity Commissioner if one is retained by their school board. Advance planning and clear policies are key for ensuring that trustee conflicts are dealt with consistently, effectively and transparently in accordance with the laws that came into force on March 1st.

1 *Re Moll and Fisher,* 1979 CarswellOnt 575 (Div Ct).

2 *Ibid.*

By

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