

Section 4.3

Conflict of Interest Guidelines for Members of Councils and Local Boards

Introduction

At some point, a question may arise as to whether a member of a council or local board is in a conflict of interest. This is a matter which cannot be taken lightly and it has warranted the provincial legislature to adopt the *Municipal Conflict of Interest Act* (see Appendix 4.3a). Furthermore, failure to act upon a conflict of interest can have serious consequences upon an individual and the credibility of the municipality.

This section provides a brief overview of the Act, as well as a copy of the Act. The reader is cautioned, however, the preparation of this material involves interpretation of legislation as it applies in general situations. Specific situations may require careful legal analysis and therefore reference should be made to the *Municipal Conflict of Interest Act*, other relevant legislation and legal advisors.

It is also important to note that the municipal solicitor does not advise individuals on issues regarding conflict of interest. The municipal solicitor's role is to advise the council and not individual councillors or members of boards, commissions or committees. It is the personal responsibility for the councillor to obtain his or her own legal advice on such matters.

Conflict of Interest

The *Municipal Conflict of Interest Act* was enacted in 1982. The Act deals with various types of interests and what conduct is required when those interests arise, as well as the penalties that result from the failure to observe the standards set out in the Act. Within the Act, the term "conflict of interest" is not used. Rather, the Act talks about declaring an interest. If the interest is declared, there is not a conflict.

Public office is a trust conferred by the public for public purposes. The present legislation in Nova Scotia permits members of councils or local boards to do business with the municipality or board, provided that they remove themselves from the decision making process in respect to

When in doubt ask your personal legal advisor whether a conflict of interest exists.

Purpose and Overview of the Act

Who is covered under the Act?

that business. It recognizes that the judgment of even the most well meaning persons may be impaired when their own financial interests, or the financial interests of someone close to them are affected.

The Act covers members of both council and local boards which means elected officials of municipalities and school boards and appointed members of municipal and inter-municipal commissions, boards, bodies and authorities and committees (Section 2).

Interests

The Act speaks of “interests.” These can be discussed under the headings:

- direct pecuniary interest
- indirect pecuniary interest
- deemed pecuniary interest

Pecuniary Interest

In each case the term “pecuniary” is used, but not defined. A pecuniary interest is money interest. It does not, however, have to be a cash interest as long as it may be converted into or measured in cash. The focus is not only on money income but on the wealth of the member. The wealth of the member includes all of the member’s assets. The possible effect must be looked at in addition to the certain effect. The magnitude or extent of the pecuniary interest is irrelevant to the determination as to whether the interest exists. Thus, a pecuniary interest can mean monetary benefits that will be received or could be received, either in cash or as an increase in asset value and it can also mean the avoidance of cash payments or a decrease in asset value.

Direct Pecuniary Interest

This is not discussed under a separate heading in the Act, however, a direct pecuniary interest is that of a member. “Member” is defined in the Act, as are council and local board, and includes a former member, so that enforcement for actions taken while a person was a member can continue after membership ceases.

A useful question for a member to ask is: “What could I possibly stand to gain or lose from the outcome of this matter?” Unless the answer is “Absolutely nothing” the member has an interest which, unless it is exempted elsewhere in the legislation, requires the member to adhere to the course of conduct set out in the Act. Generally, if you have to ask yourself whether the Act applies, it probably does, and you should

Indirect Pecuniary Interest

declare an interest, or, at a minimum, obtain independent legal advice and follow it.

Indirect pecuniary interests are dealt with under Section 3 of the Act and arise from the member’s relationship with another entity, such as a corporation, of which the member is a shareholder or director and which has an interest in any matter in which the council is concerned.

The indirect pecuniary interests (Section 3) includes interests of a/an:

- partner
- associate
- employer
- company in which the member is an officer
- private company in which the member is a shareholder
- company in which the member has or controls over 10% of the voting shares (directly or indirectly)

who or which has an interest in any matter in which the council, board, commission or committee is concerned.

The combination of the member’s relationship with the entity, and an interest of the entity, whether pecuniary or not, is sufficient to give the member an indirect pecuniary interest. An example of this may be where a councillor is a member of a volunteer organization that seeks a grant from council.

Deemed Pecuniary Interest

A deemed pecuniary interest (Section 4) results from the relationship of the member with other individuals. This section is very wide ranging in terms of the relationships covered both by blood and by marriage and by virtue of the definition of “spouse,” includes those who are living together as husband and wife. As well, the section includes anyone who normally resides in the same house as the member. The section also applies not only to pecuniary interests of which the member has knowledge, but also pecuniary interests of which the member reasonably should have known. This section means that the pecuniary interest of these people, whether it is direct pecuniary interest or an indirect pecuniary interest, is deemed to be that of the member.

There are exemptions to the Act.

Exemptions

Section 5 (1) of the Act provides the exemptions, and the circumstances. They are self explanatory (see Appendix 4.3a), however, if there is any question, the councillor should seek independent legal advice. This is not legal advice from the municipal solicitor, whose role is to advise the council and not individual councillors.

What you should do when an interest has been declared.

Discharging Obligations Under the Act

Section 6 of the Act states that any and all interests must be declared at the start of a meeting where the matter is to be considered, and the member must withdraw from his or her place as a member. In closed door meetings, he or she must physically leave the room, and at meetings open to the public, he or she must withdraw to that part of the room set aside for the general public and abstain from taking part in any discussion or voting on the matter. It is to be understood that interested members must refrain from attempting in any way whether before, during or after the meeting to influence the decision of the council or local board with respect to the matter.

A “meeting” is defined as a regular, special or emergency meeting of the municipality or local board and any committee thereof and includes informal as well as formal meetings (Section 2 (e)).

If the member was not present at the meeting where the matter in which the member has an interest was first raised, the member must disclose the interest at the next meeting he or she attends (Section 6(2)).

Similarly, a member must comply with these requirements even if he or she only intends to obtain a pecuniary interest, either on his or her behalf or while acting for, by with or through another (Section 6(3)).

Ensure records are kept.

Record Keeping

Section 7 states that every declaration of interest must be recorded in the minutes of the meeting and kept in a “central record of disclosure” by the clerk, meeting secretary or chairman. It is recommended that any person who declares an interest check the central record of

disclosure to ensure that this has in fact been recorded. This record is open to public inspection.

Consequences Upon Failure to Disclose an Interest

Section 9 of the Act provides that the Attorney General or an elector (this includes a Council member) may apply to the Nova Scotia Supreme Court for the determination of whether a member has breached the Act. The Attorney General’s Department has stated that responsibility to pursue complaints that do not involve Provincial interests lies in the hands of the electors or the council or local board concerned and that it will not pursue claims which are local in nature. An application under Section 9 must be done within sixty days of the alleged contravention coming to the applicant’s attention, and within ten years after the date of the alleged breach.

The consequences of failing to declare a conflict of interest can be severe.

Section 10(1) provides that where a judge finds that the Act has been violated, he or she shall declare the member’s seat vacant. And direct that it be filled (see exceptions below). The disqualified member will not qualify to fill any such vacancy. The judge may also disqualify the member from being a council or local board member for up to ten years. Additionally, where the violation resulted in personal financial gain, the judge may order the member to make restitution and where it was made for personal financial gain, shall impose a penalty of not more than \$25,000 or in default, imprisonment for up to 12 months. Court costs may also be awarded against the member.

If a member fails to declare an interest, the Court may also order that the Council’s, board’s or committee’s action in respect to the subject matter be void (Section 13). The judge, however, is required to consider the effect this may have on innocent third parties.

As an alternative to a court application by an elector, the Council or local board may by resolution request an inquiry into any alleged breach of the Act. The Attorney General may then appoint a judge or other suitable person to head the inquiry. The appointee is required to report to the Attorney General and the Council or local board on the results of evidence taken at the inquiry.

Defences to Legal Action

A defendant may argue that one of the exemptions in Section 5 applies. If the judge finds, however, that the Act has been contravened, the only defences available to argue that the member's seat should not be forfeited are that the contravention was committed as a result of inadvertence or *bona fide* error in judgement (Section 10(1)).

Inadvertence has been interpreted by the Courts to excuse ignorance of the law, carelessness, negligence and mere inattention. Willful blindness or reckless disregard for the legal consequences of ones action, however, does not constitute inadvertence. An error in judgement may be an error arising out of a mistake of fact or law. Whether an error has occurred in good faith or honestly, which is what *bona fide* means, is itself a question of fact.

If either of these defences can be borne out, the Court has the discretion to relieve against forfeiture of office if a member was found to contravene the Act.

Conclusion

The issue of "conflict of interest" is a serious matter of concern for all elected officials of municipalities and school boards and appointed members of municipal and inter-municipal commissions, boards, bodies, authorities and committees. Each of the above should have their own copy of the *Municipal Conflict of Interest Act* as soon as they assume their position and they should review it on a regular basis.

Appendix 4.3a

Municipal Conflict of Interest Act

**CHAPTER 299
OF THE
REVISED STATUTES, 1989**
amended 1991, c. 6, s. 40; 1993, c. 47, s. 6

NOTE - This version of this statute is provided for your convenience and personal use only. Where accuracy is critical, please consult official sources.

An Act to Prevent Conflict of Interest in the
Conduct of Municipal Government

Definitions

- 1** This Act may be cited as the *Municipal Conflict of Interest Act*. R.S., c. 299, s. 1.
- 2** In this Act,
 - (a) "council" means the council of a municipality;
 - (b) "elector" means a person entitled to vote at a municipal election in the municipality;
 - (c) "interest in common with electors generally" means a pecuniary interest in common with the electors within the area of jurisdiction of the municipality or local board or, where the matter under consideration affects only part of that area, an interest in common with the electors within that part;
 - (d) "local board" means any board, commission, committee, body or local authority of any kind established to exercise or exercising any power or authority under any general or special Act with respect to any of the affairs or purposes of a municipality or parts thereof or of two or more municipalities or parts thereof, or to which a municipality or municipalities are required to provide funds, and includes a school board pursuant to the School Boards Act;

- (e) "meeting" means a regular, special or emergency meeting of a municipality or local board and any committee thereof, and includes informal as well as formal meetings;
- (f) "member" means a member, in whatever capacity, of a council or a local board and, for the purposes of Sections 9 and 10, includes a former member;
- (g) "municipality" means a city, incorporated town or municipality of a county or district;
- (h) "senior officer" means the chairman and vice-chairman of the board of directors of a corporation, the president, vice-president, secretary, treasurer, managing director and general manager of a corporation and any other person who performs functions for the corporation similar to those normally performed by a person occupying any such office;
- (i) "spouse" means either of a man and woman who
 - (i) are married to each other,
 - (ii) are married to each other by a marriage that is voidable but which has not been voided by order of a court,
 - (iii) have gone through a form of marriage that is void and have cohabited within the preceding twelve months, or
 - (iv) are living together as husband and wife;
- (j) "substantial interest" means the direct or indirect beneficial ownership of, or the power to exercise control or direction over, equity shares of any corporation that carry more than ten per cent of the voting rights attached to all outstanding equity shares of the corporation. R.S., c. 299, s. 2; 1991, c.6, s. 40.

Indirect pecuniary interest

- 3** A member has an indirect pecuniary interest in any matter
 - (a) if the member or the members nominee
 - (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its shares to the public,

Deemed pecuniary interest

- (ii) has a substantial interest in, or is a director or senior officer of, a corporation that offers its shares to the public, or
 - (iii) is a member of a body, whether incorporated or not, that has an interest in any matter in which the council or local board is concerned;
- or
- (b) if the member is a partner of or associated in a joint venture with a person, or is in the employ of a person or body, whether incorporated or not, that has an interest in any matter in which the council or local board is concerned. R.S., c. 299, s. 3.

4 The pecuniary interest of

- (a) the spouse of a member;
- (b) any son, daughter, father, mother, brother or sister of a member or the members spouse;
- (c) the spouse of the persons referred to in clause (b); and
- (d) any other person who normally resides in the same home as the member, shall, if known to the member or of which the member reasonably should have known, be deemed to be also a pecuniary interest of the member. R.S., c. 299, s. 4.

Where the Act does not apply.

5 (1) This Act does not apply to any interest in any matter that a member may have

- (a) as an elector;
- (b) by reason of being entitled to receive any service, commodity or other benefit offered by the municipality or local board in like matter and subject to the like conditions as are applicable to persons who are not members;
- (c) by reason of purchasing or owning a debenture or other security issued by the municipality or local board;
- (d) by reason of having made a deposit with the municipality or

local board, the whole or part of which is or may be returnable to the member in like manner as such a deposit is or may be returnable to other electors;

- (e) by reason of being eligible for election or appointment to fill a vacancy, office or position in the council or local board where the council or local board is empowered or required by any general or special Act to fill such vacancy, office or position;
- (f) by reason of being eligible for appointment, or having been appointed, by the council to a local board;
- (g) by reason only of being a director or senior officer of a corporation incorporated for the purpose of carrying on business for and on behalf of the municipality or local board;
- (h) by reason of having been appointed by the council or local board to a board, committee or other body;
- (i) with respect to any allowance, honorarium, remuneration, salary or benefit to which the member is or may be entitled by reason of being a member or by reason of having been appointed, by the council or local board, to a local board or other board, committee or other body;
- (j) by reason of having a pecuniary interest that is an interest in common with electors generally;
- (k) by reason only of an interest that is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member.

(2) This Act does not apply to a council of a city, or a local board of that city, while it has in effect a by-law made pursuant to Section 19 of the Municipal Elections Act. R.S., c. 299, s. 5.

What to do if there is a direct conflict of interest.

- 6 (1) Where a member, either on the members own behalf or while acting for, by, with or through another, has any direct or indirect pecuniary interest 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 shall
- (a) as soon as practicable after the commencement of the

What to do if there is an indirect conflict of interest.

- meeting disclose the interest and the general nature thereof;
 - (b) withdraw from his place as member and
 - (i) in the case of a closed meeting, leave the room in which the meeting is held for the duration of the consideration of the matter, and
 - (ii) in the case of a meeting that is open to the public, either leave the room in which the meeting is held or remain in that part of the room set aside for the general public for the duration of the consideration of the matter;
 - (c) refrain from taking any part in the consideration or discussion of the matter and from voting on any question relating to the matter; and
 - (d) refrain from attempting in any way, whether before, during or after the meeting, to influence the decision of the council or local board with respect to the matter.
- (2) Where the member was not present at a meeting at which a matter in which the member, either on the members own behalf or while acting for, by, with or through another, has any direct or indirect pecuniary interest was the subject of consideration, the member shall disclose the interest at the next meeting the member attends, and the provisions of subsection (1) shall apply to the member in respect of the matter.
- (3) A member shall comply with this Section in respect of any matter in which the member intends to obtain a pecuniary interest, either on the members own behalf or while acting for, by, with or through another. R.S., c. 299, s. 6.

Recording the Conflict of Interest in the minutes.

- 7 (1) Every declaration of interest and the general nature thereof disclosed pursuant to Section 6 shall be recorded in the minutes of the meeting by the clerk of the municipality or by the secretary of the local board, as the case may be.
- (2) The person acting as secretary of any meeting, or the chairman of the meeting if there is no secretary, shall record every

disclosure of interest and the general nature thereof in a central record of disclosure.

- (3) Every municipality and local board shall keep a central record of disclosure, which shall be open to inspection by any elector without fee at all reasonable times. R.S., c. 299, s. 7.

What is required if a declared conflict of interest results in a lack of quorum.

- 8 (1) Where, by reason of this Act, a council or local board lacks a quorum to consider any particular matter, then, notwithstanding the provisions of any Act or other provision establishing the number of members to constitute a quorum, for the purposes of considering and acting on the matter, a quorum is one third of the council or local board or two members thereof, whichever is greater.

- (2) Where, by reason of this Act, a council or local board lacks a quorum pursuant to subsection (1) to consider any particular matter, the council or local board may apply to a judge of the Trial Division of the Supreme Court or a county court for an order authorizing the council or local board to consider and act on the matter.

- (3) The judge may, by order, prescribe the terms and conditions pursuant to which the council or local board may consider and act on the matter, and may direct that certain of the members may participate in the consideration of the matter and that certain members may not, as to the judge seems just.

- (4) Participation in the consideration of any matter in which a member has a direct or indirect pecuniary interest pursuant to an order of a judge is not a contravention of this Act. R.S., c. 299, s. 8; 1993, c. 47, s. 6.

An application to determine whether a conflict of interest has arisen.

- 9 (1) The Attorney General or an elector may apply to a judge of the Trial Division of the Supreme Court or a county court for a determination of whether a member has contravened the provisions of this Act.

- (2) An application shall be made by originating notice (application inter partes) pursuant to the rules of the court.

- (3) The application shall state the grounds on which it is believed

Consequences of an undeclared conflict of interest as determined by a judge.

that a contravention of this Act may have occurred.

- (4) An application shall be made within sixty days after the fact comes to the attention of the applicant that the member may have contravened this Act.
- (5) No application may be made pursuant to this Section more than ten years after the date of the alleged contravention of this Act. R.S., c. 299, s.9.

- 10** (1) Where the judge determines that a member has contravened this Act, the judge shall declare the seat of the member vacant and direct that the vacancy be filled in the manner prescribed by law, but if the judge determines that the contravention was committed as a result of inadvertence or a bona fide error in judgment the judge may relieve against such forfeiture of office.
- (2) The member found to have contravened this Act shall not be qualified to fill the vacancy so created.
 - (3) Where the judge determines that a member has contravened this Act, the judge may
 - (a) disqualify the member from being a member of the council or local board, or any council or local board, for a period of not more than ten years; and
 - (b) where the contravention has resulted in personal financial gain, require the member to make restitution.
 - (4) Where the contravention has been made for the purpose of personal financial gain, the judge shall impose a penalty of not more than twenty-five thousand dollars or, in default of payment thereof, imprisonment for a term of not more than twelve months. R.S., c. 299, s. 10.

Appeal process when a judge has rendered a decision on a conflict of interest.

- 11** (1) An appeal lies from the decision of the judge to the Appeal Division of the Supreme Court in accordance with the rules of court.
- (2) No steps shall be taken to fill the seat of a member who has been found to contravene this Act until after the expiration of the time limited for appeal or, if an appeal is brought, until after

**Inquiry Process for
conflict of interest.**

the appeal has been finally determined. R.S., c. 299, s. 11.

- 12 (1) If the council or local board by resolution requests that inquiry be made into or concerning
 - (a) any matter mentioned in the resolution and relating to an alleged malfeasance, breach of trust or other misconduct on the part of a member, an officer or other official, an employee or agent of the municipality or local board, or any person having a contract therewith, in relation to the duties or obligations of such person to the municipality or local board;
 - (b) any allegation that a member has contravened the provisions of this Act; or
 - (c) any matter connected with the good government of the municipality or local board or the conduct of any part of the public business thereof, the Attorney General shall appoint a judge or some other suitable person to make the inquiry.
- (2) The person so appointed shall, with all convenient promptitude, enter upon the inquiry and upon the conclusion thereof, shall report to the Attorney General and to the council or local board the result of the inquiry and the evidence taken thereon.
- (3) The person appointed shall have, for the purpose of inquiry, all the powers of a commissioner under the Public Inquiries Act.
- (4) Such person is entitled to receive and shall be paid such fees as may be fixed and paid by the Attorney General.
- (5) The council or board may engage and pay counsel to represent the municipality or local board and may pay all proper witness fees to persons summoned to give evidence at the instance of the municipality or local board.
- (6) Any person charged with malfeasance, breach of trust or other misconduct, or whose conduct is called in question, may be represented by counsel. R.S., c. 299, s. 12.

**Voidable proceedings
where Section 6
contravened**

- 13** (1) The contravention of Section 6 of this Act does not of itself invalidate any proceedings in respect of any matter, but the proceedings in respect of the matter are voidable on application to a judge of the Trial Division of the Supreme Court or of a county court at the instance of the municipality or of the local board within two years after the matter was authorized by the council or local board.
- (2) In determining whether any proceedings should be declared void under subsection (1), the judge shall give due consideration to the effect of such declaration on innocent third parties. R.S., c. 299, s. 13.
- 14** Proceedings to declare a seat vacant or to disqualify a member by reason of conflict of interest, or to require a member to make restitution where a contravention of this Act has resulted in personal financial gain, shall be had and taken only under the provisions of this Act. R.S., c. 299, s. 14.