

TEMPLEMAN

Jennifer Savini
jsavini@tmlegal.ca

Cristy Nurse
cnurse@tmlegal.ca

Bill 68:

IMPACTS AND INTERPRETATIONS

ONTARIO EAST
ECONOMIC DEVELOPMENT

OEMC

MODERNIZING ONTARIO'S MUNICIPAL LEGISLATION ACT, 2017

The Legislation Amended by Bill 68 Includes:

- the *Municipal Conflict of Interest Act*
- the *Municipal Act, 2001*
- the *Municipal Elections Act, 1996*
- the *Planning Act*

THE *MUNICIPAL CONFLICT OF INTEREST ACT*

Overview

- Rules generally apply where Members have a pecuniary interest in a matter that is before Council/a Local Board
 - *Davidson v. Christopher* (2017): “Pecuniary interest’ is not defined in the Act, but it has been held to be a financial, monetary or economic interest; and is not to be narrowly defined”
- Potential penalties for contravention include removal from office
- Enforced by the Courts; Integrity Commissioners have limited powers to inquire into sections 5, 5.1, and 5.2

THE MUNICIPAL CONFLICT OF INTEREST ACT

Key Provision

Section 5: Duty to Declare

- Members must declare any pecuniary interest, whether direct or interest, prior to the consideration of a matter at a meeting
- Members with a conflict cannot take part in the discussion of or vote on any question in respect of the matter, and cannot attempt to influence voting whether before, during, or after the meeting
- Duty applies whether meeting is open or closed; when closed, the Member must excuse himself or herself
- Exemptions to the Duty to Declare are at section 4

THE MUNICIPAL CONFLICT OF INTEREST ACT

As of March 1, 2019:

Written Disclosure

- At a meeting at which a Member discloses an interest under section 5, or as soon as possible afterwards, the Member shall file a written statement of the interest and its general nature with the clerk of the municipality or the secretary of the committee or local board, as the case may be
- Every municipality and local board shall establish and maintain a registry in which shall be kept (a) a copy of the statement filed; and (b) a copy of each declaration recorded
- The registry must be available for public inspection

Sections 5.1, 6.1(1), 6.1(2)

TEMPLEMAN

THE MUNICIPAL CONFLICT OF INTEREST ACT

As of March 1, 2019:

Influence

- A Member with a pecuniary interest cannot attempt to use his or her interest to influence any matter that is being considered by an officer or employee of the municipal or local board, or a person or body to which the municipality/local board has delegated a power or duty
- A Member is entitled to take part in the discussion and attempt to influence a vote / recommendation if the matter being considered is whether to suspend the remuneration paid to the member pursuant to a recommendation of the Integrity Commissioner, but may not vote
- A Member is entitled to attend a closed meeting if the matter being considered is whether to suspend the remuneration paid to the member pursuant to a recommendation of the Integrity Commissioner

Sections 5.2(1), 5(2.1)1, 5.2(2), and 5(2.1)2

TEMPLEMAN

THE *MUNICIPAL CONFLICT OF INTEREST ACT*

Enforcement

- Historically, *MCIA* proceedings were initiated by “electors” – effective March 1, an elector, Integrity Commissioner, or a “person demonstrably acting in the public interest” may now apply for a determination on whether the *MCIA* was contravened
- An elector or a person demonstrably acting in the public interest may also apply to an Integrity Commissioner directly
- Application directly to a Judge must be made within 6 weeks of alleged contravention, unless the applicant first applied to a Commissioner for an inquiry
- Application to a Commissioner must be made within 6 weeks of alleged contravention, unless:
 - The alleged contravention was discovered within the period of time starting six weeks before nomination day for a regular election and ending on voting day; and
 - The applicant applies to the Commission within six weeks after voting day
- No application to a Commissioner during an election period

MCIA section 8; Municipal Act section 223.4.1

TEMPLEMAN

THE MUNICIPAL CONFLICT OF INTEREST ACT

Enforcement – Penalties

Section 10 was repealed and replaced by new Section 9

If a Judge finds a contravention, the Judge may:

- reprimand the member
- suspend remuneration paid to the member up to 90 days
- declare the member's seat vacant
- disqualify the member from being a member during a period of not more than 7 years
- if the contravention resulted in personal gain, require the member to make restitution

THE MUNICIPAL CONFLICT OF INTEREST ACT

Enforcement – Penalties

The Judge may consider whether the member:

- took reasonable measures to prevent the contravention
- discussed the pecuniary interest with the Integrity Commissioner in a request for advice and acted in accordance with that advice; or
- committed the contravention through inadvertence or by reason of an error in judgment made in good faith.

THE MUNICIPAL CONFLICT OF INTEREST ACT

Halton Hills (Town) v. Equity Waste Management of Canada (1995)

“the purpose of the statute is to prohibit any vote by one who has a pecuniary interest in the matter to be considered”

Darnley v. Thompson (2016)

“[t]he purpose of the *MCI*A is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they have a personal, economic interest”

THE *MUNICIPAL ACT*, 2001

As of January 1, 2018:

MEETINGS

- “meeting” re-enacted to mean any regular, special or other meeting of a council, of a local board or of a committee of either of them, where,
 - (a) a quorum of members is present, and
 - (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee

- No court decisions interpreting “meeting” since amendment; in the earlier *Southam Inc. v. Ottawa City* (1991), it was established that an out-of-Chambers event could constitute a meeting where members and/or staff:
 - (i) discussed in a structured way matters which would ordinarily be the subject of council business,
 - (ii) in part to make action-taking decisions, and
 - (iii) to materially move along a number of matters vis-à-vis council

Section 238(1)

THE MUNICIPAL ACT, 2001

As of January 1, 2018:

MEETINGS

- Electronic participation permitted in any meeting open to the public to the extent and in the manner set out in the municipality's procedure by-law
 - Electronic participation not permitted in a meeting which is closed to the public
- Expanded number of discretionary exemptions where council can meet in closed session
- Council must now pass resolutions stating how they intend to address an investigator's report concerning whether a meeting was closed to public contrary to section 239

Sections 238(3.1), 238(3.2), 239(2)

TEMPLEMAN

THE MUNICIPAL ACT, 2001

As of March 1, 2019:

MUNICIPAL POLICIES

- Municipalities are required to adopt and maintain policies with respect to:
 - The relationship between members of council and the officers and employees of the municipality
 - The manner in which the municipality will protect and enhance the tree canopy and natural vegetation in the municipality
 - Pregnancy leaves and parental leaves of members of council

Section 270(1)

TEMPLEMAN

THE MUNICIPAL ACT, 2001

As of March 1, 2019

CODES OF CONDUCT

- Municipalities must establish codes of conduct for members of Council of the municipality and of its Local Boards
- A by-law cannot provide that a member who contravenes a code of conduct is guilty of an offence or is required to pay an administrative penalty

Section 223.2(1)

TEMPLEMAN

THE MUNICIPAL ACT, 2001

As of March 1, 2019

INTEGRITY COMMISSIONERS

A municipality must make arrangements for an Integrity Commissioner to receive complaints, and may:

- Appoint its own Integrity Commissioner to cover all responsibilities named under the MA;
- Make arrangements with another municipality for access to its Integrity Commissioner; or
- Appoint its own Integrity Commissioner but limit his or her responsibilities, and make arrangements to have all other responsibilities provided by an IC of another municipality

Sections 223.1, 223.2, 223.2

TEMPLEMAN

THE *MUNICIPAL ACT*, 2001

INTEGRITY COMMISSIONERS

Functions assigned by the municipality may include:

1. The application of the code of conduct for members of council / local boards.
2. The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members
3. The application of sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act* to members
4. Requests from members for advice respecting their obligations under the code of conduct applicable to the member.
5. Requests from members for advice respecting their obligations under a procedure, rule or policy of the municipality or of the local board, as the case may be, governing the ethical behaviour of members.
6. Requests from members for advice respecting their obligations under the *Municipal Conflict of Interest Act*.
7. The provision of educational information to members of council, members of local boards, the municipality and the public about the municipality's codes of conduct for members of council and members of local boards and about the *MCIA*

Section 223.3(1)

THE MUNICIPAL ACT, 2001

INTEGRITY COMMISSIONERS

Advice to Individual Councillors

- Requests for advice and any advice provided must be in writing

The IC has a duty of confidentiality, however:

- The IC may release advice given to a Member with his or her consent
- If a Member releases any part of the IC's advice, the IC may release part or all of the advice without further consent
- The IC may summarize advice when providing education/information to the public or in a periodic report to Council, but cannot disclose confidential information that could identify a person concerned
- If the IC is conducting an inquiry under the *MCI/A*, information may also be disclosed where it is necessary for the purposes of a public meeting; in an application to a judge; or in written reasons given by the IC, in certain circumstances

Sections 223.3 and 223.5

THE MUNICIPAL ACT, 2001

INTEGRITY COMMISSIONERS

Election Periods

- If an inquiry has not been completed before nomination day for a regular election, the inquiry is terminated on that day
 - Cannot be re-commenced unless, within six weeks of election day, the person/entity who made the request or the Member/former Member concerned requests the inquiry be re-commenced
- No new requests can be received between the nomination day and voting day
- The municipality or local board also cannot consider whether to impose recommended penalties during this period

Sections 223.4(7) and 223.4.1(3)

THE MUNICIPAL ACT, 2001

INTEGRITY COMMISSIONERS

Penalties

- A municipality or local board may impose either of the following penalties on a member of council or of a local board if the Commissioner reports to the municipality/board that, in his or her opinion, the member has contravened the code of conduct:
 1. A reprimand
 2. A suspension of the remuneration paid to the member for up to 90 days

- A local board cannot impose a penalty if the municipality has already penalized the member in respect of the same contravention

Section 223.4(5) and (6)

THE MUNICIPAL ACT, 2001

PENALTIES

Altmann v. The Corporation of the Town of Whitchurch-Stouffville (2018)

- The Town passed a by-law adopting an Integrity Commissioner's recommendations for sanctions against the Mayor, including:
 - i) a formal reprimand for the Mayor's refusal to issue an apology relating to a previous complaint;
 - ii) a suspension of remuneration for a period of 90 days;
 - iii) removal from membership in all committees;
 - iv) apart from during Council Meetings, communicate with municipal staff solely by email;
 - v) the return of keys and access cards to the municipal offices or facilities for the duration of Council term; and
 - vi) no access to municipal facilities, except Town Hall during business hours to pick up Council packages, sign documents, meet with constituents or make bill payments, and to attend Council meetings
- The Mayor challenged the by-law as *ultra vires* the Town's authority under the Act
- The Application was granted, with a declaration that items iv, v, and vi were of no force and effect, because they were not within the scope of section 223.4(5)

THE MUNICIPAL ACT, 2001

INTEGRITY COMMISSIONERS

Indemnification

- Municipalities are required to indemnify a Commissioner, or any person acting under the instructions of a Commissioner, for costs reasonably incurred in connection with the defence of a proceeding, if the proceeding relates to an act done in good faith in the performance or intended performance of a duty or authority under section 223.2 or a by-law passed under it, or an alleged neglect or default in good faith of the duty or authority

Section 223.3(6)

THE *MUNICIPAL ACT*, 2001

Indemnification

Kett v. Elston (2018)

- A municipal councillor brought a defamation action against an Integrity Commissioner
- The Commissioner brought a successful motion to have the claim dismissed, on the basis that he was exercising a statutory duty in issuing his Report to Council
- The Court declined to award the Commissioner complete indemnity costs, finding that his legal costs associated with the preparation of his defence required adjustment
- If this case were decided after March 1, 2019, the municipality may be liable to indemnify the Commissioner for the costs not awarded against the Councillor

MUNICIPAL ELECTIONS ACT, 1996

All amendments were effective during the 2018 municipal elections, subject to transition regulations

- Sections 6(1) was amended to change the beginning of all terms of office to November 12 in the year of a regular election (previously December 1)
- Section 33 was amended to provide that a nomination of a person for an office on a council must be endorsed by at least 25 persons, unless the municipality has fewer than 4,000 eligible electors
- Sections 88.9, 88.9.1, and 88.13 were amended/added to provide new rules for financial contributions to a candidate's campaign

PLANNING ACT

- **Section 2** provides a list of “matters of provincial interest” that the Minister, the council of a municipality, a local board, a planning board, and the LPAT must have regard to in carrying out their responsibility under the *Act*
- Bill 68 amended this section to include subsection 2(s), “the mitigation of greenhouse gas emissions and adaptation to a changing climate”
- Since the amendment, there have been several decisions from the Toronto Local Appeal Body, and at least one from the LPAT

PLANNING ACT

Sonoma Homes Inc. v. Hamilton (City), 2019 (LPAT)

- The LPAT allowed an appeal, in part, for an official plan amendment and zoning by-law amendment to permit the development of a 9-storey residential building
- The developer submitted that the development optimized the use of existing lands and infrastructure and was “transit-supportive”
- The City opposed the project on the basis that a high-density residential project did not “fit with the neighbourhood character”, as the neighbourhood was largely single family residential, and that the rapid transit planned for the area “may be years away” and should not dictate present development
- The LPAT permitted the applications with minor amendments. In reference to section 2(s), the LPAT stated that the proposal would “secure intensification at an appropriate location that is transit-supportive”:
 - . . . by locating intensification in close proximity to transit and by promoting the development of active transportation infrastructure that is planned along Garner Road, I find that the proposal provides a form of development that is necessary for achieving reductions in greenhouse gas emissions.

TEMPLEMAN

**205 Dundas Street East, Suite 200
Belleville, Ontario K8N 5A2
T: 613-966-2620
F: 613-966-2866**

**9 Broad Street, Suite 207
Brockville, Ontario K6V 6Z4
T: 613-498-4832
F: 613-542-8202**

**366 King Street East, Suite 401
Kingston, Ontario K7K 6Y3
T: 613-966-2866
F: 613-542-8202**