by Eric M. Davis

All Aboard the Conflict Train

Ontario's Municipal Conflict of Interest Act and Light Rail Transit in Waterloo Region

On June 15, 2011, the council for the Regional Municipality of Waterloo (the "region") voted 9-2 to build an $818-million light rail transit system, the largest public works project ever undertaken by the region. When it is finally built in approximately 2017, it will run 19 kilometres between Conestoga Mall in Waterloo and Fairview Park Mall in Kitchener.

The ultimate decision to construct a light rail transit system was only arrived at after years of debate. All levels of regional government – both upper-tier and lower-tier municipalities – voted on the project in some capacity.

It was during these debates that several regional councillors, as well as councillors for the cities of Kitchener and Waterloo, declared conflicts of interest. In total, four out of 16 regional councillors declared conflicts; five out of 10 City of Kitchener councillors declared conflicts; and five out of eight City of Waterloo councillors declared conflicts.

The councillors' reasons for declaring conflicts ranged from owning property near the proposed rail line to being an employee of one of the local universities that might benefit from the creation of a light rail transit system that would be accessible on or near campus.

However, the large number of councillors declaring that they had a conflict of interest highlights a problem with the present legislation: it is not entirely clear when a councillor has a conflict of interest and there is no independent, third party to proactively adjudicate whether or not a councillor has a conflict.

Legislative Context

According to the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, as amended (the Act), there are two types of conflicts: (1) a direct pecuniary interest; and, (2) an indirect pecuniary interest. The term "pecuniary" is not defined in the Act, though the term generally means "consisting of or pertaining to money." As well, the terms "direct" and "indirect" are not defined.

Direct pecuniary interest

A direct pecuniary interest arises where a councillor stands to gain or lose as a result of voting on a particular question. For example, if a councillor owns a construction company that bid on a project for the municipality, he or she should not be involved in council's decision as to who should be awarded the contract; the councillor would have a direct pecuniary interest in the outcome of that decision.

Indirect pecuniary interest

In relation to an indirect pecuniary interest, one must look at the Act. Section 2 of the Act states that a councillor has an indirect pecuniary interest if:

(a) they are "a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public" that has a pecuniary interest in a matter;

(b) they have "a controlling interest in, or [are] a director or senior officer of, a corporation that offers its securities to the public" that has a pecuniary interest in a matter;

(c) they are a "member of a body" that has a pecuniary interest in a matter; or

(d) the councillor "is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter."

Therefore, if a councillor's employer has a pecuniary interest in a matter, that councillor would have an indirect pecuniary interest and should declare a conflict of interest pursuant to section 2 of the Act.

Deemed interest

Section 3 of the Act further expands potential conflicts. It states that

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a pecuniary interest, direct or indirect, of a parent, spouse, or child of the councillor shall, if known to the councillor, be deemed to be also the pecuniary interest of that councillor.

Exceptions

There are several exceptions under the Act. Section 4 of the Act states that the Act does not apply to a pecuniary interest in any matter that a councillor may have:

(a) as a user of any public utility service supplied to the councillor by the municipality or a local board;

(b) by reason of having an interest in farm lands that are exempted from taxation for certain expenditures under the *Assessment Act*;

(c) by reason of the councillor having a pecuniary interest which is an interest in common with electors generally; or,

(d) by reason only of an interest of the councillor which is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the councillor.[1]

It is not entirely clear, however, as to when these exceptions would apply, as each situation is very fact specific.

For example, "interest in common with electors generally" is defined by the Act to mean "a pecuniary interest in common with the electors within the area of jurisdiction and, where the matter under consideration affects only part of the area of jurisdiction, means a pecuniary interest in common with the electors within that part." Would light rail transit fall under that definition? Granted, it will not affect the entire region; but, as its proposed route is 19 kilometres long, it would affect a fair portion. Did some of the councillors who declared conflicts merely have an "interest in common with electors generally"?

In the case of *Re Greene and Borins* (1985), 50 O.R. (2d) 513, council voted on development proposals for lands very close (220 feet) to properties owned by close members of a councillor's family. The Divisional Court held that the properties were close enough to the proposed development area, that they could be affected by the development. The councillor's pecuniary interest was held not to be an interest with electors generally, as his family's parcel "was of physical size and location as to readily lend to redevelopment. This is clearly to be distinguished from the interests of individual homeowners in the area."

Similarly, in *Re Ennismore (Township)*, [1996] O.J. No. 167, the municipality had undertaken water and sewer needs studies in a certain area. Subsequently, the township brought an application under the Act to determine whether or not a member of council with a commercial establishment in the study area could participate in the decision to build a water supply system within that area of the municipality.

The fact that the council member had a commercial establishment in the study area did not make his pecuniary interest different in kind from the other affected electors. Therefore, the Court ruled that the member was not prohibited from participating in and voting upon any questions concerning servicing within the study area.

Also, when precisely is a councillor's interest so "remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence the member"?

In *Whitley v. Schnurr*, [1999] O.J. No. 2575, the municipal council was dealing with an application by a local university for an Official Plan Amendment (OPA). The councillor was one of 5,000 employees of the university. If approved, the OPA would benefit the university's heritage trust fund. Although the councillor conceded that, as an employee, he had an indirect pecuniary interest in the university's application, he was successful in arguing that his vote on the university's application for an OPA would not reasonably have been regarded as being influenced by his status as an employee. His interest was held to be remote and insignificant.

Penalties

If a judge determines that a councillor has contravened the Act, the judge, according to subsection 10 (1) of the Act:

(a) *shall* declare the councillor's seat vacant; and,

(b) *may* disqualify the councillor from being a councillor for seven years thereafter; and,

(c) *may*, where the contravention has resulted in personal financial gain, require the councillor to make restitution to the party suffering the loss, or, where such party is not readily ascertainable, to the municipality.

Therefore, if a councillor fails to declare a conflict, beyond the public humiliation of being found to have contravened the Act, they could lose their seat and be disqualified from seeking elected office for the next seven years. That is a pretty significant penalty for any councillor to face.

It is so significant, many councillors would rather just declare a conflict than potentially be challenged for violating the Act.

Conflicts in Practice

Currently, if a municipal councillor thinks that they might have a conflict in relation to a particular matter, their only course of action is to retain a lawyer (usually at their cost) and seek a legal opinion as to whether or not they have a conflict. (As municipal in-house counsel represent the entire council, not individual councillors, they will typically not provide a legal opinion to individual councillors.)

Unless there is an obvious conflict of interest (or lack thereof), any legal opinion received by a councillor is likely to be filled with caveats and equivocations, as nothing is ever certain. The risk of not declaring a conflict and being found to have

1 Note that this is not the entire list of exceptions under section 4 of the Act.

violated the Act is so great that it will always be easier to just declare a conflict, even when a councillor's potential conflict is questionable.

Also, if a councillor does not declare a conflict of interest and is challenged, even if they are ultimately found to have not violated the Act, they will still likely have to pay significant legal costs to defend themselves in court, not to mention suffer the public humiliation of being accused of a conflict of interest.

In the light rail transit example, it is questionable whether every single councillor who declared a conflict during the debate actually had a pecuniary interest pursuant to the Act; but, why would any of them risk being challenged? Without an ability to proactively determine whether or not one has a conflict, very few councillors would ever be willing to take the risk. The end result is councillors sitting on the sidelines, instead of representing the will of their constituents.

Potential Solution

Several municipal councils in Ontario, including some in Waterloo Region, have called upon the provincial government to create a municipal conflict of interest commissioner who would consider potential conflicts (in advance), which would be binding and final.

Unlike federal or provincial politicians, Ontario's municipal councillors do not have an officer they can approach to rule on potential conflict cases. They only know for sure if they have a conflict when someone challenges them in court. As discussed above, that forces councillors to declare conflicts, even in cases where any actual conflict is questionable.

When Waterloo Region was debating light rail transit, for example, a commissioner could have addressed any potential conflicts in advance. Once a determination had been made by the commissioner, there would be no question as to whether or not a councillor had a conflict, and no need for anyone to challenge the councillor in court. It would provide a degree of certainty for municipal councillors that is presently absent. It would also, it is hoped, allow more councillors to participate in debates.

Conclusion

After reviewing the Act and the relevant case law, it is not entirely clear when a councillor has a conflict of interest, as each situation is very fact specific. The only way to proactively address that situation is to create a municipal conflict of interest commissioner, as discussed above. Otherwise, councillors will typically choose to declare a conflict, for fear of being challenged if they don't, even if their potential conflict is questionable. Where possible, councillors should be at the table, debating the issues and representing their constituents – not sitting on the sidelines. *MW*