

ONTARIO CATHOLIC SCHOOL TRUSTEES' ASSOCIATION

MUNICIPAL CONFLICT OF INTEREST ACT

Presented By

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BLG
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Conflict of Interest Legislation

Madame Justice Kelly ruled:

“Conflict of interest legislation must be interpreted harshly to control members given the highest level of trust. [Trustees] must be honest, forthright and open acting in complete good faith.”

*Michael Baillargeon and Oliver Carroll,
released on February 6, 2009*

The *Municipal Conflict of Interest Act* should be given a broad and liberal interpretation.

Highest Standards of Conduct

- Elected officials are held to the highest standards of conduct in their activities as members of the school board.
- The Act forbids holders of public office to participate in matters which their economic self-interest may be in conflict with their public duty.

A Trustee's Individual Motive is Not Relevant

- A member's individual motive is not relevant in determining whether there has been a contravention of the statute.
- A trustee may personally feel no sense of conflict and may believe in his or her ability to be impartial.
- Under the Act, the trustee's intent is not relevant.

Objective Test

Would a reasonable elector, being apprised of all the circumstances, be more likely than not to regard the deemed pecuniary interest of the member as likely to influence the member's actions and decisions on the matter before the Board at the meeting?

In the case of any matter that comes before the board, questions that every Trustee should be asking

- Do I have a pecuniary interest in this matter?
- Does one of my family members have an interest in the matter?
- Do I potentially have something financial to gain or lose in this matter?
- Are there direct or indirect possibilities of a pecuniary interest in this matter?

Modernizing Ontario's Legislation Act, 2016 (Bill 68)

- Received Royal Assent on May 30, 2017.
- Made important amendments to the *Municipal Conflict of Interest Act* that came into effect on March 1, 2019.

As of March 1, 2019:

- All boards must establish a registry of conflict of interest declarations from trustees that are open to the public.
- All boards require a written declaration of conflict of interest from trustees at all committee and board meetings disclosing the trustee's interest.

As of March 1, 2019:

- Any member of the public is entitled to make an application to a court to determine whether any trustee acted contrary to the Act. (Before this applied only to an “elector” of the trustee in question).
- Court will have discretion to consider whether the trustee took reasonable measures to prevent this contravention, including whether trustee consulted with a Municipal Integrity Commissioner.

As of March 1, 2019:

- Courts will have a new ability to impose a range of penalties of contravention of the Act.

Conflicts of Interest

Municipal Conflict of Interest Act

- Trustees are not permitted to vote on or discuss matters in which they have a direct or indirect pecuniary interest.
- The direct or indirect pecuniary interest of a parent, spouse or child is deemed to be the interest of the trustee.

Types of Pecuniary Interest

Direct Pecuniary Interest

- Where the trustee himself or herself stands to benefit or suffer financially by a decision of the Board.

Types of Pecuniary Interest

Indirect Pecuniary Interest

- Trustee is shareholder, director or senior officer of a non-share corporation and the corporation has pecuniary interest.
- Trustee is a shareholder, director or senior officer of a share corporation and the corporation has pecuniary interest.
- Trustee is a member of a body that has a pecuniary interest.
- Trustee is a partner or employee of a body that has a pecuniary interest.

Types of Pecuniary Interest

Deemed Pecuniary Interest

- When the parent, spouse or child of the trustee has a direct or indirect pecuniary interest that is known to the trustee.

Disclosure of Pecuniary Interest

- Where a pecuniary interest might exist each trustee has an affirmative duty to disclose it as soon as it becomes apparent.

Is son-in-law or daughter-in-law included as a “child” under the Act?

- Yes!
- Any trustee who participates in a decision affecting the financial circumstances of their child-in-law will enter into a deemed pecuniary interest.

The Exception would be:

1. The trustee's child and child-in-law are divorced or separated;
2. Are financially independent from one another;
3. Not in regular contact with one another; and
4. Do not formally or informally provide one another with support.

Examples of Conflict of Interest

- Trustee works as a dance instructor for the school board and earns \$2,100 over the school year.
- Trustee's child works for the school board but lives in a separate location.
- Trustee's home backs onto school undergoing renovation.
- Trustee's daughter works as an assistant in the HR Department.

Where a Trustee Identifies a Direct, Indirect or Deemed Conflict of Interest

1. Publicly declare the conflict of interest before any discussion of the matter begins, stating the general nature of the interest and having the declaration recorded in the minutes of the meeting.
2. File a written statement of interest and its general nature with the secretary of the committee or board.
3. Do not take part in any discussion of the matter.

Trustee Identifies a Conflict of Interest (Cont'd)

4. Do not attempt to influence the voting on any question related to the matter.
5. Do not vote on any question in respect of the matter.
6. Leave the meeting or part of the meeting during which the matter is under consideration and have that fact recorded in the minutes.

Declaration of Interest Recorded in Minutes of Board Meeting

- When the meeting is open to the public, every declaration of interest shall be recorded in the minutes of the board meeting.
- When the meeting is not open to the public, the declaration of interest shall be recorded in the minutes of the next board meeting open to the public.

WELLINGTON CATHOLIC DISTRICT SCHOOL BOARD
75 Woolwich Street
Guelph, ON N1H 6N6

Statement of Interest

Trustee Name: _____

Board/Committee Meeting Date: _____

Agenda Item: _____

Topic: _____

Statement of Interest (including the general nature of the interest):

Signature

Date

Date Filed in Registry

How should a Conflict of Interest be Recorded in the Minutes?

Minutes might read:

“Trustee Smith disclosed a direct pecuniary interest in item 3 of the report of the Finance Committee for April 26, 2019 and did not take part in the consideration or discussion of, or vote on any question with relation to this item. Trustee Smith recused herself and left the room.”

- Where the meeting is in private session, the disclosure must be recorded in the minutes of the next meeting open to the public.
- Disclosures should appear in the minutes in the sequence in which they were made.
- The Act requires disclosure at each meeting at which the matter arises so that separate disclosures must be made at each and every meeting.

Registry

- The school board shall establish and maintain a registry in which a copy of each statement shall be filed.
- The registry shall be available for public inspection in the manner and during the time that the school board may determine.

Lack of Quorum

- Where the number of trustees are disabled from participating in a meeting is such that at that meeting the remaining members are not of sufficient number to constitute a quorum, the remaining number of members shall be deemed to constitute a quorum, provided such number is not less than two.

Application to Judge

- Where the remaining number of members is less than two, the school board may apply to a judge without notice.
- The judge may issue an order for the board of trustees to consider the matter, and discuss and vote on the matter, as though none of the members had any interest, subject to any conditions that the judge may order.

Alleging a Breach of the *Municipal Conflict of Interest Act*

- Only a person acting in the public interest or an elector entitled to vote in the board elections can allege a breach of the Act.
- Must apply to a judge within six weeks of learning of the alleged contravention.
- The application to a judge must be made within six years after the alleged contravention.

Conflicts of the Notice of Application

- The notice of application must state the grounds for finding that the trustee contravened the *Municipal Conflict of Interest Act*.

Power of the Judge

1. Reprimand the trustee.
2. Suspend the remuneration paid to the trustee for a period up to 90 days.
3. Declare the member's seat vacant.
4. Disqualify the trustee from being a member during a period of not more than seven years after the order.
5. If the contravention has resulted in personal financial gain, require the member to make restitution to the party suffering the loss, or if the party's identity is not ascertainable, to the school board.

- In exercising his or her discretion, the Judge may consider whether the trustee:
 - Took reasonable measures to prevent the contravention;
 - Disclosed the pecuniary interest and all relevant facts known to him or her to an Integrity Commissioner under *Municipal Act, 2001* or *City of Toronto Act, 2006*;
 - Committed the contravention through inadvertence or by reason of an error in judgement made in good faith.

Is there some way to ask a court to deal with a possible conflict short of filing a conflict of interest application?

- There is no fast-track procedure to obtain a court ruling.
- Under section 8, the question of whether a member contravened the Act is to be determined by a judge.
- An application may be brought by a person within six weeks after the fact comes to his or her knowledge.

Municipal Integrity Commissioner

- *Municipal Act, 2001* and *City of Toronto Act, 2006* exclude school boards from the definition of local boards.
- Integrity Commissioner would need to be privately retained by the Board.
- For example, the TDSB (largest school board in Canada) has retained Suzanne Craig to be its Integrity Commissioner.
- OCSTA is investigating having access to an Integrity Commissioner for Catholic school boards.

Reduced Protection to Trustees

- The extent of protection provided would likely be less than the protection extended to local board members who receive advice of integrity commissioners in their official capacity under the *Municipal Act, 2001* or *City of Toronto Act, 2006*.
- Court's considerations will be grounded in assessment of "reasonable measures" and good faith".
- Weighing of privately-retained advice from an integrity commission will depend on the individual facts of each case.

Can an individual Trustee seek the advice of the School Board counsel?

- Board legal counsel may provide general advice with respect to the Act.
- Individual trustees have to govern their actions according to their individual circumstances and consider seeking their own advice.
- Board legal counsel is not in a position to tell trustees whether they are in a conflict.

Should an individual Trustee be advised to seek independent legal advice?

- The evaluation of a potential conflict is the responsibility of the trustee.
- Where the trustee has reasonable grounds to believe he/she may be in conflict, the trustee may obtain a written opinion from his/her legal counsel at his/her expense.
- This is for the protection of the trustee to demonstrate he/she acted *bona fide* in seeking advice.

What do courts do when an individual Trustee ignores legal advice?

- The courts have ruled that if a member has turned his or her mind to the question of whether a conflict exists, then the member's subsequent conduct is not inadvertent.
- When a trustee ignored legal advice, a court would likely conclude that the member did not make an error in judgment.

What are the cost implications for a Trustee who is found to be in conflict?

- The financial implications can be significant.
- If the trustee is found to be in conflict, the Board cannot pay these costs or reimburse the trustee.
- If the trustee is successful in defending the action, he/she may request the Board to pay the costs.
- Board has insurance to cover a limited amount of such costs.

How does the Board reimburse a Trustee for costs and expenses related to the *Municipal Conflict of Interest Act*

- This would require a Board resolution to pay all reasonable costs, as agreed or taxed.

Could a decision made at the Board be invalidated if a conflict exists?

- Yes.
- Where a resolution is passed by the Board and the trustee having a conflict has voted, the decision is liable to be set aside.
- Failure of a member to declare an interest does not invalidate the Board's proceedings.
- The matter is voidable at the instance of the Board within 2 years.

Are employees of the Board who have family members employed by the Board in conflict if they are involved in negotiations that impact their family members?

- The *Municipal Conflict of Interest Act* does not apply to employees of the Board.
- The School Board's Conflict of Interest Policy for Employees applies to employees.

Baillargeon v Carroll, 2009 CanLII 4510 (ONSC)

- Released on February 6, 2009.
- Mr. Carroll was a trustee of a school board.
- His daughter was employed by the same board as an elementary school teacher.
- His son had recently been approved to be on the list of supply teachers for the Board.

Board Staff Recommended Two Options

In an effort to balance the budget, Board staff recommended two options:

Option One:

- reduce some elementary teaching positions by laying off teachers, make other program reductions including reducing the number of education assistants, and rehire retired teachers for the supply list instead of using new teachers to populate the list.

Option Two:

- defer dealing with the deficit to the following year.

Legal Opinion was Prepared

- A legal opinion was prepared and circulated to all trustees that a trustee would be in breach of the Act if he or she participated in any discussion or voted on any Board matters relating to or affecting teachers if his or her child or spouse was a teacher employed by the Board.

Mr. Carroll had Declared a Conflict

- Mr. Carroll declared a pecuniary interest and properly removed himself at the first meeting which specifically discussed the budget options relating to reducing the number of elementary school teachers.

Presentation by the Union President

- However, at later meetings where the budget generally was discussed, Mr. Carroll moved that a presentation made by the union president to the Board should be adopted.
- This presentation encouraged not laying off teachers.

Urged Second Budget Option Should be Adopted

- He also moved at this same meeting that the second budget option should be adopted.

E-mail to the Trustees

- After this budget meeting, Mr. Carroll sent out an email to the trustees where he urged them not to rehire retired teachers for the supply list, but instead provide the contracts to younger teachers.

Introduced Motion To Reopen Budget Discussion

- After the budget discussions had officially ended, Mr. Carroll introduced a motion to reopen the budget discussion.

Introduced Motion To Pay Defence Costs

- Finally, after the budget vote had been made, Mr. Carroll introduced a motion for the Board to adopt a policy where it pay the defence costs of trustees charged with conflicts of interests under the *Municipal Conflict of Interest Act*.

The Court Held:

- The judge decided that Mr. Carroll had a pecuniary interest.
- There were several violations of the Act.

The Court Ruled:

- Conflict of interest legislation must be interpreted harshly to control elected members who are given the highest level of trust.

The court Stated:

- As long as there was a possibility that Mr. Carroll's children could be affected by the decision to lay-off elementary teachers or rehire retired teachers for the supply list, his pecuniary interest was engaged.

Breaches of the Act

- Sending the email to the other trustees was an attempt to influence the consideration of matters in which he had a pecuniary interest.
- Moving to reopen the budget discussion was also improper.

The Proposed Defences

- Mr. Carroll's defence included an argument of inadvertence.
- The judge held that Mr. Carroll's awareness that he was in a conflict of interest precludes the defence of inadvertence.
- He was given two legal opinions the week before the May 14, 2008 meeting.
- The fact that he had declared a conflict in the past, shows that he was aware of the issue.

The Proposed Defences (Cont'd)

- Mr. Carroll also argued that he made an error in judgement.
- The court rejected this defence in view of his experience:
 - five years' experience with the board; and
 - 28 years' as a civil servant.
- The judge found that Mr. Carroll considered the advice provided to him and simply chose to ignore it on numerous occasions.

Outcome

- Mr. Carroll's seat was ordered vacated.
- The judge declined to disqualify him from becoming a trustee again.

Justice Kelly Quoted the Purpose of the Act

“Public office is a trust conferred by public authority for public purpose. And the Act, by its broad proscription, 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.”

Moll v.Fisher

Justice Kelly stated:

“The public’s confidence in its elected representatives demands no less.”

Lessons to be Learned

- Justice Kelly broadened the concept of the link between elements in the consideration of a matter, i.e. the budget approval process.
- “Trustee Carroll should have had an heightened sense of awareness that he was in a conflict of interest regarding any matter that could affect the employment of either his son or daughter.”

If a trustee declares an interest in a specific budget line, can the trustee vote on the budget minus that line?

- If there was a possible link between the matter and the interest of the trustee, the trustee must declare the intent and not attempt to influence the outcome of the matter.
- Justice Kelly held that budget items are linked, especially when there are deficits to be eliminated which require spending cuts.
- In budgetary matters, a decision on any financial element will be seen as having an impact on every other financial element.

Budget items are linked

- By the nature of the budget, parts are linked, particularly in times of budget cutbacks.
- If a trustee with a daughter who is a teacher votes to reduce custodial spending, there may be more money to maintain the classroom program.
- The trustee or his or her child does not have to receive an actual benefit for there to be a finding of conflict.

- A trustee who has a direct or indirect interest in any portion of the budget in many instances may have an interest in other elements of the budget, such that the trustee may be excluded from participation in the development and approval of large portions of the budget.

- Considering that salary and benefits constitute about 80% of a board's budget, this impact could be substantial.
- The links between various employee groups are historical facts.
- The trustee would have to consider links between the budget item in question with the remainder of the budget.

Central Bargaining

- In light of central bargaining and Provincial Employee Group Health Trusts, a trustee who has a child or spouse who works for another publicly-funded school board would be in the same position as if employed by the trustee's board.
- Conflict of interest with respect to collective bargaining should be considered similarly.

Can a trustee who has a spouse, parent or child who is a member of the bargaining unit, communicate directly with the union?

- Justice Kelly held that trustees with a spouse, parent or child who is a member of the bargaining unit should not meet or discuss issues with employee groups or others on matters that could impact the budget.

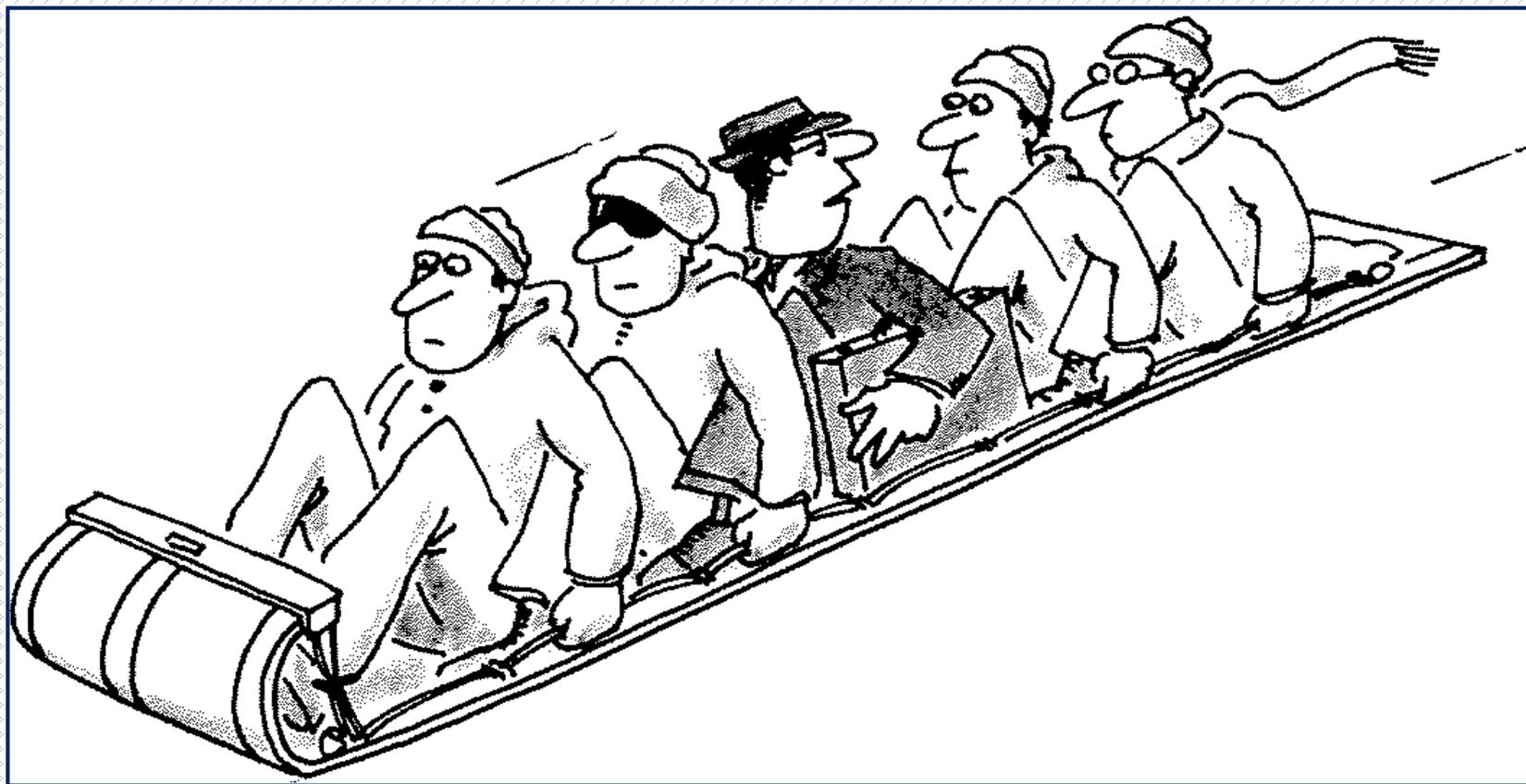
The Act should be given a broad and liberal interpretation

- In the current climate, given the importance of holders of public office;
- Given the trust conferred in holding public office;
- Given the emphasis on corporate transparency;
- The Act should be given a broad and liberal interpretation.

Justice Belleghem

“The Act is crystal-clear. It is harsh. It must be. It controls the actions of [Trustees]. They are the repositories of the citizens’ highest trust. They must not only be unshrinkingly honest they must be seen to be so – by those who voted *for* them and those who voted *against* them.”

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



"Look, I'm not saying it's going to be today.
But someday - someday - you guys will be happy that
you've taken along a lawyer."



Questions?

Thank You

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