

January 9, 2019

SOLICITOR-CLIENT PRIVILEGED

VIA EMAIL

The United Townships of Head, Clara & Maria
15 Township Hall Road
Stonecliffe, ON
K0J 2K0

Attn: Peggy Young-Lovelace
Acting Municipal Clerk

Dear Ms. Young-Lovelace,

Re: Legal Opinion Re Councillor Conflicts of Interest
Our File No.: 17439-25

Thank you for your request to provide our legal opinion about whether Councillors who are members of The Missing Link Snowmobile Club Inc. (the "Club") have conflicts of interest on matters concerning the Club that come before Council.

Documents reviewed

In providing this opinion we have reviewed:

- The Club's Letters Patent dated September 3, 1991;
- The Club's By-law No. 1;
- 2018-19 OFSC Member Organization: Membership Certification Form (blank); and
- Memorandum of Understanding between the Club and Snow Country Snowmobile Region dated June 15, 2018.

Opinion in brief

It is our opinion that for matters the Club has a financial or economic interest in, such Councillors have conflicts of interest.

There are exceptions that may be applicable to permit such Councillors to take part in the discussions and/or votes on such matters including, most notably, where the Councillor's interest is so remote or insignificant in its nature that it cannot reasonably be regarded as likely to influence them.



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Recent court decisions considering these exceptions have rendered it difficult, if not impossible, to determine when they will apply.

We understand that by such Councillors complying with the *Municipal Conflict of Interest Act* (the "Act") and not taking part in the discussions or votes on such matters, Council will not have quorum (there being only one member remaining). As such, we recommend Council apply to a judge for an order authorizing Council to do so, notwithstanding the conflicts of interest.

Detailed discussion

(a) Pecuniary interest: direct, indirect, or deemed

Conflicts of interest arise under the Act when a member of Council or a local board has a direct, indirect, or deemed pecuniary interest in a matter before Council.

The Act does not define "pecuniary interest". The courts have held that a "pecuniary interest" relates to a financial or economic interest, or money in some shape or form.

Likewise, the Act does not define the term "direct". The courts have held that it refers to a situation in which a member could experience an immediate, in the sense of close, non-deviated or traceable financial or economic impact, positive or negative.

Sections 2-3 of the Act set out the ways an indirect pecuniary interest can arise. Section 3 deems the interest of certain family members to be that of the member, and section 2 defines an "indirect pecuniary interest" as follows:

For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

- (a) the member or his or her nominee,
 - (i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,

- (ii) has a controlling interest in, or is a director or senior officer of, a corporation that offers its securities to the public, or

- (iii) is a member of a body,

that has a pecuniary interest in the matter; or

- (b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter.

(b) "Body" includes not-for-profit corporations

The courts have held that the term "body" as used in the Act includes volunteer run, non-share, not-for-profit corporations and boards.

Accordingly, a member of Council or of a local board who is an officer, director, committee member, or general member of these types of organizations would have an "indirect pecuniary interest" in any matter the organization has a pecuniary interest in.

(c) Councillors who are members of the Club have an indirect pecuniary interest in any matter the Club has a pecuniary interest in

The Club is incorporated as a corporation without share capital under the laws of Ontario by Letters Patent dated September 3, 1991. Per the above discussion, the Club is a "body" as that term is used in the Act.

Under the Club's By-Law No. 1, members consist of:

1. those elected/appointed at the annual general meeting to fulfill specific roles in the Corporation; and
2. those persons who have demonstrated and have been recognized by the Corporation for his/her volunteer efforts; and
3. such other persons interested in furthering the Corporation's purposes and who have been accepted into membership in the Corporation by resolution of the Board.

We understand that four of the Townships' five Councillors are currently members of the Club. One of these four Councillors is the Club's President.

Given that we understand the Club is a volunteer organization and, per article 2.06 of its By-Law No. 1, Directors serve as such without remuneration, it is unlikely the four Councillor-members would have a direct pecuniary interest in any matter concerning the Club. Under section 2(a)(iii) of the Act, they would each, however, have a deemed "indirect pecuniary interest" in any matter that the Club has a pecuniary interest in.

(d) Relevant exceptions likely do not apply

The prohibitions against discussion, voting, or attempting to influence the vote on a matter a member of Council or of a local board has a pecuniary interest in section 5 of the Act are subject to certain exceptions.

Most notably for the four Councillors in question, the relevant exceptions are set out in sections 4(j) and (k) of the Act, which read as follows:

4. Section 5 does not apply to a pecuniary interest in any matter that a member may have,

.....

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

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

i. Interest in common with electors generally

Section 1(e) of the Act defines "interest in common with electors generally" as:

(e) "interest in common with electors generally" means 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.

The meaning of the word "generally", as found in section 1(e) of the Act, has been addressed with greater precision by the courts. It has been interpreted as applying to a certain class or order of electors in the area in question who are affected by the matter. Further, the courts have held that generally means "in most cases" or "widely" and there cannot be taken to include only a small number of electors.

There is only one decision in which the argument that a Councillor's position as a member of a not-for-profit organization was interest in common with electors generally. In that case it was argued that the section 4(j) exception applied because the club raised money for projects to benefit the community. The court rejected this argument explaining that just because a club does good works does not automatically mean that its interests equate to the interests of the community. The club in question was but one of many local not-for-profits, each of which had its own objectives and interests. The court concluded that, in the pluralistic society of today, arguing that the section 4(j) applied because of a club's positive actions for the community could not be accepted.

In every other case, the section 4(j) exception has been considered as pertaining to electors with a certain geographic area. Most commonly, the context is a member of Council or a local board owning property on a street to receive some form of improvement or other benefit.

It is our opinion that it applies only to electors within a certain geographic area, not electors sharing other characteristics such as club memberships etc. Although not considered by the courts to date, the definition of "interest in common with electors generally" is qualified such that it refers to electors "within an area of jurisdiction". The use of the word "area" is significant as it clarifies that the "jurisdiction" is not referring to matters over which municipalities have been granted powers under the *Municipal Act, 2001*. This is because the language used in the *Municipal Act, 2001* speaks to "spheres" of jurisdiction, not "areas".

For the foregoing reasons it is our opinion that the section 4(j) exception could not be successfully relied upon to exclude Councillor from the Act's prohibitions based on membership in the Club being something they share with other electors in the Townships.

ii. Insignificant or remote interest

As noted above, section 4(k) of the Act provides an exemption for remote and insignificant interests.

In a recent decision, the court considered this exception in the context of members of a local Chamber of Commerce. There the matter before the municipality was an annual grant to the Chamber to be used to run a golf tournament, hold some public Canada 150 events and exhibits, and produce a business Directory.

The court held that the pecuniary interest of Councillors who were "social members" of the Chamber were so insignificant that they could not reasonably be regarded as likely to influence the member. Specifically, the uses of the grant that these members would benefit from, namely the golf tournament and Canada Day celebration were too remote and too much aligned with the interests of the community as a whole to influence these Councillors.

The court, however, held differently with respect to the pecuniary interest of a Councillor who was a "business member" of the Chamber. The Court found it significant that, as a "business member" the Councillor stood to benefit by having the name of her company appear in the Chamber's Directory and certain other Chamber advertisements and promotions. The Court reviewed the Chamber's unaudited financial statements and found the costs associated therewith were "significant" for the Chamber and that the Councillor's interest in funding these costs was neither remote nor insignificant. Accordingly, the court refused to apply the section 4(k) exception in the circumstances.

The foregoing illustrates that it is difficult, if not impossible, to predict how the courts will apply the section 4(k) exception. Each case will turn entirely on its own facts. We recommend, therefore, that the Councillors in question err on the side of caution and not attempt to rely on this exception and comply fully with the prohibitions set out in section 5 of the Act.

(e) Recommendation: apply to a judge to resolve quorum issues

As discussed above, we understand that four of the Townships' five Councillors are members of the Club. We understand that by fully complying with the prohibitions set out in section 5 of the Act, the Township would not have quorum on matters in which the Club has a pecuniary interest.

Section 7 of the Act provides the remedy for lack of quorum. Where the remaining number of members who are not disabled from participating in a meeting is less than two, as is the case at present, Council may apply to a judge without notice for an order authorizing Council to consider, discuss and vote on the matter.

The judge may, by order, declare that section 5 of the Act does not apply in respect of the matter and Council could proceed to consider, discuss and vote on the matter as though none of the members had an interest in it, subject only to such conditions and directions as the judge finds are appropriate.

We recommend that Council make an application under section 7 of the Act in advance of any meeting that a matter in which the Club has a pecuniary interest is expected to be considered, discussed, or voted on.

Increased litigation is expected after changes to the Act come into force on March 1, 2019

On March 1, 2019, numerous changes to the Act come into force. Among the most significant is a new section 8 that will provide that, in addition to an elector, an Integrity Commissioner of a municipality or a person demonstrably acting in the public interest can apply to a judge to determine contraventions of the Act.

Currently, only an elector may do so. Having to bear the costs of such an application have likely prohibited many alleged contraventions from proceeding before the courts.

Given the greater range of persons that will be able to bring such applications, particularly the fact that the Integrity Commissioner of a municipality may do so, we expect to see a significant increase in the amount of litigation after March 1, 2019. We will keep the Townships apprised of any changes in the law that result therefrom.

This opinion is based on the facts provided to us. If these facts change our opinion may be affected.

If you have any questions, please do not hesitate to contact the undersigned.

Yours very truly,
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