COURT FILE NO.: 02-B5310
DATE: 2003/04/17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JAMES TOLNAI	)	James TOLNAI , on his own behalf
	)	
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
DOUGLAS R. DOWNEY	)	M. Steven Rastin, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** March 18, 2003

P.H. HOWDEN J.

[1] James Tolnai applies under the Municipal Conflict of Interest Act[1] for an order declaring that the respondent Douglas Downey contravened the Act.

[2] It is common ground that in November 2002 the Respondent was a member of the Orillia Kiwanis Club and chairman of a committee of the Club organizing an event called the Kiwanis Auction. He is a lawyer practising in Orillia. And he is a member of Council for the City of Orillia.

[3] Signs advertising the Kiwanis Auction were posted along City Streets without the City's permission in violation of a by-law. The Club was notified on November 7, 2002 of the by-law violation and of a potential fine, including removal costs, unless the signs were removed.

[1] 1990 R.S.O. Chap. M.50

[4] A special meeting of Council was called following presentation to the City Clerk of a petition signed by a majority of councillors. Mr. Downey had initiated the request. The issue for discussion at the special meeting was a temporary exemption from the City's sign by-law to allow the Kiwanis Auction signs to remain in place until the auction occurred. The Respondent made no declaration of interest, participated in the council meeting, and moved the enabling motion. He had considered the provisions of the Municipal Conflict of Interest Act prior to the meeting and believed that he was not in contravention .Council granted the requested exemption for 48 hours.

[5] Should I find the respondent in contravention of the Act, the applicant requests an order, that Mr. Downey's council seat be declared vacant and that he be disqualified from being a member of council for seven years.

[6] The issues before me are:

(i) should the respondent be granted leave under Rule 39.02(2) to file and use at the hearing an affidavit delivered subsequent to his being cross-examined?

(ii) does the Applicant have standing to bring this application?

(iii) did the Respondent contravene s.5(1) of the Municipal Conflict of Interest Act?

i) The Rule 39.02 Issue

[7] After hearing submissions from the Applicant and counsel for the Respondent, I ruled out the post-cross-examination affidavit of the Respondent. The intent of Rule 39 is to promote efficiency and discourage delays caused by continuous filing of responding affidavits and the corollary adjournments of motions in order to cross-examine.

> 39.02(2). A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under Rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit…

[8] In my view, the content of the Respondent's affidavit was directed at matters already in issue prior to the cross-examination or at issues not requiring a response.

ii) Standing of Mr. Tolnai

[9] Counsel for Mr. Downey submitted that Mr. Tolnai has no standing to bring this application because he is not an elector. Mr. Rastin argued that the applicant has failed to show that he either resides, or is a tenant of land within the City limits of Orillia. It is common ground that Mr. Tolnai has not lived in Orillia since June 2001 when he sold his residence and moved to Atherley in the Township of Ramara. This argument boils down to whether Mr. Tolnai is a tenant of premises at 299-301 Atherley Road in the City of Orillia. Counsel for Mr. Downey submitted that those premises are occupied and rented, not by Mr. Tolnai, but by a water treatment business conducted by an

incorporated entity called Assured Equipment Sales Limited, owned in part by the Applicant and for which Mr. Tolnai works as a commission salesman.

[10] The Applicant's position is that he personally is a sub-tenant and occupant at 299-301 of Atherley Road pursuant to a verbal lease agreement. He provided, as exhibits to his affidavit, a letter purportedly from his lessor and a post facto rental agreement signed on January 30, 2003. Both the letter (dated Jan.20, 2003) and the rental agreement refer to Mr. Tolnai's tenancy having subsisted since Sept. 7, 2002, for which rent continues to be paid monthly. A rent receipt signed in the same style as the rental agreement and dated January 7, 2003 was filed as an exhibit showing payment of rent for the period January 7 to February 7, 2003. It names Mr. Tolnai personally as the payor. The rental agreement shows the tenant to be "James Tolnai/Water So Pure".

[11] Mr. Tolnai further stated that he is formally nominated for a seat on Orillia Council in the coming municipal election this fall. He pointed to an exhibit entered at his cross-examination, his nomination paper[2] completed on a form pursuant to the Municipal Elections Act, 1996. Mr. Tolnai advised me that they had been filed and accepted by the City Clerk. However, it was pointed out by counsel for Mr. Downey that the Clerk's certification form on exhibit #3 is not completed. I understand that the deadline for certification of candidates' nominations by the Clerk has simply not yet arrived; therefore the clerk has not yet ruled on any candidate's qualification to run in the fall election.

[12] There is no question regarding the legal requirements for standing to bring applications under the Municipal Conflict of Interest Act. Those relevant here are:

- The applicant must be an elector.
- "Elector" is defined as a person entitled to vote at a municipal election, in this case a municipal election in the City of Orillia.[3]
- To be qualified to vote, the person must be a Canadian citizen, at least 18 years of age, not prohibited from voting by law, and must reside in the municipality or own or lease land there:[4]

[13] The applicant has the onus of proving that he has standing. That onus employs the civil standard of proof, i.e. whether the increments of standing and, in turn, of an elector as defined by the relevant law, are shown to be present on a balance of probabilities. Mr. Tolnai has provided evidence that he alone and personally, or together with a corporation in which he has an interest, is a tenant of land municipally described as 299-301 Atherley Road in the City of Orillia under an oral tenancy agreement, later confirmed in writing and signed by R. Barber. There is no evidence before me to indicate that Mr. Barber is not what he purports to be, i.e. the lessee of this property who rents to a sub-tenant. Though Mr. Downey presented evidence on his cross-examination that the owner of the property has not signed a consent to the sub-lease to Mr. Tolnai or his company, it appears that the

[2] Ex. 3, J. Tolnai cross-examination, pp. 7-8
[3] Municipal conflict of Interest Act, ss.9(1), 1(definition "elector")
[4] See s.17(2) and (3), Municipal Elections Act

owner may be taken to have consented by acquiescence since September 2002. I appreciate the force of counsel's argument portraying the post-dated rental agreement as self-serving and entitled to little weight. There is other evidence before me on this issue, however.

[14] This issue is not without difficulty. Mr. Tolnai clearly does not reside any longer in Orillia. A corporation is, of course, not a qualified municipal elector. [5] There is also no prohibition in law barring a person from being a tenant along with a corporation. In fact, lessors often require it to ensure an additional pocket to look to for the rent.

[15] For purposes of this application, I find the evidence to indicate that it is more likely than not that Mr. Tolnai is a tenant of the lessee of 299-301 Atherley Road, Orillia. There is no issue before me that the statutory qualification of being a "tenant of land" includes a sub-tenant. Accordingly, Mr. Tolnai has standing to bring this application.

(iii) The Conflict of Interest Issue

[16] The applicant's position is that prior to the exemption of November 7, 2002, the Kiwanis Club faced a potential liability of $275.00 for inspection fee and fine including sign removal costs. He submits that after the by-law exemption was granted the Kiwanis Club was relieved of that cost, and that as a member of the Kiwanis Club and organizer of the fund raising event for which the signs were allowed to remain until its conclusion, Mr. Downey flouted the law by his non-declaration of conflict and by participating in the meeting. Mr. Tolnai put forward as central to his case that all persons must be treated equally in a democracy and that that principle was offended by Mr. Downey's conduct.

[17] The respondent states that he was well aware of his responsibilities under the Act. He has declared conflicts of interest on at least 15 prior occasions. He considered his situation prior to the November 7th meeting and re-read the Act. He believes now that he was not in a conflict of interest situation. His grounds for that conclusion are:

- The signage exempted at the special meeting arose out of the understanding of members of council including Mr. Downey (apparently mistaken) prior to November 7th that council had already exempted the signage practice of the Kiwanis Club at a prior meeting dealing with changes to the sign by-law. That intent was applied to the particular case of the Kiwanis Club on November 7th and was later carried out by passage of an amending by-law exempting all non-profit organizations from the sign by-law for three years.
- He had no personal pecuniary interest in the issue in question, being a voluntary chair of the fundraising event to benefit various projects, without benefit or detriment to the Kiwanis Club or its members financially. The net amount raised by the auction, usually between $40,000.00 and $50,000.00 (after deducting expenses including any advertising related cost), goes to the community service projects.

[5] s.17(3), Municipal Elections Act.

- A team of Kiwanis volunteers would have removed the signs that night but for the exemption by council at no cost to the City 48 hours earlier than they actually did, before any fine was to be levied by the City.
- Because of other advertising, the loss of the advertising signage on municipal property for less than 48 hours before the event would not have prejudiced the success of the auction.

[18] Finally, Mr. Downey's position is that even if he was held to have an indirect pecuniary interest in the by-law contravention issue, the exceptions in s.4(j) and (k) apply, i.e. that such interest paralleled that of electors generally, or that it was too remote or insignificant to be found likely to have influenced him.

[19] The provisions central to this issue are s.5(1) and s.2(a)(iii) of the Municipal Conflict of Interest Act.

> "s.5(1) Where a member, either on his or her own behalf or while acting for, by, with or through another, has any pecuniary interest, direct or indirect, 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,
>
> (a) shall, prior to any consideration of the matter at the meeting, disclose the interest and the general nature thereof ;
> (b) shall not take part in the discussion of, or vote on any question in respect of the matter; and
> (c) shall not attempt in any way whether before, during or after the meeting to influence the voting on any such question.
>
> s.2. 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,
> (iii) is a member of a body, that has a pecuniary interest in the matter.

[20] These provisions have been considered in numerous cases involving differing situations. No one case is the same as another, and that maxim applies here as well. However, the intent and purpose of these provisions has been considered by the Ontario Divisional Court. The principles propounded by the Divisional Court regarding the legislative intent and judicial interpretation to be applied in considering the Act in light of individual circumstances, are important and binding on this court.

[21] In Re Moll and Fisher[6], Mr. Justice Robins wrote, with the concurrence of the full panel:

> "The obvious purpose of the Act is to prohibit members of councils and local boards from engaging in the decision-making process in respect to matters in which they

[6] (1979), 96 D.L.R.(3) 506 (Ont.Div.Ct.)

> have a personal economic interest. The scope of the Act is not limited by exception or proviso but applies to all situations in which the member has, or is deemed to have, any direct or indirect pecuniary interest. There is no need to find corruption on his part or actual loss on the part of the council or board. So long as the member fails to honour the standard of conduct prescribed by the statute, then, regardless of his good faith or the propriety of his motive, he is in contravention of the statute. And I should say at once, that in so far as this case is concerned there is no suggestion that the Appellants acted out of any improper motive or lack of good faith.
>
> This enactment, like all conflict of interest rules, is based on the moral principle, long imbedded in our jurisprudence, that no man can serve two masters. It recognizes the fact that the judgment of even the most well-meaning men and women may be impaired when their personal financial interests are effected. Public office is a trust conferred by public authority for public purpose. And the Act, by its 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. The public's confidence in its elected representatives demands no less."

[22] That case dealt with two members of a Board of Education whose spouses were elementary school teachers. They participated in Board deliberations relating to a collective agreement with secondary school teachers. The evidence established a clear link between collective agreements with either group of teachers where the objective over the years had been to recognize comparable qualification and experience in both teaching sectors equally. The Act ties the interest of a spouse to the board member. That the nature of the interest attracted by the Act is economic was underlined in that case where the agreement covers issues of salary, job security and fringe benefits in a contract one step away from the contract that would apply to the wives of the board members.

[23] An interesting case which dealt with a non-economic personal interest in the context of another province's municipal conflict legislation is Elliott v Burin Peninsula School District No.7[7]. Of course, the words of the legislation differ from the Ontario Act; however, its objective is similar. Elliott involved a mayor of a combined municipality who also sat on the area school board. He had previously been the mayor of one part of the new municipality. Early in its mandate, the school board faced issues of school consolidation and closings. The school board arrived at several options. Two of them involved the closing of a school in the municipality of the mayor-board member. A citizens group objected at a board meeting to his continued participation and accused him of having a conflict of interest. They identified his conflict as being subject to political pressure to decide in favour of keeping open the school in the former town of which he previously had been mayor – it was referred to as his "part of the town". That legislation included, like Ontario's, both direct and indirect monetary interest as well as a more broadly worded "other interest" in the matter.

[24] The Supreme Court held that " other interest" in the conflict-of-interest legislation, while it does not have to be pecuniary in nature, requires that the interest have some tangible or particular benefit for the board member accused of conflict. The court held that the wider language in the

[7] [1997] N.J. No.275 (Nfld. S.C.) Aug.12, 1997)

Newfoundland legislation failed to encompass the political interest of the board member-mayor which was identified as a presumed interest in pleasing his former town.

[25] After reviewing the Ontario case law relating to this legislation, I concur with findings by other justices that the standard to be applied cannot properly be neatly captured in a series of guidelines. I accept that it is best expressed by the question posed by the Divisional Court in Re Greene and Borins[8]: Does the matter to be voted upon have the potential to affect the pecuniary interest of the municipal councillor? It is an objective test not reliant on subjective feelings. It relates to the potential for enrichment or for economic loss, directly or indirectly through an official position in a club or association, not merely to whether the council member has another moral or political responsibility to a group other than the municipal council.

[26] S.2(a)(iii) of the Act is involved where the council member is a member, and holds a position of responsibility, with another group or body which has a pecuniary interest in the matter before the council. S.2(a)(iii) fixes on a council member an indirect pecuniary interest in the issue presented to council if "the member….is a member of a body that has a pecuniary interest in the matter." This is what Mr. Tolnai argues.

[27] The problems with this argument are two-fold:

(i) it is not substantiated by the evidence before me, and
(ii) it is being used as a method to deliver Mr. Tolnai's real objection which is that the Orillia Kiwanis Club got the ear of council and was given preferential treatment.

[28] The evidence before me is that the Kiwanis Club faced no actual or potential pecuniary loss if no exemption was granted on November 7, 2002. The Club, or more realistically the Auction's organizing committee, faced the task of getting their forces out that night instead of 2 days later to take down the signs. The organizing committee, and particularly Mr. Downey as its chair and a member of City Council, would face some local notoriety, no doubt, for their mistake in assuming that a by-law exemption for such signs had already been enacted when apparently it had not been. Though it is not determinative, it is a relevant factor that Mr. Downey had considered his duties under the Municipal Conflict of Interest Act at the time and that other council members were well aware of his public position as chair of the Kiwanis Auction and took no exception to his actions. Though Mr. Tolnai correctly cited the sign by-law's potential penalties of fine (including sign removal cost), it was not inevitable on November 7th that that penalty would be invoked, whether it included an inspection fee or not, if the exemption were not granted. Even if the fine and inspection fee of $275.00 were to be levied, it would be paid as an expense from the auction's proceeds which was not a finite sum. There is no evidence whatsoever that dues payable by members to the club in the future would be affected by the by-law fine in question here. The only evidence before me was that money raised following payment of expenses of the auction would be turned over to the community service projects.

[29] Even if it were found that s.2(a)(iii) deems the Kiwanis Club to have an indirect pecuniary interest in the matter before council, as Mr. Tolnai's argument implies, that is not the end of the

[8] (1985) 50 O.R. (2d) 513

matter. In view of s.4(k), the question then becomes, as in Whitely v Schnuur[9] : would a reasonable elector, being apprised of all the circumstances, be likely to regard the economic interest of the councillor in the matter (i.e. potential for financial benefit or detriment) as likely to influence that councillor's action and decision on it? In my view, for the reasons given, clearly the answer is no.

[30] Counsel for Mr. Downey argued that s.4(j) applied to this case. He submitted that Mr. Downey's position as a member of the Kiwanis Club was an interest in common with electors of the City generally because the club raises money for projects of benefit to the community as a whole. In my view, the fact that a private club does good works does not automatically mean that its interests equates to the interests of the municipality as a whole, or that members of that club interested in the pursuit of its particular objects have an identity of interest with electors generally. The Kiwanis Club is one of many non-profit organizations in the City of Orillia, each of which has its own objectives and interests. For example, a club may own property and may wish to maximize its zoned uses, and the municipality may well disagree in the interest of the community as a whole. In the pluralistic society of today, this argument cannot be accepted.

[31] I understand Mr. Tolnai's indignation at the ease and speed with which the Orillia Kiwanis Club obtained the ear of Council. The use by Mr. Downey of his position to get Kiwanis Auction specifically exempted may well be seen even by Mr. Downey to have been a political misjudgement. In the end, council did deal with the issue as it affects all non-profit groups by exempting them all from the sign by-law temporarily. The evidence as to whether s.5(1) of the Municipal Conflict of Interest Act was violated in this case leads clearly to the conclusion that any pecuniary interest on the part of Mr. Downey indirectly as the volunteer head of a fund-raising project, did not influence his actions.

[32] For these reasons, the application is dismissed.

P. HOWDEN J.

Released: April 17, 2003

[9] [1999] O.J. No.2575 (S.C.O.; June 28/99)