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LEGAL PEAKS AND VALLEYS IN THE JOURNEY OF A MUNICIPAL COUNCILLOR

by George H. Rust-D'Eye*

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INTRODUCTION

Why would anyone embark upon a career which may last only a few years; for which the pay is significantly less than would normally be expected for the responsibilities and pressures under which the work is performed; where your every action and statement may be publicly analyzed and criticized severely in the local press; where every citizen feels he or she has a right to complain to you about almost anything; where perceptions are often more important than actualities; where very little on-the-job training is provided; where your tasks may involve almost every aspect of human social existence; where requirements on your time are far greater than you ever anticipated when you took the job; and where your performance is reviewed in public by the press and populace at large, with the possibility of terminating your career, at the end of each term of office?

This paper will not provide an answer to that question.

Suffice it to say, the writer is constantly thankful to be in a position of providing legal advice and assistance to members of municipal councils, instead of being one of them.

What this paper will attempt to do, is to discuss the legal status of the municipal councillor and the legal context in which a municipal council functions.

This paper was prepared for delivery to a group consisting almost entirely of municipal in-house lawyers, in the hope that it may prove to be of some assistance to them in carrying out their professional responsibilities, and that some of them may wish to share the paper's contents with members of their respective municipal councils.

While the paper is based primarily on Ontario municipal legislation, most of the principles would appear to apply to municipalities across Canada, particularly in view of the recent trends towards modernization of municipal legislation.

THE STATUTORY BASIS FOR MUNICIPAL POWERS

The most important and fundamental principle of municipal law is that municipalities are entirely the creation of statute, and consequently have only the powers and responsibilities specifically conferred upon them by legislation, ordinarily, enactments of the

[1] This paper is based substantially on a previous paper by the same author entitled, Councillor, Counsellor, and Getting Things Done - Legal Considerations Affecting the Role of the Municipal Councillor and Municipal Procedures. That paper was written in 1994, but statutory references have been updated to reflect the current municipal law of Ontario.

Provincial Legislature, which address comprehensively the questions: "what may municipalities do?", "what are municipalities required to do?", and "how do they do it?".

As an example of the stringency of this rule, the fact alone of the creation of a municipal corporation does not in itself endow the corporate body with the power to own land, sue or be sued, or enter into contracts. In Ontario, these powers were, under the regime of the previous *Municipal Act*,[2] provided by section 27 of the *Interpretation Act*, which also "[exempted] individual members of the corporation from personal liability for its debts, obligations or acts if they do not contravene the provisions of the Act incorporating them".

Now, under the new Ontario *Municipal Act*,[3] most of which came into effect on January 1, 2003, such power exists because, pursuant to section 8, "a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act".

While this authority itself has a number of restrictions, exemptions and limitations, many of them contained in section 17 of the Act, it affirms the principle of the entirely statutory context within which municipalities operate.

Even where, as in several Provinces, the municipal legislation no longer adopts a prescriptive specific approach to the provision of municipal powers, replaced instead by much more broad spheres of jurisdiction, and the liberalization of principles of interpretation applicable to them, it is still necessary that every municipal power must have, somewhere, a statutory foundation.

THE LEGAL STATUS OF A MUNICIPALITY

Under the Ontario *Municipal Act, 2001* (the "*Act*" or the "new *Act*"), a "municipality" is defined to mean a geographic area whose inhabitants are incorporated. Under subsection 1(2), a reference to a municipality is a reference to its geographical area or to the municipal corporation, as the context requires. It is also significant that the interpretation provisions of the *Act* apply to all other Acts or provisions affecting or relating to municipal matters unless the context otherwise requires. This provision may have a significant impact on statutory interpretation, particularly when it is understood that "person" is defined in the *Act* to include a municipality unless the context otherwise requires. Under previous legislation, a municipality, not being a "corporation", nor a natural person, was not considered a "person" for the purpose of most statutes.

It may be an interesting issue of interpretation in the future, involving some degree of circularity, to ascertain whether or not any particular act or statutory provision "affects or relates to municipal matters".

[2] *Municipal Act*, R.S.O. 1990, c. M.45, as amended
[3] *Municipal Act, 2001*, S.O. 2001, c. 25

THE EXERCISE OF MUNICIPAL POWERS

It appears that in Ontario, every municipality, however previously created by statute, has been re-incorporated, as a body corporate, by section 4 of the *Act*. Under section 5 of the *Act*, the powers of every municipality, which includes upper-tier municipalities, lower-tier municipalities and single-tier municipalities, are required to be exercised by its council by by-law.

This includes the exercise of natural person powers as well as all powers conferred by the generalized bases of powers referred to as spheres of jurisdiction, under section 11 of the *Act*.

Some provisions of the *Act* authorize municipalities to exercise certain of their powers by resolution, instead of by-law. In all other cases, every municipality must exercise its powers by by-law. The issue to be decided is when a municipality is "exercising a power".

In addition to powers conferred upon municipalities by their principal statutes, such as the *Municipal Act* and the *Planning Act*, a number of municipalities, particularly the City of Toronto, are still governed as well by their own Private Act statutes, most of which survived the enactment of the new *Act*.

Under subsection 5(2) of the *Act*, proceedings begun by one council may be continued and completed by the succeeding council. This is not to say, however, that all of the by-laws, contracts and other work of a municipal council die or become void at the end of its term. Contracts binding on the corporation may continue to be enforced, and by-laws remain until amended by the new council. At the same time, however, a municipal council cannot fetter the legislative discretion of successor councils except where authorized by law, and attempts by an out-going council to impose procedural or other constraints on an incoming council may be unsuccessful.

An interesting provision in this respect is section 275 of the new *Act*, known as the "lame duck council" section, which prohibits a municipal council from taking certain action after the first day during an election for a new council on which it can be determined that the new council will include fewer than three-quarters of the members of the outgoing council.

Generally, in Ontario, the term of municipal office is three years, commencing on the first day of December in an election year. The holders of offices hold office until their successors are elected and the newly elected council is organized. The polling date in a regular election is the second Monday in November in each election year.

These matters are provided for under the *Municipal Act* and the *Municipal Elections Act*, which also deal with qualifications for office, elections and election recounts.

THE FORM AND FUNCTIONING OF MUNICIPAL COUNCILS

In Ontario, there are approximately 450 municipalities,[4] including the Regional Municipalities of Durham, Halton, Niagara, Peel and York, and the District of Muskoka, as well as single-tier municipalities such as Toronto, Hamilton, Ottawa and London, and a number of county municipalities, and lower-tier municipalities.

Section 11 of the *Act*, which confers powers upon municipal councils with respect to ten general "spheres of jurisdiction", also provides for the distribution of such powers among upper-tier, lower-tier and single-tier municipal councils.

QUORUM OF A COUNCIL

Section 237 of the *Act* provides that, for most municipalities, a majority of the members of the council is necessary to form a quorum.

Specific provisions of that section affecting certain upper-tier municipalities require that a majority of members representing lower-tier municipalities be present in order for a quorum to be reached.

Under the *Municipal Conflict of Interest Act*, where compliance with that Act disables a number of members from participating in a meeting such that 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 that such number is not fewer than two. Where fewer than two remain, the council may apply to a judge for authority "authorizing the council … to give consideration to, discuss and vote on the matter out of which the interest arises".

A judge may also, on such an application, declare that the requirements of the *Act* precluding members from participating in consideration of matters in which they have a pecuniary interest, not apply to the particular matter in question, and the council may then give consideration to the matter as though none of the members had any interest therein, subject to such conditions and directions as a judge may impose.

THE STATUTORY ROLE OF A MUNICIPAL COUNCIL

The *Act* sets out, for the first time, the statutory role of council, as follows:

> **"224. It is the role of council,**
>
> **(a) to represent the public and to consider the well-being and interests of the municipality;**
>
> **(b) to develop and evaluate the policies and programs of the municipalities;**

[4] Interestingly, the original paper, written in 1994, the year before the coming of the "Common Sense Revolution", instigated by the election of the Progressive Conservative Party, referred to "830 municipalities". In other words, almost half of the municipalities which existed in 1994 have, through restructuring, been phased out of existence in their previous form.

(c) to determine which services the municipality provides;

(d) to ensure that administrative practices and procedures are in place to implement the decisions of council;

(e) to maintain the financial integrity of the municipality; and

(f) to carry out the duties of council under this or any other Act."

It is noted that this section delineates a "role", involving a task or function, which does not necessarily involve any statutory mandate, power or duty (as opposed to the status of the chief administrative officer, who, under section 229 of the *Act*, "shall be responsible for exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality", as well as performing such other duties as are assigned by the council).

THE MUNICIPAL CLERK

An even higher order of responsibility is imposed upon the municipal clerk who, pursuant to section 228 of the *Act*, has the duty and, therefore, I would submit, the power, to perform a number of functions, including recording all proceedings of the council and conducting recorded votes where required by any member present at the meeting, as well as performing a number of other responsibilities, including all other duties assigned by the municipality.

In these, as well as with respect to other, statutory duties conferred upon the clerk under the *Act*, and other legislation, the clerk acts as a "*persona designata*"; in other words, an officer whose duties are owed to the public, and may and must be performed by the clerk as a public officer, quite independently of the clerk's status as an employee of the municipality, which is usually the case.

It is noted in this latter regard that neither a clerk nor a deputy clerk is required to be an employee of the municipality, leaving it open, for instance, to agreements among municipalities to share the duties of a clerk who, unlike, for instance, a medical officer of health, under section 62 of the *Health Protection and Promotion Act*,[5] is not required to be appointed full-time.

It is also interesting to note that under subsections 228(4) and (5) of the *Act*, the clerk (but not the council) may delegate in writing to any person other than a member of council, any of the clerk's statutory powers and duties, but the clerk is specifically entitled to continue to exercise the delegated powers and duties despite the delegation.

[5] R.S.O. 1990, c. H.7, as amended

THE HEAD OF COUNCIL

The *Act* appears to have weakened the position of the head of council who, under section 70 of the previous *Municipal Act*, had a number of statutory duties to perform, involving maintaining compliance by the municipality with all laws, overseeing the conduct of subordinate officers, and communicating information and recommendations to the council on an ongoing basis.

Now, the functions of the head are described through the weaker term of "role", including to act as chief executive officer of the municipality, preside over council meetings and "provide leadership to the council".

There does not appear to be any reported court decision defining the functions or responsibilities of the chief executive officer of a municipal corporation, nor distinguishing the roles of chief executive officer and chief administrative officer from one another.

THE MUNICIPAL POWER TO CONTRACT

It is generally considered that municipalities are not bound by the "indoor management rule"[6] or principles of ostensible authority. In other words, the fact that the head of council purports to enter into a contract or other binding obligation on behalf of a municipality will not be given legal effect unless the municipal council itself granted authority for the entering into of the commitment, or ratified the obligation after the fact.[7]

There are some exceptions to this rule, such as where municipal staff have entered into an agreement in the normal course of the municipality's business, and the municipality has benefited from the contract through complete or partial execution. Issues of unjust enrichment or quantum meruit (you have to pay for what you get) may also come into play from time to time.

There is also the peculiar case of *Moin v. Blue Mountains (Town)*,[8] in which the Ontario Court of Appeal upheld the liability of a municipality for negligent misrepresentation where the Reeve of the municipality, at a council meeting, stated the municipality's intention to build a road by a particular time, in the presence of four other members of council who said nothing, despite the fact that they did not agree with the Reeve as to the timing for rebuilding the road. The trial judge found that the silence of the members of council constituted the Reeve's representation that of the council itself. Consequently, the municipality was liable to the property owner, who had signed a development agreement and refinanced his property on the basis of the Reeve's assurance. The Town was held liable for the statements made by the Reeve. The Town did not show that it was unreasonable for the trial judge to accept the plaintiff's account of the representations and that he believed the Reeve was speaking for the municipality.

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[6] *Porky Packers Ltd. v. Town of Le Pas and Tawse et al*, [1977] 1 S.C.R. 51; *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, para. 68

[7] *Sherway Contracting (Windsor) Ltd. v. Kingsville (Town)* (2002), 42 M.P.L.R. (3d) 126 (O.S.C.J.)

[8] (2000), 143 M.P.L.R. (3d) 1 (Ont. C.A.)

THE UNIQUE ROLE OF THE COUNCILLOR

Generally, a municipal councillor is not considered an employee or agent of the municipal corporation. With the possible exception of the head of council, as chief executive officer, members of council are not considered public officers of the corporation, although it is sometimes said that they may constitute "legislative officers". Such members have no executive or administerial duties imposed upon them. They are not employed by, nor are they in any way under the control of, the corporation while in office. They have no authority to act for the corporation, except in conjunction with other persons constituting a quorum.[9]

When a municipal council is sitting as a quasi-judicial body, for instance, in dealing with an application for a business licence, it is exercising a quasi-judicial function and, consequently, the councillors are sitting as a quasi-judicial body when considering such issues. Consequently, council members are generally exempt from being cross-examined about decisions made when they are sitting in such capacity.[10]

Normally, the head of council, like other members of the council, is entitled to vote in respect of all matters except where disqualified or precluded by statute.

The council exercises its powers by by-law and makes its decisions by votes at meetings. The *Act* prohibits votes by ballot or any other method of secret voting, and any member may request a recorded vote in certain circumstances. At a recorded vote, the failure by a member who is present and not disqualified to vote is deemed a negative vote. Many municipal procedure by-laws make this requirement applicable to all votes.

Under the *Act*, all meetings of municipal councils, except certain special meetings, are required to be held in public, as are the meetings of many local boards. Where a meeting is open to the public, no person can be excluded except for improper conduct, although the head or other presiding officer is authorized to expel or exclude from any meeting any person who has been guilty of improper conduct at the meeting.

PROCEDURAL BY-LAWS

Under section 238 of the *Act*, every municipality is required to pass a procedure by-law for governing the calling, place and proceedings of meetings. In addition, under section 130 of the *Act*, a municipality may regulate matters not specifically provided for by statute for purposes related to the health, safety and well-being of the inhabitants of the municipality.

As with all statutory powers, the application of this section to a particular municipality or situation may depend on the wording of one or more statutory provisions.

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[9] Rogers, The Law of Canadian Municipal Corporations, (2d), at 148 and 1329; *Davies v. The Sovereign Bank* (1906), 12 O.L.R. 557; *Porky Packers Ltd. v. Town of Le Pas and Tawse et al, supra*

[10] *Wiswell et al v. Metro Corporation of Greater Winnipeg*, [1965] S.C.R. 512; *Re Schabas et al and Caput of the University of Toronto et al* (1975), 6 O.R. (2d) 271; *Broda v. Edmonton (City)* (1989), 102 A.R. 255 (Alta. Q.B.)

THE POWER TO DELEGATE

Municipal legislation confers specific authority on municipal councils to delegate powers in respect of certain specified subject matters, but otherwise a municipal council has no right to delegate any of its powers, as opposed to administrative responsibilities. For administrative purposes a council may appoint committees, to which can be assigned certain administrative duties, such as to collect information, hear submissions, make findings of fact, report and recommend action by the council, in respect of any particular area of interest assigned to that committee.

Probably the phrase "committee of council" is intended to refer to a committee composed of council members. Unless otherwise provided by statute, a council may appoint non-councillors to an advisory committee.

THE EXERCISE OF MUNICIPAL POWERS

Every council is authorized to pass its by-laws and resolutions in English or in both English and French.

Municipal councils exercise executive, legislative, quasi-judicial and administrative functions, in respect of a wide variety of matters, as assigned to them by statute.

Many municipalities, particularly larger ones, pass what is called a "confirmatory by-law" at the end of each council meeting, or part of a council meeting, confirming all decisions taken at that meeting. This saves the municipality from having to have printed a large number of by-laws dealing with individual issues. The use of confirmatory by-laws is highly recommended.

THE RIGHTS OF COUNCILLORS

Ordinarily every member of a municipal council has the right to receive notice of and attend all meetings of the council, and where authorized by by-law or statute, all or certain meetings of committees. The same applies to local boards, agencies created by statute which carry on certain aspects of municipal business, such as school boards, public utilities commissions, public library boards, boards of health, police services boards, planning boards and other similar bodies. Like municipalities, local boards are creatures of statute, and may or may not be given the rights and powers of other legal entities.

A council member may be disqualified from participating in debate or voting on certain matters in which such member has a direct or indirect pecuniary interest, pursuant to the *Municipal Conflict of Interest Act*. In such circumstances, the member must declare his or her interest, and the basis therefor, and not take any steps before, during, or after the meeting to influence the vote in council. If the meeting is closed to the public, the member must leave the meeting. If the member is not present at a meeting, the interest must be declared at the following meeting.

The municipality, through its clerk, is required to record all resolutions, decisions and other proceedings of the council, and to keep certain other books and documents. Most documents and records in the possession of the municipal clerk are made available to the public

through section 253 of the *Municipal Act* and the *Municipal Freedom of Information and Protection of Privacy Act*.

THE ROLE OF MUNICIPAL STAFF

There is need for thought to be given to the relationship generally between members of municipal councils and municipal staff. This is an area which has rarely been discussed, let alone analyzed in a comprehensive way in legal writings, and yet the extent to which a municipal government operates properly and smoothly depends so much on the mutual support and interrelationship between members of the two levels of a municipal government organization.

A municipal government works best where everyone understands his or her role in the process. Members of council are elected to govern, to establish policies, and to take responsibility for the functioning of government. Municipal officers and staff have their own responsibilities, to provide whatever assistance is necessary to the members of council to carry out their functions, to provide timely and authoritative reports to the council to enable appropriate decision-making, and to carry out the policies, directives and instructions of the council.

Municipalities function best when the players understand their respective roles. Members of council should not attempt to fulfil the role of staff, and staff should not encroach on the policy-making discretion of the council.

In Ontario, most members of municipal councils have other full-time occupations; being a councillor, and sometimes even a head, is not considered a full-time role, except in some of the larger municipalities. This leaves the staff, who are essentially permanent fixtures at city or town hall, and most knowledgeable about the workings of the government. In particular, the municipal clerk, as has been mentioned, and/or the CAO, normally stand at the hub of municipal activity, and are most up-to-date with the affairs of the municipality and the requirements of effective municipal government.

Although members of municipal councils run for office every three years, re-election is generally granted to those who seek it and have not committed a major blunder.

It is the duty of municipal staff to acknowledge and support the democratic process, and to provide whatever is necessary to enable the members of council to function. To the extent that members of staff feel that they, and not the elected members, make the important decisions, the government will not be properly served, and conflicts will arise. At the same time, members of staff, often serving for several decades in the municipal government, are in a position not only to provide advice to councillors, but to provide a historical context for the operation of the municipality generally.

It is the experience of the writer that almost without exception, municipal staff simply wish to do their jobs, carry out the wishes of council, and ensure the fulfilment of the public interest, irrespective of the personal or political position or attitudes of the individual staff members. It is generally acknowledged that it is not up to staff to bring about particular results

for their own benefit, nor is it proper for members of council to seek personal political or policy support at the staff level.

In addition to the traditional fact that in all except the largest municipalities, members of council serve part-time, the recent trend in "cottage country" is for a number of members, sometimes the majority, of municipal councils to be composed of non-residents.

THINGS THAT MUNICIPAL POLITICIANS WANT TO KNOW

The following are the questions most frequently asked by members of municipal councils to municipal lawyers. The answers are not intended to constitute legal advice, nor to provide definitive answers to these questions. It is emphasized that in the event of a need for professional assistance, the services of a lawyer should be sought to provide advice relating to the specific circumstances and issues.

Q.1 Will I be personally liable if I vote on a matter?

Ans. Generally, the principle of law is that individual members of a municipal council may be successfully sued only if the act alleged to form the basis for the action is done maliciously, and thus constitutes misfeasance in public office. In the absence of an improper motive, breach of good faith, an intention to injure a third party, or malice or reckless abuse of public office, simply voting on a matter should not lead to personal liability.

As a general rule, it may be stated that no action lies against individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act is maliciously done by the individual charged, and the corporate name used as a mere colour for the malicious act, or where the act is beyond the power of the corporation, and is not, and cannot be in contemplation of law, a corporate act at all.

"Malice" generally involves the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict injury or in circumstances in which the law will imply an evil intent. Malice in law does not necessarily involve personal hatred or ill will, but it is a state of mind which is reckless of the law and of the legal rights of others. It may also involve a motivation or intent based on an improper ulterior purpose, not relevant to the objectives of the authorizing legislation, or involving indifference to the truth.

There are a few statutory provisions creating special penalties for members of council in certain circumstances, such as for misapplication of funds or breach of conflict of interest legislation. On the other hand, there are also a number of statutory provisions providing protection to individual members of council exercising the duties of their office, even where the municipality itself might be found to be liable.

For instance, section 448 of the *Act* provides that no proceeding for damages or otherwise shall be commenced against a member of council or an officer,

employee or agent of a municipality for any act done in good faith in the performance or intended performance of a duty or authority under the *Act* or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

A new section 450 provides that no proceeding based on negligence in connection with the exercise or non-exercise of a discretionary power or in the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision of the municipality made in good faith, shall be commenced against a municipality, a member of council, or any officer, employee or agent of a municipality.

Q.2 Can I be sued for defamation for statements made in council?

Ans. First of all, the distinction must be made between "can I be sued" and "can I be sued successfully". Although it is not common, those bringing actions or claims against municipalities will from time to time also add as parties individual members of council. Unfortunately, from time to time, proceedings against members are brought maliciously or without proper basis, in an intent to get even with or intimidate councillors properly carrying out the municipality's business, or possibly to change the quorum of council by attributing a conflict of interest to members involved in the action. In such cases, expeditious action should be taken to have the proceedings dismissed. It is extremely rare that any action ultimately succeeds against a municipal councillor.

A municipal councillor acting in good faith in what he or she perceives to be the public interest who deals with a matter within the municipal jurisdiction, should generally pursue his or her convictions fearlessly in confidence that municipal councillors have the legal right to fulfil their legal duties as such.

On the other hand, members of council should be very aware of the potential for defamation proceedings arising in the course of their work.

There exists at law what is know as the defence of qualified privilege, which attaches to statements published in the course of carrying out of a public duty, where there is honest belief in the truth of the statements made and an absence of malice.

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers, which lowers him or her in the estimation of right members of society, and in particular, which causes him or her to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or dis-esteem.

The law recognizes a public interest in permitting members of governmental bodies to communicate frankly and freely with one another about matters with respect to which the law recognizes that they have a duty to perform or an interest to protect in so doing. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable, even though it be

defamatory and turns out to be untrue. However, it is lost if the occasion which gives rise to it is misused. For instance, if council, or a committee, at a public meeting, deals with matters which are beyond its jurisdiction, or if a member of a council makes statements outside of the council chamber, the protection may be lost. If a plaintiff can establish that the person making a statement has acted from malice, or for base motives, does not believe what he or she says, or makes a statement recklessly not caring whether it is true or false, the defence which would otherwise be attendant upon the occasion, may be lost. Even if a person believes in the truth of what he or she says, the privilege may be lost if the predominant motive for publication is dishonourable, or made for purposes of spite.

Q.3 If I get sued, will the municipality pay my expenses?

Ans. To a large extent, this is up to the individual municipal council to decide. Provisions of the *Act* authorize municipalities to provide by by-law for compensation of members of council for expenses incurred by them as a result of acting in their capacity as a member. Many municipalities have such by-laws, or deal with each matter separately in specific circumstances as they arise.

It is important to note the requirement that such expenses may be paid only when the member of council is engaged in the performance or intended performance of the duties of office, and not in respect of personal matters, not relating to his or her municipal position.[11] In general terms, such indemnity may be provided in respect of both the legal costs in the defence of a proceeding, and damages or costs required to be paid to other parties.

Generally, such compensation is not provided for the unsuccessful defence of criminal proceedings, the prosecution of actions or proceedings against third parties, the unsuccessful defence of proceedings under the *Municipal Conflict of Interest Act*, the payment of fines or proceedings arising out of actions taken as a candidate in a municipal election. Councils may or may not provide funding for their members to seek legal advice with respect to conflict of interest legislation.

A municipal council also has the power to pass by-laws for procuring insurance to indemnify and protect members of council or of a local board, as well as employees of the municipality, against risks that may involve liability for damages or costs, occurring as a result of acts or omissions done or made by them in their public capacity, including while acting in the performance of a statutory duty, or paying damages or costs awarded or expenses incurred as a result of proceedings, or any sum required in connection with the settlement of such a proceeding or assuming the cost of defending the person in such an action or other proceeding. It is noted that this provision does not apply to a proceeding brought

[11] *Santa v. Thunder Bay (City)*, [2004] O.J. No. 1241 (Ont. C.A.); *Rawana v. Sarnia (City)* (1997), 35 O.R. (3d) 640n (C.A.), affirming (1996), 30 O.R. (3d) 85 (Gen. Div.)

under the *Municipal Conflict of Interest Act* where the member is found to have contravened the Act.

Q.4 When should I declare a conflict of interest?

Ans. The technical answer is "never". The requirement, contained in the *Municipal Conflict of Interest Act*, is to declare a pecuniary interest, direct or indirect, in any matter which is the subject of consideration by a council or local board, prior to any consideration of the matter at the meeting. The Act requires not only the disclosure of the interest, but also its general nature.

It is also important to note that where such a requirement applies, the member is also prohibited from attempting in any way, before, during or after the meeting, to influence the voting on any such question.

Although there have been cases where members were found not to have breached the requirements of the Act where they were not in attendance at any council meeting where the matter was discussed, nevertheless, as a general rule, members should give serious consideration to their duties under the Act, when such a issue arises at a meeting of a committee, or at any other time in which an action taken by the member could ultimately affect a vote at council.

Where the member is absent from a meeting involving a discussion of a matter in which a member has a pecuniary interest, the disclosure is required to be made at the first meeting of council attended by the member after such previous meeting.

Q.5 Do I have a right to legal advice from the municipal solicitor?

Ans. The general principle is that the municipal solicitor is in a solicitor and client relationship with the municipal corporation, not with members of its council. Therefore, the municipal lawyer is not in a position to provide personal or individual legal advice to councillors in their personal capacities. It must always be remembered that as the solicitor to the municipal corporation, the lawyer owes a duty to that corporation, and issues may arise from time to time involving potential for conflict between that corporation's legal interest, and the interests of individual members of council.

It must also be emphasized that the lawyer is in a fiduciary relationship with the municipality, involving confidentiality, trust and a requirement to disclose to the municipal corporation all information relevant to its interests in the possession of the solicitor.

Very often, municipal lawyers are asked by individual members of council if they "have a conflict of interest". Once again, a municipal lawyer is not in a position to be able to provide such advice to a member, particularly when he or she is not in a position to know all of the factors which may be relevant to that member's decision as to whether or not the requirements of the *Act* must be followed in any

particular matter. Consequently, the municipal lawyer must advise the councillor to seek independent legal advice with respect to the issue.

Notwithstanding the above comments, the writer has, while acting for a municipality, on occasion, been asked questions about the personal position of a member of a council, and in some cases, has referred a member to particular provisions of the *Municipal Conflict of Interest Act* suggesting that the member may in fact have a problem under that statute, such as provisions which deem certain interests of others, such as members of family, bodies of which the councillor is a member, or an employee, to be the interest of that member. However, any such suggestion has always be joined with the advice that the member should seek his or her own legal counsel.

In spite of the foregoing cautions, it is to be noted that the writer is not aware of any case in which a member sought and followed the legal advice from a municipality's lawyer, where such member was not excused from the consequences of breach of the *Municipal Conflict of Interest Act*.

Q.6 Do I have a right to see all documents in the hands of staff?

Ans. Generally, but not always.

In the normal course of things, municipal staff are required to provide assistance to the municipal council and its members in enabling them to carry out their respective duties and powers, and it is very rare that a situation arises in which any information or document is refused to a member of the council.

A councillor is also, of course, a member of the public, and any document available to the public, whether under the *Municipal Act* or the *Municipal Freedom of Information and Privacy Act*, is also available to a councillor.

Problems do, however, arise from time to time, particularly when one or more members of a municipal council seek personal information relating to an individual, which is in the hands of the municipality, but collected for a purpose other than that for which the disclosure is sought by the councillors. In such cases, the councillors may not have a right to access to such documents.

From time to time an issue arises, where an individual member of a council, as opposed to the council itself or one of its committees charged with a duty in a particular area, seeks disclosure of a confidential document in the hands of staff for reasons other than the proper performance of the member's responsibilities of office. The general principle is that while the council, as the directing body of the corporation, has a right to require production of such documents in the possession of its staff, obtained in that capacity, nevertheless individual members of council do not necessarily have a right to every such document.

Q.7 Does the municipal councillor speak on behalf of the municipality?

Ans. A member of a municipal council is neither an employee nor an agent on behalf of the municipality.

Also, as a general rule, a municipal corporation is not bound by the acts of councillors acting as individuals, nor can it be held liable for a contract not authorized by the council exercising its collective capacity to bind the corporation through the enactment of by-laws.

The municipal council is the policy-making body for the municipality, and in general terms, no individual member of council can speak for the council or make representations on its behalf, unless authorized by the council, or otherwise by law, to do so.

It is emphasized that the municipal council is a collective decision-making body, and that the individual motives or opinions of individual members of council will not necessarily be attributed to it. The fact that a member of a council may act in bad faith in deciding whether or not to vote for or against a particular measure, does not, in itself, invalidate the decision, although it is generally the duty of a member of council to act in the best interests of the corporation and the citizens they represent, and the council as a whole has a duty to act in good faith.

Councillors are legislative decision-makers of the municipality, and, with the exception of the head, who is the chief executive officer, they have no individual executive or ministerial duties. Moreover, they have no authority to act for the corporation except in conjunction with other members constituting a quorum. As legislators, they fulfil a role similar to members of Parliament or the Provincial Legislature.

In general terms, members of municipal councils, other than the head of council, are not considered to be "officers" of the municipal corporation, for the purpose of statute law. It also appears unlikely that a member of a municipal corporation would be considered a "director of a corporation" in the absence of a statute specifically defining such term to include such members.

Q.8 Can a member who has attended an in camera meeting legally divulge what took place at that meeting, after it is over?

Ans. A municipal corporation could have an action for damages against the councillor for breach of confidence, in certain circumstances, if the divulging of the confidential information had a detrimental effect upon the financial interests of the municipality.

It may also be that in some circumstances such conduct could involve a breach of fiduciary duty. Although it does not appear to have been conclusively decided by any court that a member of a municipal council has fiduciary duties owed to the

municipal corporation, there are certainly good arguments why should would be held to be the case.

A member should also be concerned about codes of conduct or procedural by-laws enacted by a municipal council which could preclude such activity, possibly constituting breach of its requirements an offence punishable by prosecution.

One could also argue that where a council had decided, as it has the power to do so in certain circumstances under section 239 of the *Act*, that a meeting or part of a meeting be closed to the public, that would appear to preclude a member from acting in contempt of that ruling, although it is unclear what penalty, other than a motion of censure, a council could impose upon such a member. It probably could not interfere with his or her status as a member.

A recent court decision would suggest that it may be open to a member to divulge confidential information as to what took place at an in camera meeting, although the decision would appear to constitute *obiter dictum* (statements not necessary to the decision and, therefore, not binding) and be distinguishable on its facts. Leave to appeal to a higher court was dismissed.[12]

Q.9 Can municipal councils hold private "retreats" or "information sessions"?

Ans. The provisions of the *Act* requiring open meetings of councils, local boards and committees apply only to "meetings" of those bodies. The question remains, therefore, whether or not the members of a council may get together, with or without staff or outside advisors, for the purpose of orienting or informing themselves generally with respect to their work as councillors, or exchanging ideas relevant to their work as members of the body in question.

A series of authoritative court decisions have provided the conclusion that a number of factors, including the words of the applicable legislation, and in some cases, duties of procedural fairness, may play a role in affecting this decision.

Generally, the requirement that meetings be open to the public does not preclude informal discussions among members, either alone or with the assistance of their staff, but a "meeting" may be held to have been established: where the body in question is discussing matters within the ambit of its jurisdiction; where matters are dealt with which would normally form the basis of council's business; where the "meeting" deals with such matters in a way which moves them materially along the way in the overall spectrum of council decision-making; or where the public is being deprived of the opportunity to observe a material part of the decision-making process.

As a matter of law, each situation depends upon its own circumstances. Generally, if a council desires to hold informal get-togethers, retreats, bull sessions,

[12] *RSJ Holdings Inc. v. London (City)*, [2004] O.J. No. 2700; leave to appeal refused, [2004] O.J. No. 1982 (O.S.C.J.)

workshops and the like, it is most desirable that it establish in its procedural by-law when and for what purposes such assemblies may be held.

It is most desirable that municipal councils provide as much information and assistance as possible to its members, particularly newly-elected members of councils, who will benefit substantially and fulfil their duties as councillors in a more valuable way, if they are given the benefit of an orientation session at the commencement of their term in office.

Q.10 When can municipal councils reconsider their decisions?

Ans. Many municipal procedural by-laws contain provisions dealing with circumstances in which the municipal council may reconsider questions previously decided by the council.

Such provisions are presumably enacted for the purpose of preventing repetitious attempts to have the same issue debated over and over again in the hopes that the changing composition of council or other circumstances may lead to a different result from that previously obtained.

Typical conditions of such provisions for "reconsideration motions" may involve the requirement that the member moving the motion to reconsider have previously voted with the majority, presumably indicating that at least one member has changed his or her mind and now feels that it is fit that council as a whole revisit the issue and consider arguments why changed circumstances or new grounds of approach might suggest that council at this point of time decide the question anew. (There is reason to believe that from time to time some members of councils, recognizing a lost cause, have voted with the majority and against their own position, in the anticipation that at some point such a member might be in a position to move a reconsideration motion).

Some reconsideration provisions may contain additional conditions imposed as a precedent to allowing reconsideration, such as a two-thirds vote.

Many such provisions apply only in respect of a question decided during the same term of council; others are open-ended, and could, if construed literally, constitute an indefinite fetter on the right of a council to reconsider matters dealt with during a previous term.

Normally, a motion to reconsider, and reconsideration of the question, involve a two-stage process: first the debate, if debate is permitted, of the reconsideration motion itself; and if that motion passes, the general debate on the substantive issue. In such cases, it is either specifically provided in the by-law, or generally considered, that debate relevant to the motion to reconsider should not involve arguments addressed to the merits of the issue itself, but only to the question as to whether or not it is appropriate at this time that the council re-debate that issue.

It may pose a difficult problem for the head of council chairing the meeting to draw a line between debate relevant to the reconsideration motion alone and debate going to the merits of the case.

The question arises as to whether or not a municipal council has the power to enact such a provision, at least to the extent that the by-law seeks to impose conditions upon the introduction of business before a council which may have the effect of prohibiting a majority of the council from voting upon a matter within its jurisdiction and otherwise properly introduced.

This issue is also tied up with the question as to whether or not a council has the power to bind a successor council and prevent it from deciding by a majority vote an issue otherwise properly brought before it.

A more complex issue is the substantive point of law dealing with the question of in what circumstances may a council, by changing its mind, affect the legal position of the municipal corporation and the rights of third parties who may have relied upon a previous council decision, perhaps formalized through a written agreement, and who may have relied upon the council decision to their detriment.