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IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

THE PRACTICAL ISSUE

How to Get Council Buy-in—While Maintaining Professional Ethics

Lead in Drinking Water: How to Get the Most out of Your Municipality's Insurance

Second Look: How to Select an e-Discovery Vendor

Code Enforcement: Practical Advice for the Code Enforcer

Practice Tips: Key Considerations for Developing a Community Broadband Network

ListServ: Virtual Attendance and Hangover Buses

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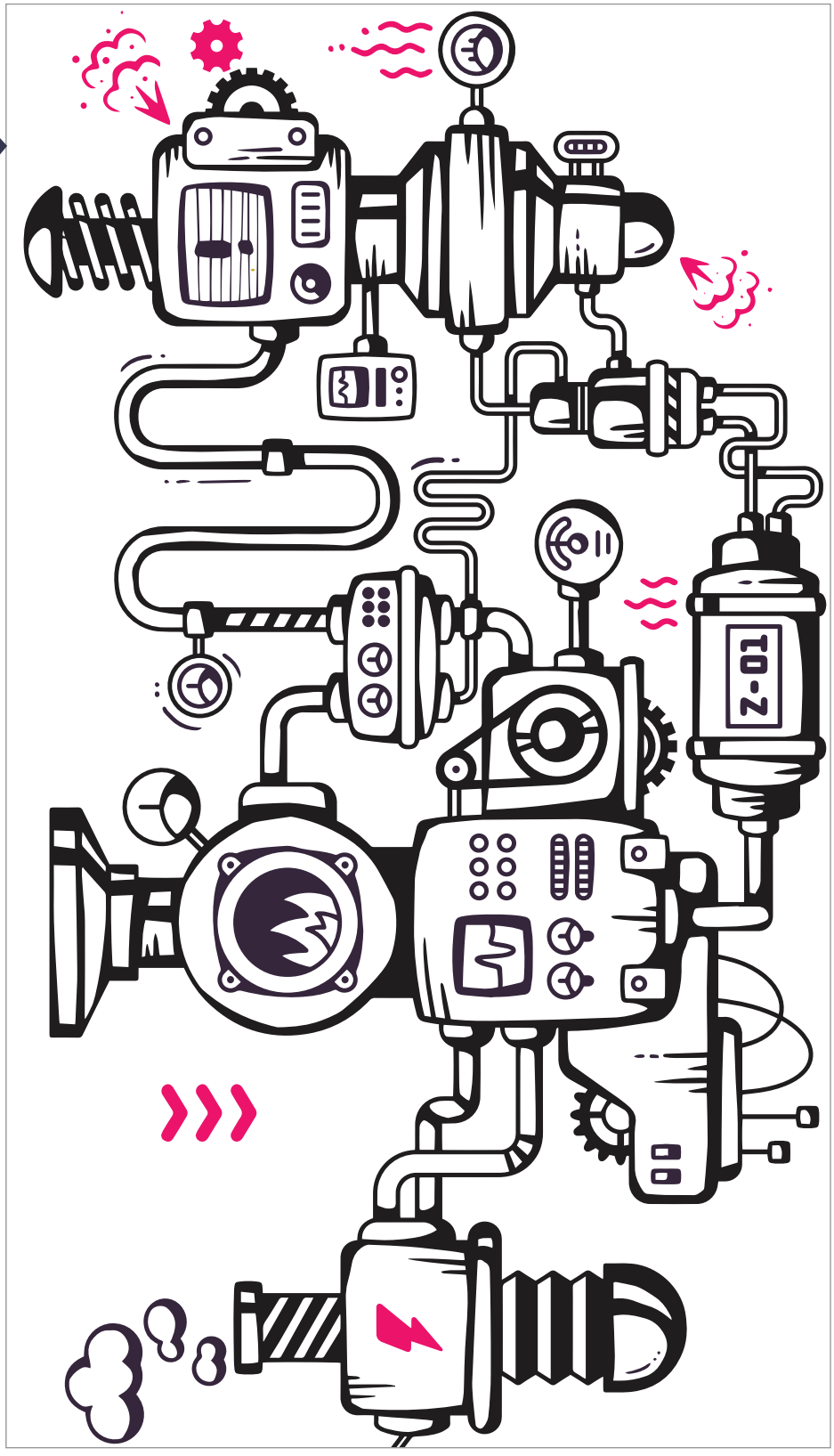



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THE MUNICIPAL LAWYER MAGAZINE



THE PRACTICAL ISSUE

HOW TO GET COUNCIL BUY-IN—WHILE MAINTAINING PROFESSIONAL ETHICS

By: Nick Robichaud, City Solicitor, City of Moncton, New Brunswick

No less than their American counterparts, Canadian municipal counsel face challenges in distinguishing between duties to municipal corporations and the councillors who lead them.

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EDITOR'S NOTE:

IMLA
THE MUNICIPAL LAWYER MAGAZINE

Dear Reader:

Two years after America's Civil War concluded, Canada began its journey as a unified nation. On July 1, 1867, the Province of Canada, which would become Ontario and Quebec, was joined by the maritime colonists in New Brunswick and Nova Scotia to form the Canadian Confederation. Western neighbor Manitoba soon followed. The transformational Canadian Pacific Railroad spurred far-away British Columbia Colony to enter the new dominion in 1871, as did Prince Edward Island. Agricultural powerhouses Saskatchewan and Alberta were added in 1905, with outlier Newfoundland and Labrador finally pledging fealty to the Canadian flag in 1949.

These ten provinces, and Canada's northern lands spreading across Yukon, Northwest Territories and Nunavut, comprise the second most expansive nation on the planet. More significantly for American purposes, Canada's population of 36 million continue a tradition of mutual support between our countries–and enable the world's most important bilateral economic partnership. It is virtually impossible to measure the advantages that the United States and Canada have each gained by the presence of a peaceful and productive neighbor across an undefended border of nearly 4,000 miles.

Next year, IMLA will help celebrate Canada's sesquicentennial by holding our Annual Conference in Ontario, overlooking the spectacle of Niagara Falls. Appropriately, we will ring in 2017 under the leadership of our just-inaugurated IMLA President, Mary Ellen Bench, City Solicitor of Mississauga, Ontario–a city 100 kilometers from the Conference site. In her President's Letter, Mary Ellen issues an ambitious call to action for broadening our organization's demographics. This November-December *Municipal Lawyer*—the "Practical Issue" providing how-to advice across a spectrum of practice areas—continues a Canadian cast, with our lead article on ethics by Moncton, New Brunswick City Solicitor Nick Robichaud. We also feature prominently the image of Bruce Noble, IMLA's first Canadian President, as he delivers, *a cappella*, "The Star Spangled Banner" and "O Canada"—in English and flawless French—at our recent (and highly successful) Conference in San Diego.

Other "how to" articles discuss optimizing insurance for poisoned municipal water supplies (Finley Harckham of New York City's Anderson Kill P.C.); selecting the proper e-discovery vendor (Pete Haskel, Executive Assistant City Attorney, Dallas); developing a local high speed broadband network (Adrian Herbst of Bradley, Hagen & Gullikson, LLC, Washington D.C.); and practical tips for code enforcement officers (Sheri Russell, City Attorney, Lake Jackson, Texas). Brad Cunningham, City Attorney of Lexington, South Carolina, assesses the merits of "hangover buses" and absentee meeting attendance; and your IMLA editor looks at legislative prayer.

By the time the print version of this *Municipal Lawyer* is distributed, our 2016 American elections will finally be history. Despite murmurings to the contrary, a peaceful transition of power will have occurred. Those of us living below the 49th parallel will then be able to rejoin our Canadian colleagues in focusing on more substantive pursuits.

We hope you find this Practical Issue–and its occasional Canadian flavouring–useful in your practice.

Best regards-

Erich Eiselt

DO YOU HAVE AN ARTICLE FOR THE MUNICIPAL LAWYER?



IMLA members are involved in some of the most challenging legal issues of our time — First Amendment questions, environmental debates, law enforcement policies, taxation and finance, and many others.

Share your experience, insights and practice tips. Our readers include a wide range of government attorneys at the state, city, county and local level, many lawyers in private practice who specialize in municipal law, and law libraries across the country.

To Submit An Article, please contact the **Editor, Erich Eiselt, at eeiselt@imla.org** with a brief description of your topic.

Municipal Lawyer is published 6 times per year, and feature articles should be between 2,500 and 4,000 words in length.

Submitted articles are subject to review by IMLA staff, and IMLA reserves the right to edit articles (for style, clarity, length, etc.).

We look forward to hearing from you!

Questions? Please contact IMLA at info@imla.org.

PRESIDENT'S LETTER

Our Mandate to Embrace Change

By: Mary Ellen Bench, City Solicitor, Mississauga, Ontario



I am honored to be writing this article as your new IMLA President, and to have taken on the mantle of IMLA leadership from Herb Thiele at our recent Conference in San Diego.

This role caps a long and very worthwhile relationship with our organization. Early in my career I was told about an amazing resource for municipal lawyers, then called NIMLO. Now known as IMLA, our organization has been an integral part of my professional career for over two decades. It has never failed to live up to the high standards first set by Charles Rhyne so long ago. IMLA is where I go to learn about municipal law topics and to compare what is happening at home to what is transpiring across Canada and the United States. Most importantly, IMLA has allowed me to develop a key network of sage advisors that I can turn to whenever I need help from experts who can relate to the issues that face a City Solicitor and involve more than just legal questions. They are all people I can trust (and if that isn't enough, I never get an invoice!).

Whenever I am asked about what makes my job so rewarding, I think about all of the different issues that land on my desk every day. It doesn't matter how full my calendar is, there is always room (and the necessity) to respond to something unexpected. In recent years, for example, the sharing economy has emerged. Our law department has been challenged to balance the interests of traditional service providers like taxis and hotels against new paradymes exemplified by Uber, Lyft, Uber Eats, AirBnB, and many others. Municipalities, state/provincial and federal authorities have all worked together to craft solutions that recognize these technologies are here to stay while preserving public safety, protecting impacted businesses, and finding ways to ensure these new entrants do not become nuisances and bear their fair share of the tax burden.

The upcoming year will be an exciting one for municipal lawyers as we tackle challenges new and old. Some of the new issues coming my way include the potential for "ranked" ballots (which are already in use in Minneapolis), and their impact on the municipal election; international trade agreements and their impact on municipal infrastructure projects; medicinal and recreational marijuana and distribution facilities; testing for drug usage versus privacy rights; the impact of foreign investment in driving up local real estate prices; and mental illness in the municipal workforce, to name a few. IMLA will help us address each of these challenges more effectively.

I am very engaged these days in responding to change, and am excited by many of the changes that are coming our way.

In a 2013 Emory Law Journal article titled "The Trouble with Lawyer Regulation," Washington & Lee Law professor and author James Moliterno commented:

> Lawyers tend to look backward to precedent and sideways to existing articulations of law. When lawyers do look forward, their primary task is to predict and guard against risk. It is not in lawyers' nature to be forward looking planners or sensitive to cultural trends.
>
> • • •
>
> Change happens. . . The unwelcome cure is to enlist . . . people, who have a wider view and can see the path ahead and not merely the ground already trod, [and] can regulate the legal profession without the same self-interest as established members of the bar.

He was talking about the need to have non-lawyers play a role in lawyer regulation, but the potential also exists for us to play this role, by staying abreast of the ever-changing world around us. We are subject matter experts and we are also business management experts. Much has been written lately about this subject, including Richard and Daniel Susskind's thought-provoking book, *The Future of the Professions-How Technology Will Transform the Work of Human Experts.*

Municipal lawyers have to respond to change and embrace it. Some of the topics I referred to earlier in this letter are evidence of that. More important are other matters, like responding to social and cultural change as reflected in our advice to clients on issues such as low income housing, policing, public health, crisis response, climate change, meeting the infrastructure challenge, and so on. Our world as municipal lawyers is not always logical (to other lawyers) but it is responsive and practical. It is responsive to the public; it is not driven by avoiding risk but by doing our best at risk allocation within a framework that allows municipalities to provide needed services within a legislated framework. We are problem solvers as well as legal advisors. In short, we see it all.

From time to time the courts have criticized law firms for their man-

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How to Get Council "Buy-in"— While Maintaining Professional Ethics

By: Nick Robichaud, City Solicitor, City of Moncton, New Brunswick



Introduction

Lawyers fulfill many roles within the organizations for which they work. They can be advocates for their clients in judicial or quasi-judicial proceedings; they can be the "deal- makers" in a variety of corporate/commercial transactions; and in many cases they act as trusted advisor in both legal and non-legal matters.

The above also holds true for in-house municipal counsel. Municipalities may rely on legal counsel for everything from strategic management advice to digging sewer trenches during a labour dispute (true story!). The old adage "every day is different" certainly holds true for municipal lawyers, and is perhaps one of the most compelling parts of the job.

Typically in the "CAO" municipal organizational structure, legal counsel reports to a chief administrative officer, and the CAO reports to council as its main employee. Having said that, legal counsel are in regular contact with councillors, both on an individual basis as well as with council as a whole. Councillors look to legal counsel to carry out the legal functions of the municipal corporation; to interpret by-laws and policies; to assist in answering questions from constituents; and for advice when faced with challenging decisions. The relationship between legal counsel and councillors may be complicated because the lawyer's client is the municipal corporation itself, not the councillors elected to manage it, a fact which may be lost on many elected officials.

This paper examines the role of in-house municipal counsel and its dealings with municipal councillors. I will begin by discussing the possible rules of professional conduct and other sources of regulation which govern legal counsel in a municipal setting.

Once this framework has been established, I will then share some best practices for communication with councillors and council as a whole, tips that will hopefully help you in your practice to get "buy-in" from council when you need it.

PROFESSIONAL CONDUCT

Competence

Like many other professions, lawyers must adhere to their respective law society's rules of practice, including a professional code of conduct. While these rules may vary slightly by province or territory, many jurisdictions have adopted, either in whole or in part, the Federation of Law Societies of Canada Model Code of Professional Conduct (the "Code").[1] Under the heading of "Competence", the Code recognizes that lawyers may be called upon to provide non-legal advice:

> Competence
> 3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
>
> Commentary
> [10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.[2]

This is especially relevant to lawyers in a municipal setting, as the City Solicitor is often part of the municipality's senior management team which makes decisions regarding the strategic direction of the Corporation, or makes recommendations to Council for a decision on same. The City Solici-

tor's involvement in many matters can go beyond that of simply legal advisor. According to the above commentary, such non-legal advice should be qualified when necessary.

Quality of Service

One of the key roles of municipal counsel is to communicate effectively with council. Good communication is at the heart of quality service; as such, lawyers are expected to adhere to a minimum standard of professionalism with respect to client communication:

> Quality of Service
> 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
>
> Commentary
> [3] A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.
> [5] The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:
> (a) keeping a client reasonably informed;
> (b) answering reasonable requests from a client for information;
> (c) responding to a client's telephone calls;
> (f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
> (g) answering, within a reasonable time, any communication that requires a reply; ...
> (l) providing a client with complete and accurate relevant information about a matter; ...
> (o) being civil.[3]

Arguably, councillors would likely agree that the above list sets out their minimum expectations in terms of communication with legal counsel. In order to make informed decisions, elected officials require relevant and accurate information. Similarly, if information is required to answer a question from a constituent, there will be a certain service level expectation for the required information in a timely manner. Beyond being a professional responsibility, effective client communication is also a cornerstone best practice for any municipal lawyer.

Open and honest

While it may be difficult at times, municipal lawyers have a duty to be open and honest when advising their client, even if this could mean disagreeing with the client's position:

> Honesty and Candour
> 3.2-2 When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.
>
> Commentary
> [2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.
>
> [3] Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.[4]

This is perhaps the most common situation where municipal legal counsel may find it challenging to balance their professional responsibilities towards their client (the municipal corporation – see Rule 3.2-3 below) with advising elected officials who make up the municipal council. Although usually well-intentioned, in certain circumstances councillors may have difficulty accepting the advice of legal counsel if they are not aligned with the needs of that councillor's constituents. Legal advice against a certain course of action could be perceived as "bureaucratic red tape," preventing the councillor from "getting things done" for her constituents.

In private practice, clients may choose to follow their lawyer's advice or not. If they feel their lawyer is not providing the quality of service they bargained for, they can choose to work with another lawyer, and the lawyer (hopefully) will have other clients with whom they continue to work.

In a municipality, the lawyer typically has only one client – the municipal corporation. However, council is the decision-making body of the corporation. The lawyer has a duty to provide honest and candid advice to protect the interests of the corporation; in some cases, that advice may not be aligned with the interests or views of some (or all) members of council, who ultimately have the authority to terminate the employment relationship.

In order to ensure that the lawyer is able to provide the best and most honest advice possible to protect the interests of the municipality without fear of retribution, some jurisdictions have included in their governing provincial statute a "job protection" clause for certain senior officers. For example, New Brunswick's *Municipalities Act*[5] contains the following provision:

Continued on page 8



Nick Robichaud is the City Solicitor for the City of Moncton in New Brunswick, Canada. Prior to entering the field of municipal law, Nick was in-house counsel at a large university in Atlantic Canada for several years. He obtained his JD from Dalhousie University, as well as a Bachelor of Education from the University of New Brunswick. As well as being a member of IMLA, Nick is also currently the Chair of the Municipal Law section of the Canadian Bar Association - New Brunswick Branch, as well as serving as a member of the Canadian Exam Review Board of the International Association of Privacy Professionals.

How to Get Council "Buy-in" Cont'd from page 7

74(1) The council of a municipality may appoint a chief administrative officer for the municipality.

74(2) The council of every municipality shall appoint a clerk, a treasurer and an auditor.

74(3) The council of a municipality may appoint an assistant clerk, an assistant treasurer, an engineer, a building inspector, a solicitor and such other officers as are necessary for the administration of the municipality.

74(4) A person may be appointed to more than one office.

74(5) With the exception of auditors, all officers employed solely by the municipality on a full time basis and appointed under this section, are entitled, subject to section 85 and subsection (6), to hold office until retirement, death, resignation, or dismissal for cause by the affirmative vote of at least two thirds of the whole council.

As further explained by Strat6on C.J.N.B. for the New Brunswick Court of Appeal in *Hughes v. Moncton (City)*:[6]

When one reads the whole of s.74 of the Municipalities Act, it is, in my view, important to note the scope of tenure granted by subsection 74(5). This protection is an extraordinary form of employment security. The Common Law and statutory right of an employer to give reasonable notice of termination to such employees is usurped by subsection 74(5). The subsection provides officers named in subsection 74(2), those named officers who are appointed by Council under subsection 74(3) and those other officers who are declared to be necessary for the administration of the municipality, a level of security available in very few other employment relationships.

While this type of provision does provide the municipal lawyer with a sense of employment security and independence, it is important to remember that professional rules regarding honesty and candour apply in all jurisdictions in one form or another, whether such statutory protection exists or not.

Acting for the Municipal Corporation

Generally speaking, municipalities in Canada are constituted as "municipal corporations," a unique form of corporate entity created by statute. The powers of a municipality are to be exercised by its council, which in many ways is the equivalent of a business corporation's board of directors. It is now well-settled that, like any other corporation, the municipal lawyer's "client" is the municipal corporation. This principle has also been codified in the Code:

When the Client is an Organization
3.2-3 Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

Commentary
[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.[7]

The Code also addresses the lawyer's responsibility where the organization acts dishonestly, fraudulently, or illegally:

Dishonesty, Fraud when Client an Organization
3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to his or her obligations under rule 3.2-7:
(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary
[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 3.7-1. In some but not all cases, withdrawal means resigning from

his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.[8]

This rule is an important reminder of the lawyer's professional responsibilities when faced with dishonest, fraudulent, criminal or illegal client conduct, even when acting for an organization. While such behaviour would (hopefully) be exceedingly rare, there are examples where such situations may arise. For instance, in the case of *Toronto Party for a Better City v. Toronto (City)*,[9] the Executive Committee of Toronto City Council sought the City Solicitor's opinion regarding the validity of a grant program for councillors to cover approved extraordinary legal and audit expenses during an election campaign and subject to requests for compliance audits. The City Solicitor expressed the opinion that the City's grant-making power did not permit council to make a grant to assist candidates with their compliance audit costs. About six months later, she provided a further opinion that the courts have held that council lacks the authority to reimburse a councillor for legal costs for activities outside of his or her office, including activities related to candidacy for council.

The City Solicitor was then asked to review the reasonableness of legal fees related to the compliance audit process. Instead of answering the narrow question being asked, the City Solicitor took the opportunity to expand on her previous opinions regarding council's authority to reimburse such expenses. Finally, in a fourth report to all members of Council about three days before it was set to vote on a proposed by-law to authorize payments to two councillors, the City Solicitor reiterated her previous opinion that Council had no authority to reimburse councillors for legal expenses incurred resisting an application for a compliance audit of their campaign expenses.[10]

Despite the City Solicitor's repeated advice, Council approved the by-law, which was subsequently found by the Divisional Court to be *ultra vires* City Council, with leave to appeal by the City dismissed. The Toronto Party, a non-profit group promoting good government and fiscal responsibility, brought an application to the Ontario Superior Court to declare the individual councillors who voted in favour of the ultra vires by-law jointly and severally liable for the amounts paid out, on the basis that they breached their fiduciary duty to the taxpayers of the City of Toronto. One of their arguments advanced in this regard was that the councillors' repeated failure to follow the advice of the City Solicitor amounted to misfeasance and a breach of the fiduciary duty owed by councillors to the taxpayers of Toronto.

The application judge failed to find misfeasance by the councillors on this or any other basis. On appeal, the Court of Appeal agreed, and made the following comment:

> The councillors' repeated failure to follow legal advice may not have been wise, but it does not, on its own, or together with the subsequent declaration of invalidity, give rise to an inference, much less amount to proof of misfeasance.[11]

While not a case of "whistleblowing" per se, the facts and commentary regarding the role of the City Solicitor in this case are interesting for several reasons. First, it is a prime example of the municipal lawyer's duty to provide honest advice to council, even when it is clear that council does not want to follow that advice. Furthermore, it demonstrates the proper actions legal counsel should take when council decides on a course of action beyond the scope of their legal authority – the City Solicitor in this case provided advice on four separate occasions (two of which were unsolicited) of council's lack of authority to act in the manner they were proposing. Finally, the case shows the limits of the role of City Solicitor—it must provide opinions and advice to council, but ultimately council will decide on its own course of action, which may not always be in agreement with the advice of legal counsel.

Conflict of Interest

Beyond a duty to act in the best interests of the corporate client, municipal legal counsel also have a duty to avoid any conflict of interest:

> Duty to Avoid Conflicts of Interest
> 3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.[12]

As further explained in the Code, a conflict of interest may arise not only where a lawyer has clients with competing interests, but also in situations where the lawyer acts in his or her own personal interests over those of his or her client.

In the municipal context, all elected officials should be familiar with the statutory provisions in their respective jurisdictions governing conflict of interest. However, it may surprise some municipal lawyers to know that, in certain jurisdictions, those same provisions could also apply to their own practice. For example, New Brunswick's *Municipalities Act*[13] contains conflict of interest provisions which also apply to "senior appointed officers," including "a municipal solicitor, or the person who has the primary responsibility to advise council on legal matters:"

> 90.2(1) Subject to subsection (1.1) and section 90.3, for the purposes of this Act a member or a senior appointed officer has a conflict of interest if
> (*a*) he or a family associate
> (i) has or proposes to have any interest in any contract in which the council or local board of which he is a member or by whom he is employed or was appointed has an interest; or
> (ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to him or the family associate;
> (*b*) he, his nominee or a family associate is a shareholder in, or is a director or a senior officer of, a private company that
> (i) has or proposes to have an interest in any contract with such council or local board; or
> (ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to the company;
> (*c*) he, his nominee or a family associate has a controlling interest in or is a director or a senior officer of a public company that
> (i) has or proposes to have an

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interest in any contract with such council or local board; or

(ii) has an interest in any other matter in which such council or local board is concerned that would be of financial benefit to the company; or

(d) he or a family associate would other wise benefit financially by a decision of such council or local board in any contract, proposed contract or other matter in which the council or local board is concerned.

90.5(1) Upon the coming into force of this section, and thereafter upon assuming office, a senior appointed officer shall file with the clerk in the form prescribed by regulation a statement disclosing any conflict of interest of which he has knowledge or should reasonably have knowledge; but a senior appointed officer need not disclose particulars of his financial interest or the extent of any interest in any matter giving rise to a conflict of interest.

Beyond filing a statement regarding the senior officer's conflict, it is unclear what further steps the officer would be required to take (unlike members of council, who are also expected to remove themselves from the debate on that particular subject, such a provision does not appear to apply to senior officers). There do not appear to be any reported cases where action was taken against an officer of a municipality under this provision.

Perhaps more relevant to municipal legal counsel would be the provisions regarding the acceptance of gifts and gratuities, and the use of privileged information for personal gain:

90.8(2) A member or senior appointed officer shall not

(*a*) accept any fees, gifts, gratuities or other benefit that could reasonably be seen to influence any decision made by him in the carriage of his functions as a member or senior appointed officer, or

(*b*) for his personal gain or for the personal gain of a family associate make use in any way of his position or of any privileged information to which he may have access or to which he is privy because of his position.

Beyond potential sanctions by the governing law society, lawyers who are in breach of any of the above provisions could also be faced with a large of additional Court-imposed penalties, including removal from their position:

90.9(1) Subject to subsection (2),

(*a*) a person who fails to comply with section 90.4 or 90.5 commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category F offence, and

(*b*) a person who fails to comply with section 90.8 commits an offence punishable under Part II of the *Provincial Offences Procedure Act* as a category H offence, and in addition to or in lieu of any sentence which may be imposed in accordance with the *Provincial Offences Procedure Act*, the Court may make one or more of the following orders, namely

(*c*) order the person to resign his office or position on such terms and conditions as the Court prescribes,

(*d*) prohibit the person from holding that office or position or any other specified office or position during such period of time as the Court prescribes,

(*e*) where the contravention has resulted in financial gain to the person or a family associate, to return any gain realized thereby in accordance with terms and conditions imposed by the Court, or

(*f*) make any other order that the Court considers appropriate in the circumstances,

and a failure to comply with any such order shall be deemed to be a contempt in the face of the Court and is punishable as such.

Regardless of whether it arises under statute or professional code of conduct, lawyers must adhere to their duty to avoid any conflict of interest at all times.

BEST PRACTICES FOR COMMUNICATING WITH COUNCIL

With the above framework in mind, what are some practical tips and best practices for municipal lawyers when dealing with members of council? How do you get "buy-in" from a group of individuals who have been elected to represent their various constituents, especially if the interests of those they serve do not always mesh with the interests of your client, the municipal corporation?

Below are some practical tips for effective communication with council, based on past experience:

Can council defend their actions to their constituents?

Your client is the municipal corporation, but who does council work for? They are the body through which a municipality acts, and they are in a fiduciary position towards the residents of the municipality. At the same time, councillors are regular people from many different backgrounds, often with no other experience holding public office.

Each member of council will have their own priorities or projects about which they are passionate, however they will also react to issues which are brought forward by their constituents. At the end of the day, making the "right" decision is one thing, but councillors must be able to defend their actions and decisions to those who elected them to office, otherwise their constituents will speak their minds at the next ballot box.

While always respecting the duties of honesty and candour when advising clients, municipal lawyers should put themselves in the place of council, and ask themselves the following questions:

- How will this decision be viewed by the general public?
- Are there any particular groups or individuals who will be impacted?
- What would residents want/need to know about why this decision was made?

If elected officials can see that the above considerations have been taken into account when receiving a staff re-

port, it will make it easier for them to make a decision which is defendable to their constituents.

No one likes surprises

Each municipality has its own process for providing background information to council prior to a meeting, including deadlines for submission of written reports. Ideally, reports should be submitted far enough in advance that council has time to prepare themselves for discussion, ask questions of staff, and make an informed decision. This is especially true where the topic involves complex legal matters such as commercial transactions, land negotiations, or litigation.

As much as possible, municipal lawyers should try to give council the time to fully digest all information presented, ask questions, and be comfortable in making a decision. This may require discussing particularly complex or contentious issues over the course of multiple meetings; if this is the case, it is always best to let council know from the outset if they are not expected to make a decision right away. Otherwise, they may feel like the topic has been sprung on them at the last minute, and they were put in a difficult position to react without having the time to make an informed decision. Furthermore, if new information comes to light on a topic to be discussed with council, it is always best to provide them with such information prior to the meeting in which that item is scheduled to be discussed.

Don't be afraid to make a recommendation

Imagine you are a councillor and you receive a staff report on a controversial development proposal that will mean increased property tax revenue and act as a catalyst for future development; however it will also mean the loss of some green space and an increase in traffic in what is now a quiet neighborhood. All of the relevant staff departments have provided input on the report, but the staff "recommendation" is simply for council to direct staff on how to proceed, without staff having provided a recommended course of action.

Lawyers are typically called upon to provide advice or opinions. When working in isolation this is easier to do; however when working as part of a multi-disciplinary team seeking direction from council on a complex file, there may be hesitancy on the part of the staff or management to advise on a recommended course of action.

In my view this is exactly what council wants: advice from those who are closest to the file. Keep in mind that staff are hired to run the day-to-day operations of the municipality, and council act as the "board of directors" to provide overall management direction. Council are still free to make any decision they want on a file, but at least a staff-recommended course of action will provide them with some guidance from those who are "on the ground."

As part of our council report process, all reports must be approved by a representative from the legal department prior to going to the city manager for final approval. Personally, it would be an extremely rare occasion where I would approve a report seeking a decision from council that did not also have a staff recommendation included.

Be open, but avoid information overload

Recently I was involved in a file which involved a land swap with a private developer, whereby the City would be giving up land currently used as surface parking downtown in order to acquire a parcel of land located in front of a culturally significant building, and protect it as green space. The City had plans to eventually reconfigure some of the streets and parking areas adjacent to the conveyed parking lot, however there were no commitments made as part of this transaction, and any such plans would need to go back to council for approval as part of the capital budget process. Despite this fact, council tabled the proposed land transaction (which had originally been initiated at their request) no less than three times while they attempted to get more specifics on the future plans for those streets and adjacent parking areas, which actually had nothing to do with the land swap itself. The result was over a year's delay in getting the deal concluded, causing frustration on all sides.

In the above example, staff had provided council with some drawings and maps to show what the new streets and parking areas could look like if those projects were to proceed; many individual councillors then lost sight of the land transaction and focused on all of the potential issues and design flaws with drawings which were simply to provide some context and vision for the future.

Lawyers have a duty to provide their clients with all relevant information necessary to make an informed decision. When communicating with council, the question often becomes "how much information is too much?" In the above example, some members of council certainly latched onto vagueness in the future adjacent street plans to defer making what would have been a controversial decision; having said that, much of the frustration over this file could have been avoided by not discussing future plans which were irrelevant to the decision at hand, or by reminding council early on that they would have an opportunity to fully discuss any proposed future street plans once such plans were finalized and brought forward for council approval.

Legal counsel should keep in mind their duty to provide all relevant information necessary to make a decision, however they should try to avoid extraneous information which may unnecessarily complicate council's analysis of the issue.

Put it in writing

As mentioned above, like many other municipalities we have a process for the delivery of report forms to council prior to meetings, which must go through several layers of approval (including legal, finance, and city manager) prior to making their way to council. These report forms are a great tool for providing council with the relevant information pertaining to a file, as well as a staff recommendation, prior to the meeting.

Well-written, concise and comprehensive reports will result in less discussion during meetings, less questions, fewer items being tabled for further discussion or information, and better decisions being made by council. A sample report form could

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How to Get Council "Buy-in" Cont'd from page 11

include the following headings:

- Issue
- Current status
- Recommendation
- Other options
- Risk analysis
- Legal considerations
- Financial considerations
- Community sensitivities
- Environmental considerations
- Intergovernmental considerations

Even for issues of a purely legal nature, our department would still use this template report form, albeit there may be a separate legal opinion memo attached. Regardless of the type of form used, in my experience a best practice would certainly be to provide council with a background staff report, giving them sufficient lead time to review and fully digest prior to the meeting.

Anticipate questions

Similar to the comment above regarding anticipation of the general public's reaction to a council decision, municipal legal counsel should also try to anticipate what questions council may ask of them during a meeting, and where possible try to proactively answer those questions in the background report, or at least have a "back pocket" answer ready in the event that it comes up in the meeting. This holds true whether the item is being brought forward as a purely legal item, or if it is from another department but may have some elements that could require minor legal input on issues such as liability, by-law enforcement, etc.

It's okay if they don't agree with you

This point was saved for last, because in my view it is one of the most important principles to keep in mind in order to preserve your sanity and maintain the longevity of your career.

There is one particular file that has been kicked around various lawyers' desks in my department for over a decade, and it involves the city's ability to regulate or prohibit the practice of private companies placing vehicle immobilization devices on cars parked without permission in private parking lots. This is a priority issue for our council, mainly because they continually receive emails and telephone calls from irate residents and visitors to our city who have come out of a restaurant after a nice, romantic dinner only to find a "boot" on their vehicle, and a note on the windshield specifying who to call to pay the fee to have the device removed. Legal opinions from our office as well as outside counsel have consistently been that municipalities in New Brunswick lack the legislative authority to regulate this practice. Nonetheless, the issue continues to be raised by council year after year, some of whom would like the city to simply enact a by-law to regulate, whether we have the authority or not.

While it may be frustrating for some to re-visit the same issue time after time, one must keep in mind that councillors are simply trying to appease their constituents and find a solution to a long-standing problem. Similar to the *Toronto* case cited above, there is nothing malicious in councillors disagreeing with the advice of the City Solicitor. The lawyer's job is to provide the best advice possible to protect the interests of the municipal corporation; whether or not council chooses to follow that advice is up to them, and (in most cases) should not be taken as a personal attack.

In rare circumstances, municipal counsel may have personality conflicts with one or more individual councillors. Such conflicts usually arise out of an experience on a previous file, where a councillor may feel that the lawyer has provided the wrong advice, or advice which goes against the interests of his or her constituents. Such conflict is inevitable in a municipal setting; however, it is incumbent upon the lawyer to maintain professionalism and to not let such conflict cloud his or her judgement or ability to provide sound legal advice. If an elected official's conduct towards legal counsel falls below an acceptable standard of behaviour, there are usually other avenues available to deal with such behaviour, for example a councillor's code of conduct, or a workplace harassment policy.

Conclusion

Municipal lawyers fulfill a variety of roles for their client, the municipal corporation. They are in frequent contact with council, the "board of directors" elected to carry out the functions of the corporation. Maintaining effective communication with council is an invaluable tool in ensuring the lawyer's ability to carry out his or her role within the corporation.

Like all other lawyers, those in a municipal setting must respect certain rules of professional conduct, as well as any other statutory regimes in place in their respective jurisdiction. Adherence to these rules must be balanced with providing advice or opinions to council, even in those difficult situations where such advice is met with resistance.

Like any other client, councillors expect to receive all relevant information in a timely fashion in order for them to make an informed decision. They expect open and honest communication, delivered in a professional manner.

The main factor which distinguishes the relationship between municipal legal counsel and councillors from a traditional lawyer-client relationship is that council, both collectively and as individual councillors, effectively answers to its constituents, while municipal lawyers have a duty towards the municipal corporation. A successful relationship between council and the municipal lawyer is one in which the lawyer is able to carry out its duties towards its client, while at the same time being cognizant and respectful of council's political realities.

Notes

1. As amended October 10, 2014.
2. *See* the Code at pages 18-20.
3. *See* the Code at pages 21-22.
4. *See* the Code at page 24.
5. R.S.N.B. 1973, c. M-22.
6. 118 NBR (2d) 306.
7. *See* the Code at page 25.
8. *See* the Code at pages 28-29.
9. 2013 ONCA 327.
10. *Id.* at par. 9.
11. *Id.* at par. 66.
12. *See* the Code at page 38.
13. *Supra* note 5. ML

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the mute button when he went to the restroom. No further description needed.... Or the one where the member with a sinus infection attended remotely and "sniffled," coughed and blew her nose through the whole meeting. Of course many of these problems can be overcome with behavior changes and technological adaptations, but some members have questioned whether it is worth the effort.

If it renders me old-fashioned so be it, but sometimes there is no substitute for a face