A recent decision *Toronto Party for a Better City v. Toronto (City)* dealt with the issue of whether elected official breach a fiduciary duty when they vote to spend money in the face of a legal opinion from in-house counsel that expressly advices that they do not have the authority to approve such an expenditure.

The courts have been clear that the members of the council/board are in a fiduciary relationship to the electorate. In *Toronto Party for a Better City v. Toronto (City)* the court reviewed the law and adopted the principle set out in *Guerin v. The Queen,* 1984 CanLII 25, (SCC), [1984] 2 S.C.R. 335 that:

> *…where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary*.

What, however, is the content of that fiduciary duty? In *Toronto Party for a Better City v. Toronto (City)* the applicants argued that the duty included a responsibility to avoid acting in an *ultra vires* manner. They relied on *Kelliher (Village) v. Smith* 1931 CanLII (SCC), [1931] S.C.R. 672 which adopted the principle that no action lies against an individual member of a corporation for a corporate act done by a corporation in its corporate capacity unless the act was done maliciously by the individuals charged and the corporate name was use as a mere colour for the malicious act, or unless the act was *ultra vires*. In the latter case the act is not a corporate act at all. Any unauthorized expenditure of funds is *ultra vires* and therefore a breach of the member's fiduciary duties *Cluff v. Cameron* (1922), 22 OWN 245 (H.C.), Aff'd (1923), 23, OWN 89 (C.A.).

The court rejected this position and concluded that the cases indicated that where elected officials were found to have breached their fiduciary duties there was an element of conflict of interest and/or misfeasance which was the basis for imposing personal liability on the elected officials for the actions of the corporate body. As there was no malice or element of a conflict of interest the court concluded that the personal councilors were not liable.

A related question arises when legal counsel provides an opinion on a disputed claim. The scenario is as follows:

> Your municipal entity is involved in litigation. The litigation has proceeded to the point where a legal opinion on liability is provided. The opinion notes that the municipal entity has a strong case but there are some issues with one witness and, of course, there is the usual reference to general litigation risk. Your opinion is that the municipal entity has a strong case and recommends proceeding to trial.
>
> The council/board would like to settle the matter because either:

(a) The claimant is a developer that plays an important and ongoing role in the development of the municipality and the council/board does not want to strain the relationship further with this litigation; or

(b) The claimant has been campaigning directly with some of the councilors/directors to effect a settlement and is causing an embarrassment to them in the press; or,

(c) The claim is politically sensitive and looking down the road the councilors/directors can see that the trial will proceed in the middle of "silly season" and that this issue, that they want to sweep under the carpet, is going to be front and centre during the campaign season.

During the closed council/board meeting some of the councilors/directors put forward their concerns about litigation risk and how much this will cost in external legal fees and how they recall a case like this that someone said was a winner and it was a loser and how they had to pay the claimant a lot of money in that case. The vote is taken and the council/board instructs counsel to settle the matter as soon as possible.

On the one hand the problem here is straight forward, there is always a general litigation risk and no case is without risk. A very strong case can be lost because a witness provides unexpected evidence or resiles from a previous position or because you have pulled the "wrong" judge. But in each case there is an inherent difficulty. With scenario "(a)" the council/board is confirming a unique benefit to the developer. With scenarios "(b)" and "(c)" the council/board members are seeking personal gain in the form of re-election rather than determining a course of action based on the best interests of the organization. The question that arises then is what role does the in-house counsel play in guiding the discussion so as to prevent undue reliance on the negligible risk?

An alternative scenario to consider is the case where no litigation has been initiated but the council/board is faced with a contract that includes a provision drafted many years ago that is vague with respect to a particular responsibility of the municipal entity. Depending on the interpretation of the section the municipal entity would either pay a significant amount of money out to the contracting party or owe nothing. With an eye to the disclosure that would come as part of a litigation process senior management is concerned that if the payment is not made it will be politically embarrassing or alternatively will be embarrassing to the staff involved in the project and ask if you can produce a legal opinion on the matter. You advise that you can and but because in the context of the whole of the agreement it is highly unlikely that the court would take the position that the provision is vague it is likely that the opinion will state that the money is not owed. The senior staff then asks that no opinion be prepared and they present the matter to the council/board in closed session and recommend payment because of the "litigation risks" arising from the purportedly vague provision.

With this latter scenario the corporation is again skirting on the edges of an unauthorized grant of assistance. Moreover, the position is exacerbated by the absence of a legal opinion setting out the legal

position and comparative risks. Theoretically an approval resolution is an unauthorized expenditure which creates a risk of personal liability, which again the council/board has not been advised on, for the council/board members.

What in these circumstances is the responsibility of the legal team? I do not intend to engage in a discussion regarding "who is my client".[1] Clearly it is not the senior managers or the council/board members. The CBA Code of Professional Conduct defines a "client" as:

> *In the case of an individual who consults the lawyer in a representative capacity, the client is the person, corporation, partnership, organization, or legal entity that the individual is representing.*

The problem here is that in advising the "corporation" on the marginal nature of the expenditure it is the exposure of the council/board members that is at stake. Thus, on the one hand, advice to the corporation that decision could be overturned or expenditure *ultra vires* is only part of the story. The real story in behind the advice is that the members may be personally liable for breach of trust.

There is a long line of cases that uphold the principle starting with *Thomas v. Wilson* (1861) 20 U.C.Q.B. 331 (C.A.) in which the court held that the councillors were liable for the price of goods that were purchased for purposes that were *ultra vires* the corporation. See Rogers The Law of Municipal Corporations s. 37.1

In addition, most municipal legislation includes provisions that make councillors responsible unauthorized expenditures. For example, section 191 of the *Community Charter* S.B.C. 2003 c. 26 which states:

> ***Liabilities for use of money contrary to Act***
> ***191*** *(1) A council member who votes for a bylaw or resolution authorizing the expenditure, investment or other use of money contrary to this Act or the Local Government Act is personally liable to the municipality for the amount.*
>
> *(2) As an exception, subsection (1) does not apply if the council member relied on information provided by a municipal officer or employee and the officer or employee was guilty of dishonesty, gross negligence or malicious or willful misconduct in relation to the provision of the information.*
>
> *(3) In addition to any other penalty to which the person may be liable, a council member who is liable to the municipality under subsection (1) is disqualified from holding local government office for the period established by section 110 (2).*
>
> *(4) Money owed to a municipality under this section may be recovered for the municipality by*

[1] See "The Role of Public Counsel" - Neil Robertson, Q.C. IMLA 2004; "Client Relationship – How to Practice Municipal Law" – Ronald D. Stutes IMLA 2004; "*The Cold Sweats – You've Just Been Appoint City or County Attorney*" – W. I Thornton, Jr. – IMLA 1998; "*Riding the Needle on the Municipal Moral Compass – Who is Serving Whom?*" – R.G. Hildebrand –IMLA 2001

> *(a) the municipality,*
>
> *(b) an elector or taxpayer of the municipality, or*
>
> *(c) a person who holds a security under a borrowing made by the municipality.*

We all want a court to refer to our work in the terms set out in *Jackson v. Vaughan (City)*[2009] O.J. No 1057; 59 M.P.L.R. (4th) 55 (Ont. S.C.):

> *The City Solicitor's opinion canvassed fully the options open to Council and the applicable legal and policy principles, and added as a concluding factor for Council to consider: "[w]hether, in Council's opinion, having regard to all of the circumstances with respect to the matter, it is in the public interest to commence legal proceedings against the candidate or take no further action." Council had the advice of qualified personnel and there is no reason for me to assume that the advice given in respect of Ms. Jackson's case was any different regarding the options open to Council*.

However, liability can arise for the councillors even if they rely on a legal opinion supporting payment. In *Patchell v. Raikes* [1904] O.J. No. 167; 7 O.L.R. 470 (Ont. C.A.) the town had entered into an agreement with a company for the completion of certain works. Upon completion the company was to be paid a bonus. As the work proceeded alterations were required and a new agreement was executed. Upon completion the company sought payment of a bonus and interest for the late payment of the bonus. The town and the company agreed to obtain the opinion of counsel, who, on incomplete (as it was later found) statement of the facts, advised the payment of the claim. When the legal opinion was challenged the counsel wrote back stating:

> *"I regarded the matter as submitted to me ... very much in the character of an arbitrator ... In writing you previously I was not looking at the matter exactly as a question whether the company could by suing the town have compelled payment of the interest claimed. I viewed it more as a matter of what was just and equitable, though I do not by any means wish to be understood as saying that if the town had resisted to the uttermost payment of this interest they could not have been compelled by the company to pay it"*

The lower court found that all parties had acted in good faith and the council was without negligence. It also found that the claim was at least a doubtful one since there was a genuine question as to the triggering date for the payment; the payment was not ultra vires but rather a settlement to avoid litigation upon competent advice of what was at least a doubtful claim. The appellate court took the opposite view of the claim and stated at paragraph 12:

> *The claim was, therefore, in my opinion, not only invalid, but was not in any proper sense even a doubtful claim. Doubt, without a justifying fact which can be pointed out, is not in such circumstances doubt at all, but mere caprice upon which no reasonable man would act.*

The court also noted that whether or not the action of the council was *ultra vires* is irrelevant to the determination of whether there had been a breach of trust and moreover the fact that the parties acted in good faith was of no import. As for the reliance on the legal opinion the court stated: "*The mere opinion of counsel, however eminent, is in itself no defence to claim for breach of trust.*"

Questions for Consideration:

In light of the above, what actions if any, should in-house counsel take in the second scenario?

Is there an obligation to report up the ladder with respect to the senior manager's "advice" to the council/board? (Law Society of Upper Canada Rules 2.02(5.1) and 2.02(5.2) – reporting of conduct that would be dishonest, fraudulent, criminal or illegal.)

How should the opinion be framed to prevent its abuse?