Charting an Ethical Course: Navigating Changes to Municipal Ethics Rules

- Steven Dribnenki and David Boghosian
- 87th Annual IMLA Conference (Portland, OR) - Canada Day Program
- October 22, 2022

Municipal Ethical Rules, they are a-changin’

Ontario

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Consultation: Strengthening accountability for municipal council members

We sought feedback on:

- what changes or mechanisms are needed to better hold council members accountable for municipal code of conduct violations
- how to more effectively enforce these codes
- whether a broader range of penalties for violations of the codes of conduct are needed

The feedback provided will help the province determine what changes may be needed.

- Consultation ended July 2021

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News release

More Accountability for Local Governments

Municipal Affairs (Feb. - Aug. 2021)
March 24, 2021 - 1:17 PM

Quotes:

“Changes regarding the code of conduct are very important to our members. We’ve heard loud and clear from our members that they want legislation with more teeth. The Nova Scotia Federation of Municipalities supports legislative changes that provide clear measures for municipal councils to support elected officials in ethical and effective governing.”

– *Emily Lutz, president, Nova Scotia Federation of Municipalities*

- Amendments requiring a code of conduct for municipal councils and appoint an independent body to receive and investigate breaches (March 2021)

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British Columbia

Codes of conduct in local government are being used to quash dissent, critics say

Codes are intended to foster respectful dialogue, but some say that power can be wielded inappropriately

Justin McElroy · CBC News · Posted: Feb 02, 2022 12:01 PM PT | Last Updated: February 2

Municipalities can't remove councillors from office, but councillors can use codes of conduct to remove other councillors from committees and exclude them from some meetings.

But councillors on the receiving end of those judgments argue that power can be wielded inappropriately.

"A code of conduct is a double-edged sword," said qathet Regional District director Mark Gisborne, who is currently facing the threat of censure for allegedly violating the district's new code of conduct.

Creatures of the Province…

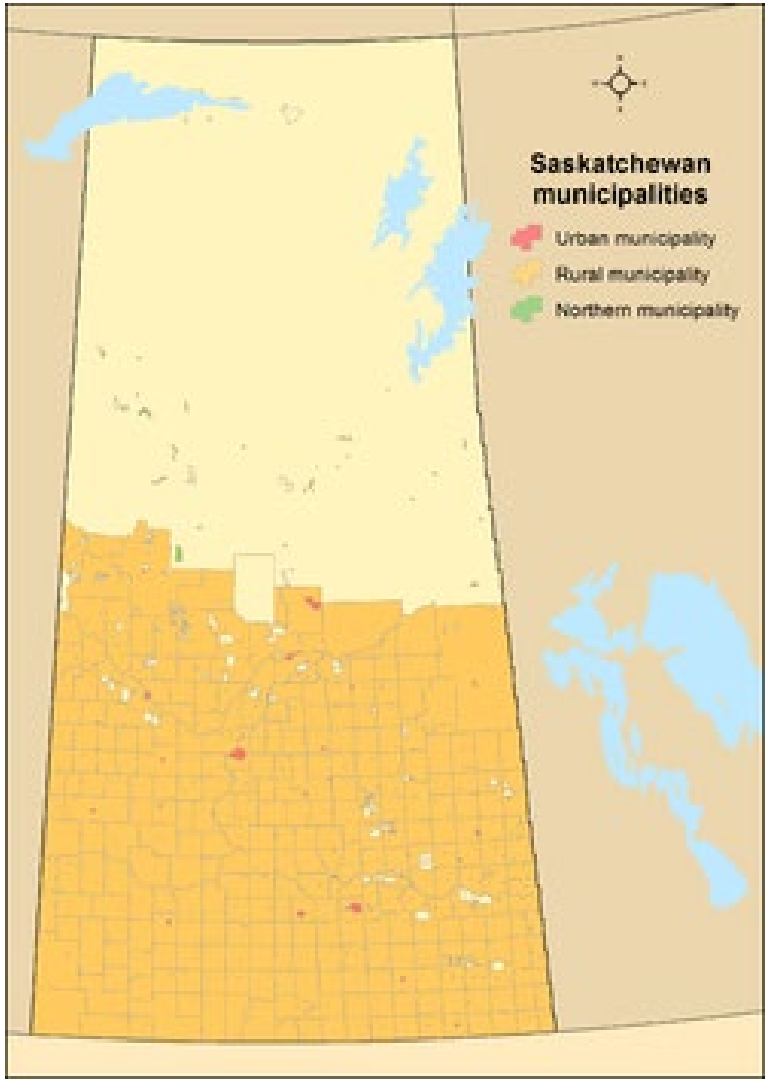
…the Courts…

… and the Public

- Section 92(8) of the *Constitution Act, 1867*
  - Provincial responsibility – created by legislation
  - No link to the Crown, not constitutionally recognized
- Legislatively, "municipal corporation"
  - s. 4(1) of *The Cities Act* (Saskatchewan), s. 6(1) of *The Community Charter* (BC), s. 4 of *The Municipal Act* (Ontario), *Municipal Government Act* (Nova Scotia)
  - Council = Board of Directors? The Public = Shareholders?
- Judicially, "municipal governments"
  - Legislative powers
  - *Charter of Rights and Freedoms*
- The Public:
  - Each voter can choose at least two council members (mayor and councillor for ward)
  - Everyone can simply walk in and address council

Saskatchewan: A Land of Municipalities

- Twice the size of Germany but 0.01 per cent of Germany's population
- 40 per cent of Canada's arable land
- 769 urban, rural, and northern municipalities
  - 16 cities
  - 147 towns
  - 243 villages
  - 42 resort villages
  - 296 rural municipalities (districts/counties)
  - 25 northern municipalities
- Four municipal acts

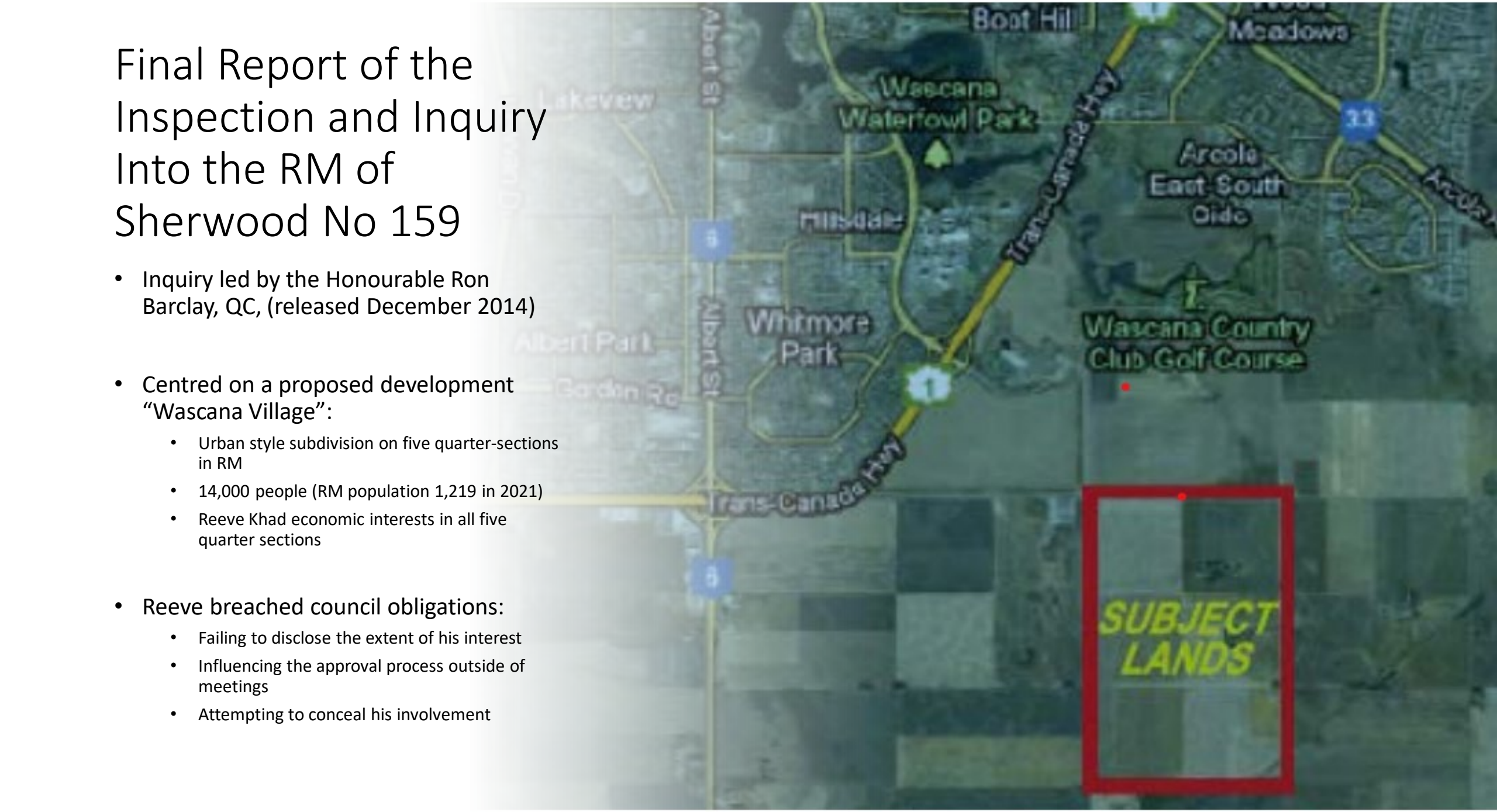


Final Report of the Inspection and Inquiry Into the RM of Sherwood No 159

- Inquiry led by the Honourable Ron Barclay, QC, (released December 2014)

- Centred on a proposed development "Wascana Village":
  - Urban style subdivision on five quarter-sections in RM
  - 14,000 people (RM population 1,219 in 2021)
  - Reeve Khad economic interests in all five quarter sections

- Reeve breached council obligations:
  - Failing to disclose the extent of his interest
  - Influencing the approval process outside of meetings
  - Attempting to conceal his involvement



2015 Municipal Legislative Amendments

- Express inclusion of “conflict of interest” provisions rather than limited to “pecuniary interests”
  - Prohibition on participating in decisions that can further the member’s private interests or those of a closely connected person
- Oversight by Ombudsman Saskatchewan
- Public disclosure document for members
- Mandatory code of ethics bylaw (effective 2016)
- **NOT INCLUDED: councils being able to remove members**

2019 Municipal Legislative Amendments

- Reopening of the acts to update
- Whistleblower protections for administration
- “the private interests of a closely connected person” changed to “to improperly further another person’s private interests”
- Council empowered to by resolution declare member’s office vacant
  - member has 10 days to appeal the resolution at court
- Member found liable is disqualified for 12 years

The new rules in action

***Maharaj v Rosetown (Town)*, 2020 SKQB 254**

- Court quashed two code of ethics resolutions due to the town breaching procedural fairness
- Two employees filed harassment complaints against the mayor, confirmed by external investigator and report submitted
- Mayor filed complaint alleging a council member contravened communications rules in the code of ethics bylaw
- At council, the employees' complaints resolution passed, and resolution finding mayor's complaint invalid passed
- The court held that the resolutions did not violate legislation or the procedure bylaw, but town's failure to provide reasons and not providing the member's response to the mayor's complaint was unfair and in breach of the code of ethics bylaw

The new rules in action

***Baran v Rural Municipality of Dundurn No. 314*, 2022 SKQB 182**

- Court dismissed application by three members to quash resolution declaring their seats vacant
- Resolution presented at December 20, 2021 council meeting
- After discussion, but before a vote, each of the members left the council room – vote passed
- Next day, each received email from the reeve advising their seats were vacant
- The court held that 10 days was the time to appeal and challenging the resolution would improperly circumvent the time restriction

Challenges for municipal lawyers

- Who is the client?
- Who benefits from good advice?
- What are your duties as a municipal lawyer?
- What processes will be implemented?
- What processes will be judicially respected?

How to implement changes in uncertainty?



Explain the need clearly and concisely



Go with what you know



Keep the process simple

Explaining the Need

- Legislation typically requires council to take an action – not simply voluntary
- Carrot and stick: highlight the penalties but do not forget the need for accountability
- Link the changes to improvements – how are things going to get better

Go With What You Know

- Know the legislation
- Is there caselaw that explains it
- Search for provincial materials or representative
- Reach out to other similar municipalities

Keep It Simple and Fair

- Know the bylaw and process implemented
- Let the proper authority act – integrity commissioner
- Review and refine – is there potential for ongoing feedback

Bringing it all together

***Skakun v Prince George (City)*, 2011 BCSC 1796**

- Court approved process of council regulating member short of disqualification
- Member leaked confidential report to media, led to council conducting a review and reprimanding him
- Member sought judicial review, argued *Community Charter* did not state councils could sanction members
- Court held that although the act had no specific reference, the power to do so was implied
- Court emphasized the need for procedural fairness:
  - Notice
  - Investigation
  - Hearing (“day in court”)
  - Council giving reasons
  - “appropriate sanctions” – censure

Thanks

- Questions