LEGAL STUDIES 479

Unit 1: Local Government Authority

1.1 The Status of Municipalities in Canada

Municipalities are creatures of statute, created by the provincial government under its powers under s. 92(8) of the Constitution Act, 1867, which permits the provinces to create "municipal institutions in the Province."

In Alberta, the Legislature has enacted the *Municipal Government Act,* R.S.A. 2000, c. M-26, to create municipalities in the province.

Other provinces have passed acts establishing municipalities and setting out their powers:

British Columbia:
Local Government Act, R.S.B.C. 1996, c. 323

Saskatchewan:
The Municipalities Act, S.S. 2005, c. M-36.1

The Cities Act, S.S. 2002, c. C-11.1

Manitoba:
Municipal Act, C.C.S.M. c. M225 (Part 1 and Part 2)

Ontario:
Municipal Act, 2001, S.O. 2001, c. 25

Quebec:
Municipal Powers Act, R.S.Q. c. C-47.1

Municipal Code of Québec, R.S.Q. c. C-27.1

New Brunswick:
Municipalities Act, R.S.N.B. 1973, c M-22

Nova Scotia:
Municipal Government Act, S.N.S. 1998, c. 18

Prince Edward Island:
Municipalities Act, R.S.P.E.I. 1988, c.M-13

Newfoundland and Labrador:
Municipal Affairs Act, S.N.L. 1995, c. M-20.1

Since municipalities are created under provincial statute, they are bound by the division of powers under the *Constitution Act, 1867*, and they cannot regulate areas outside their constitutional competence. Therefore, municipalities cannot intrude into areas expressly reserved for the federal government, such as criminal law, etc. The extent to which municipalities can regulate in their areas of competence and potentially impact the federal sphere of powers will be examined in more depth in Unit 3 (bylaw-making powers).

1.2 Municipalities Are Subject to the *Charter*

Municipalities are subject to the laws of Canada, which include the limitations contained in the *Constitution Act, 1982* (more commonly referred to as the *Charter of Rights and Freedoms*). Section 32 of the *Constitution Act, 1982* provides that the *Charter* applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province:

> Application of Charter
>
> 32. (1) This Charter applies
>
> *(a)* to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> *(b)* to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Although on its face, the language of the section may not suggest that municipalities are part of the legislature or government of each province, the 1997 Supreme Court of Canada case of *Godbout v. Longueuil* clearly established that municipalities were subject to the *Charter*. The City of Longueuil, Quebec passed a resolution that required all permanent employees to reside within the municipal boundaries of the City. Ms. Godbout signed an employment contract in which she agreed to live in the City for as long as she was employed by the City. Further, she agreed that if she moved out of the City, her employment could be terminated without notice (and, therefore, without any pay in lieu of notice). Shortly after her job became permanent, she relocated to a neighbouring municipality, and refused to move back to the City. Not surprisingly, her employment was terminated without notice or pay. Ms. Godbout sued the City, seeking reinstatement of her position and damages, alleging that the residence requirement was a breach of her rights under the *Quebec Charter* (*Charter of Human Rights and Freedoms*, R.S.Q. c. C-12), and her rights under section 7 of the *Canadian Charter* (life, liberty and security of the person). Justice Major discussed the preliminary question of whether the *Canadian Charter* applied to municipalities:

> 50 . . . . The main issue concerns whether the Canadian *Charter* applies to municipalities—like the appellant—at all. To my mind, the analysis I have undertaken thus far leads inexorably to the conclusion that it does. . . . Indeed, municipalities—though institutionally distinct from the provincial governments that create them—cannot but be described as "governmental entities". I base this finding on a number of considerations.
>
> 51 First, municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent. . . . Secondly, municipalities possess a general taxing power that, for the purposes of determining whether they can rightfully be described as "government", is indistinguishable from the taxing powers of Parliament or the provinces. Thirdly, and importantly, municipalities are empowered to make laws, to administer them and to enforce them within a defined territorial jurisdiction. . . . Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces; that is, they

exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier) simply avoid the application of the *Charter* by devolving powers on municipal bodies.

52 . . . This cannot be the case, for it would permit circumvention of the Charter through delegation to anybody that is not classified as part of the Government of Canada or of a province. This is contrary to the tenor of s. 32(1), which provides that subordinates (the Governments of Canada and of each province) cannot do that which their principals (Parliament and the Legislatures) cannot do. It must be that more junior subordinates, like municipalities, are to be similarly bound by the Charter. . . .

. . . TOP

55 For all these reasons, then, I am firmly of the opinion that the Canadian *Charter* applies to municipalities. But what of the appellant's submission that the *Charter* should not apply because the activity in question -- i.e., the imposition of the residence requirement -- is a "private" as opposed to a "governmental" act? As I have already suggested, I cannot accept this distinction. The particular modality a municipality chooses to adopt in advancing its policies cannot shield its activities from *Charter* scrutiny. All the municipality's powers are derived from statute and all are of a governmental character; . . .. An act performed by an entity that is governmental in nature is, to my mind, necessarily "governmental" and cannot properly be viewed as "private" at all. . . .

56 One final point should be added. As I explained earlier, refusing to subject entities acting in a governmental capacity to *Charter* scrutiny would permit governments to avoid the *Charter* by conferring governmental powers on non-governmental bodies. It seems clear to me that the same situation could arise if entities that are governmental in nature (or, for that matter, governments themselves) were not subjected to *Charter* scrutiny in respect of <u>all</u> their activities, including those that could -- if they had been performed by a non-governmental entity -- plausibly be described as "private". Stated simply, a government or an entity acting in a governmental capacity could circumvent the *Charter* not simply by granting certain of its powers to other entities, but also by itself pursuing governmental initiatives through means other than the traditional mechanism of government action -. . .

. . . Were the *Charter* not to apply to <u>all</u> activities of governmental entities, the municipal resolutions pursuant to which the residence requirement was imposed on the appellant's permanent employees would not be subject to the *Charter*, while precisely the same requirement implemented through the formal mechanism of a by-law would be. The difficulties to which such an approach could give rise are sufficiently obvious as to require no further explanation.

The Court recognized that the municipality had passed the resolution in furtherance of valid municipal objects, namely, (1) improving the job performance of municipal employees and, therefore, the quality of the services they provide to residents; (2) supporting the local economy; and (3) ensuring that certain employees who provide essential services are readily available. Despite the argument of the municipality, these objectives were not sufficient to justify the infringement on Ms. Godbout's security of her person and her ability to choose where she was to live.

The Court in *Longueuil* has clarified that municipalities are subject to the *Charter*. Therefore, municipal actions are subject to challenge on the basis that their bylaws infringe upon individuals' rights. This will be discussed further in Unit 3.

1.2.1 Elected Officials

The *Act* defines two elected persons: *Chief elected official* is defined in section 1(1)(d), and *councillor* is defined in section 1(1)(g) as including the chief elected official. Municipalities are governed by a council (section 142), which is made up of councillors, one of whom must be the chief elected official (section 143).

Section 155 of the *Act* provides that a councillor is to have the title *councillor* and the chief elected official is to have the title *chief elected official*, unless the council directs another title. In urban municipalities, the person occupying the chief elected official position is usually called the *mayor*, while in rural municipalities, the person occupying the position is called either the *reeve* or the *mayor*. Regardless of the name, the powers are the same.

Section 150 provides that in cities and towns, the chief elected official is to be elected by a vote of the electors, unless council has passed a bylaw that provides that the chief elected official is to be appointed from among the councillors. By contrast, in villages or municipal districts, the contrary is true. The chief elected official is to be appointed from among the councillors unless the council has passed a bylaw specifying that the electors are to vote for the chief elected officer. Since all municipalities are created "equal" under the *Act*, it is difficult to explain why this should be so.

See also *Girouard v. Sturgeon (Municipal District No. 90)*, 2001 ABQB 709 for another judicial examination of the ability of the municipality to establish its internal structure.

1.3 Municipal Officials

The *Municipal Government Act,* R.S.A. 2000, c. M-26 defines a number of persons and bodies with responsibilities and authority under the *Act*. It is necessary to understand who those persons and bodies are, and the scope of the powers established by the *Act*.

1.3.2 Duties of Councillors

The general duties of councillors are set out in section 153. The duties specified in the *Act* range from considering the welfare and interests of the municipality as a whole to the very specific of participating in council meetings and keeping in confidence matters discussed in private. It is interesting that the drafters of the *Act* specifically included the duty of confidentiality. Although this duty is included in section 153, there is no remedy specified for the breach of this duty, even though section 174 sets out the reasons for which a councillor may be disqualified.

Even if a councillor is not disqualified, it is possible for a council to pass a motion of censure against another councillor for a breach of the section 153 duties. This may be the remedy chosen by a council should one of their members not follow municipal policies or otherwise breach duties under section 153. This is an extreme remedy, not utilized often. However, if a council chooses to exercise this remedy, it still owes a duty of natural justice and procedural fairness to the councillor who is being censured. This means that the council must notify the councillor of the accusations being made, and give the councillor the opportunity to respond to those accusations. Failure to do so may result in a judicial challenge against the motion, resulting in it being quashed. This may cause embarrassment to the council seeking to pass a motion of censure.

Chief elected officials have the duties of a councillor and have additional responsibilities as set out in section 154 of the *Act*. Those duties include presiding over council meetings and performing other duties imposed by the *Act* or a bylaw.

Each member of council has only one vote (section 182). As a result, a chief elected official's vote is only one vote out of the total number of councillors. However, chief elected officials may, depending upon the nature of the bylaws–creating council committees, exercise power by the appointment of certain members of council to various committees. Depending upon the power given to the chief elected official in any municipal bylaws, he may either have more powers than other councillors or be more visible, as a result of the functions given to him in those bylaws.

Although the chief elected official may attempt to influence the other councillors to support the policies proposed, this is likely to be no different than the actions of other councillors in attempting to persuade their colleagues to support the policies they propose.

The duties of council as a whole are found in Part 6, section 201:

TOP

201(1) A council is responsible for

(a) developing and evaluating the policies and programs of the municipality;

(b) making sure that the powers, duties and functions of the municipality are appropriately carried out;

(c) carrying out the powers, duties and functions expressly given to it under this or any other enactment.

(2) A council must not exercise a power or function or perform a duty that is by this or another enactment or bylaw specifically assigned to the chief administrative officer or a designated officer.

(*Municipal Government Act* R.S.A. 2000)

Council may delegate certain of its functions, but there are certain duties of council, enumerated in section 203, that council cannot delegate. Council cannot delegate its bylaw-making ability. As council is the body elected to create law, this makes eminent sense. The implication of this inability to delegate means that councils cannot create committees and empower them to create bylaws. For example, a council may create a taxi commission to provide governance for the industry. However, the commission cannot make bylaws to regulate the industry. It is only able to recommend bylaw changes to council; it is not able to make those changes itself. For an example of this, see the City of Edmonton Vehicle for Hire Commission Bylaw No. 14400, section 6(e).

Council also cannot delegate the power to adopt budgets, its powers with respect to taxes, or its powers in relation to the appointment, suspension or revocation of the appointment of a chief administrative officer.

1.3.3 Pecuniary Interest of Councillors

Part 5, Division 6 of the *Municipal Government Act* focuses on the pecuniary interest of councillors. It is important to be aware of this part of the *Act* as a determination that a councillor has a pecuniary interest in a matter that has a significant impact on the actions of that councillor. Section 170 defines "pecuniary interest" as follows:

TOP

170(1) Subject to subsection (3), a councillor has a pecuniary interest in a matter if

(a) the matter could monetarily affect the councillor or an employer of the councillor, or

(b) the councillor knows or should know that the matter could monetarily affect the councillor's family.

(2) For the purposes of subsection (1), a person is monetarily affected by a matter if the matter monetarily affects

(a) the person directly,

(b) a corporation, other than a distributing corporation, in which the person is a shareholder, director or officer,

(c) a distributing corporation in which the person beneficially owns voting shares carrying at least 10% of the voting rights attached to the voting shares of the corporation or of which the person is a director or officer, or

(d) a partnership or firm of which the person is a member.

Section 170 then identifies eleven situations that do not come within the definition of "pecuniary interest." If a councillor has a pecuniary interest pursuant to section 172, the councillor must both disclose the general nature of the pecuniary interest before any discussion of the matter and abstain from voting on the question, and he may be required to leave the room in which the meeting is held until the discussion and voting on the matter is concluded. The councillor can remain in the meeting

room if, as an elector, owner or tax payer, the councillor has a right to be heard from council on the matter.

A pecuniary interest is the sole exception set out in the *Act* that excuses a councillor from the duty to vote (found in section 183). The rationale for this exemption from voting has been set out by the Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 as follows:

> Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

The consequences of a failure to abide by the disclosure and abstention rules in section 172 can be severe. Pursuant to section 174(1)(g), if a councillor contravenes section 172, it is grounds for the disqualification of the councillor. Immediately upon disqualification, the councillor must resign. If the councillor does not resign, either council or an elector may apply to the Court of Queen's Bench for a declaration that the councillor is disqualified. Although the *Act* (section 177) grants the Court the discretion to dismiss the disqualification application if the judge believes that the disqualification arose inadvertently or by reason of a genuine error of judgment, the Court has no discretion to dismiss an application for an order disqualifying a councillor where the disqualification arises due to pecuniary interest breaches under section 172. If the Court finds the councillor had or has a pecuniary interest and failed to disclose that interest, the Court appears to have no option but to declare the councillor disqualified from remaining in office.

However, the Courts appear loathe to disqualify a councillor, even in circumstances where the councillor is found to have breached the pecuniary interest provisions of section 172. In 2009, the Court of Queen's Bench in the case of *Lac La Biche (County) v. Bochkarev* heard an application by the County to disqualify Councillor Bochkarev because he voted on two matters coming before Council which monetarily affected him. The Court found that the councillor did breach section 172. However, the Court went on to examine its powers as specified in sections 177 and 176 of the *Act*. The Court was clear that the power to grant relief under section 177 did not extend to relief of a breach of the pecuniary interest provisions under section 172. The Court found that "even if a councillor breached section 172, the Court retains discretion under section 176 to exercise an equitable jurisdiction to relieve against declaring the Councillor to be disqualified and instead 'declare the person able to remain a Councillor'" (para. 30).

The Court considered five questions when deciding whether to exercise its equitable jurisdiction to relieve against disqualification resulting from a breach of the pecuniary interest rules:

TOP

1. How obvious was the conflict?
2. Was Councillor Bochkarev actually aware of the disqualification? Is there any evidence of willful blindness or lack of good faith?
3. Did it occur to anyone at the Council meeting that the councillor was in a conflict of interest?
4. Did the County have any procedures or policies in place for the purpose of identifying, addressing and reconciling pecuniary interests?
5. Does disqualification seem a harsh result? (para. 39)

The Court granted the county's application, declaring that the councillor was in breach of section 172, but concluded that it was an appropriate case in which to exercise discretion. In the end, the Court declared that the councillor could keep his position, despite that contravention.

> In this case, having regard to all of the first four considerations, I am of the view that Councillor Bochkarev's disqualification comes closer to a lack of reflection than to those cases where the conduct can best be described as outrageous, or acting in the face of a patent and obvious conflict. There is no evidence of any bad faith here so that disqualification is a harsh remedy. (para. 49)

Other cases considering section 172 include the following:

Crowsnest Pass (Municipality of) v. Prince, 2001 ABQB 212

Wainwright (Municipal District No. 61) v. Willerton, 2000 ABQB 539

Flach v. Newell, [2011] A.J. No. 727, 2011 ABQB 409

1.3.4 Administrative Officials

Chief Administrative Officer

Sections 205–209 of the *Act* establish the position of chief administrative officer and the set out powers and functions of that position.

> **207** The chief administrative officer
>
> (a) is the administrative head of the municipality;
>
> (b) ensures that the policies and programs of the municipality are implemented;
>
> (c) advises and informs the council on the operation and affairs of the municipality;
>
> (d) performs the duties and functions and exercises the powers assigned to a chief administrative officer by this and other enactments or assigned by council.

While council is responsible for developing and evaluating the policies and programs of the municipality, the chief administrative officer (CAO) is responsible for ensuring the implementation of those policies. Section 206 sets out the specific responsibilities of the CAO. In the absence of a designated officer, the CAO exercises any power the *Act* grants to the designated officer.

Pursuant to section 209, the CAO may delegate his functions to either an employee of the municipality or a designated officer who is not required to be an employee of the municipality.

In *Remmers v. Lipinski*, 2000 ABQB 194, upheld on appeal in *Vogel v. Hall*, 2001 ABCA 188, ratepayers from the Municipal District of Bighorn No. 8 (the "M.D.") sued the chief administrative officer, Hall, for the loss of $2.4 million in six months due to unauthorized investments by an employee Hall was to have supervised as part of his responsibilities as CAO. As the treasurer for the M.D., the employee Nichol invested surplus funds of the M.D. in investments that did not comply with the *Act* or the regulations that limit municipal investment powers. Nichol also did not seek ministerial approval for the non-compliant investments. Hall questioned the treasurer about the investments, but did no independent checking to corroborate what he had been told. After the auditors raised the issue and conducted further investigation, the extent of the problem became clear. Shortly after the conclusion of the audit, the treasurer quit his employment with the M.D. The Court found that Hall breached his duties as outlined in sections 207(b) and 208(1)(1) by failing to undertake an independent investigation or inquiry into the statements made by the treasurer. The Court found that Hall breached his duties to implement financial controls.

Hall argued that he was entitled to the protection granted under section 535(2) of the *Act*, which

provides that municipal officers (of which a CAO is one) are not liable for loss or damage during the course of their employment. However, this protection is not applicable where gross negligence has taken place. The determination of gross negligence is driven by the particular facts and, in the end, the Court found Hall's conduct to have been grossly negligent and, thereby, rendered Hall liable for a judgment of $2.4 million plus interest:

> [83] Similarly in the present case, Hall was made aware of the investments shortly after they began in September 1995. At that time the propriety of the investments did not cross his mind. But importantly, in my view Hall was bothered by whether the investments complied with section 250. In October 1995, Hall approached Nichol specifically with respect to the investments' compliance with section 250 of the ***MGA***. But then, he accepted Nichol's confusing explanations and incomplete documentation without question. It would have been a very simple matter at that time for Hall to contact a lawyer, the auditor, or AMA to confirm Nichol's representations. Further, Hall could have requested further documentation from Nichol. Hall ignored the difficulties associated with Nichol's explanations. I do not find that he acted with conscious indifference to the rights of the M.D. inhabitants. But although conscious indifference may be an indicator of gross negligence, it is not an essential ingredient of gross negligence. See ***McCulloch v. Murray, supra,*** para.71**.** However, considering the likelihood of harm and the magnitude of damage from failing to supervise Nichol I find this to be gross negligence as defined as very great negligence: ***City of Kingston v. Drennan,*** cited ***supra***, para. 72. I find that had Hall undertaken even a bare minimum of independent supervision, the investments could have been stopped and the loss avoided. He did not. His omissions in this regard constituted breaches of his duties under sections 207(b) and 208(1)(l) of the ***MGA***as well as his obligations to implement financial controls as provided for in his employment agreement.
>
> This is the only Alberta case of CAO liability, and serves as a warning for CAOs to adequately supervise their employees, lest they be held liable for their errors.

TOP

Designated Officer

The *Act* specifies a number of duties that may be performed by a designated officer. The *Act* refers to actions by designated officers in the following sections:

25	217	429	483	574
62	270	436.11	524	606
69	283	436.21	525	612
171	284	436.24	532	623
199	309	439	535	624
201	334	455	542	630
202	336	461	544	634
203	343	462	545	675
212.1	350	469	546	678
213	420	482	558	

There are two mandatory designated officers under the *Act*: the clerk and the assessor.

Clerk

455(1) The council must appoint a designated officer to act as the clerk of the assessment review boards having jurisdiction in the municipality and prescribe the remuneration and duties of that person.

(2) The clerk must not be an assessor.

Assessor

289(1) Assessments for all property in a municipality, other than linear property, must be prepared by the assessor appointed by the municipality.