

WORKSHOP

CURRENT LEGAL ISSUES OF INTEREST TO RMs

SARM 102nd Annual Convention
Wednesday, March 14, 2007 @ 3:20 p.m.
Main Convention Hall

INTRODUCTION

Municipal councils and officials have been given extensive powers to make decisions that affect the rights and interests of the public. Not surprisingly, members of the public are not always happy with the manner in which those powers are exercised, and seek the assistance of the courts to get their way.

The purpose of my presentation this afternoon is to help you to become aware of some of the legal limitations which there are on you as members of Council or Administrators in making decisions which affect the interests of those who live or work in your municipalities.

Through a review of the basic principles and the use of examples, my goal is that you as members of Council and Administrators will be better equipped to avoid problems and to stay out of court.

Specifically, I will address the following topics:

- General principles governing the exercise of municipal powers
- Some specific limitations on the exercise of municipal powers
- Statutory provisions to ensure accountability to the public.

GENERAL PRINCIPLE

As a matter of general principle, all municipal powers are to be exercised in good faith and in the public interest.

In this context, the term “good faith” means simply that the actions are not founded upon fraud, oppression or improper motives.

The term “public interest” can best be understood by what it is not, namely actions that are taken from some private interest or advantage.

SPECIFIC LIMITATIONS

Challenges to municipal action will typically be based on an assertion that the council or official has ignored a legal limitation on the exercise of its powers.

The most common lines of attack are that the council or official has:

- i) done something which it did not have the authority or jurisdiction to do;
- ii) failed to give an interested party a fair opportunity to have input into the decision-making process;
- iii) made a decision based on self-interest rather than the public interest;
- and
- iv) abused the discretion which it has been given.

I will deal with each of these in turn.

JURISDICTION

- **Background**

Municipal action may be subject to review on the grounds that the council or official did not have the authority to do what it did.

The starting point here is the fact that municipalities do not enjoy independent constitutional status. They are creatures of statute.

In particular, under the *Constitution Act, 1867*, the Provinces are given the right to create “municipal institutions” and, by implication, to delegate to them such of their powers as they wish.

Thus, all municipal authority is delegated authority. [What this means is that you do not have the authority to do something unless it has been given to you by the legislature.]

Determining whether or not you have the authority to do something requires an examination of the relevant statute to determine:

- i) what the municipality has been authorized to do;
- ii) to whom the authority is given;
- iii) what if anything must be done before you can exercise the power; and
- iv) what conditions must exist before you can act.

- **What Have You Been Authorized To Do?**

The first point is fairly straightforward. Before doing something, you must first find some statutory provision authorizing you to act. Jurisdiction may be express or implied.

Jurisdiction/Express

The usual starting point is *The Municipalities Act*, S.S. 2005, c. M-36.1, which came into force on January 1, 2006.

Of particular note is section 4 of that Act, which identifies the purposes of the municipalities as follows:

- To provide good government
- To provide services, facilities and other things that, in the opinion of council, are necessary and desirable for all or part of the municipality
- To develop and maintain a safe and viable community
- To foster economic, social and environmental well-being
- To provide wise stewardship of public assets.

The legislature has also gone on, in section 4 of the Act, to say that for the purpose of carrying out its powers, duties and functions, a municipality has the capacity and, subject to any limitations that may be contained in this or any other Act, the rights, powers and privileges of a natural person.

This is significant. Among other things, this provision has eliminated the need to list, in great detail, all of the things a municipality could do (ex. acquire land or an interest in land) as was the case under the old Act.

The council is given the authority to pass bylaws respecting a long list of subject matters. These are spelled out in section 8 of the Act.

Regard must also be had to section 6 of the Act, which says that the power of a municipality to pass bylaws is to be interpreted broadly for the purposes of:

- a) providing a broad authority to its council and respecting the council's right to govern the municipality in whatever manner the council considers appropriate, within the jurisdiction provided to the council by law; and
- b) enhancing the council's ability to respond to present and future issues in the municipality.

Reference can also be made to numerous other pieces of provincial legislation which either grant powers to, or impose duties on, municipalities.

Significant examples include *The Stray Animals Act*, *The Noxious Weeds Act*, *The Pest Control Act*, *The Prairie and Forest Fires Act*, *The Uniform Building and Accessibility Standards Act*, *The Public Health Act*, *The Planning and Development Act*, *The Municipal Expropriation Act*, *The Tax Enforcement Act*, and so on.

Jurisdiction/Implied

Authority may also be implied.

Given the provisions of *The Municipalities Act* which I have quoted previously, this is less significant. The legislature has now made it clear that the authorities given you as municipalities are to be interpreted broadly, so as to permit you to achieve the purposes of the municipality.

Where, however, the legislature has set out your powers in detail, the same considerations do not apply.

To explain, the courts have said that when the legislature grants specific authority in respect of a particular subject matter, such a grant is considered to be exhaustive and the municipality cannot try to expand the scope of that specific authorization by reliance on a more general grant of authority.

By way of example, under *The Municipalities Act*, municipalities are given the power to pass bylaws respecting “streets and roads” [c. 8(1)(g)]. This broad statement of authority replaces, among other things, s. 206 of *The Rural Municipality Act, 1989*. However, on certain issues, such as the closing of municipal roads, there are more specific provisions, namely sections 13 to 15 of the Act. On such issues, the more specific provisions will govern.

The same can be said of the detailed powers spelled out in many of the other pieces of legislation I referred to earlier.

Jurisdiction/Overlapping

One question which occasionally arises in this context is can a municipality “legislate” in relation to a subject matter in respect of which the provincial and/or federal governments have legislated? Can the municipality pass a bylaw in relation to such a subject matter, or is it precluded from acting?

What the courts have said in this regard is that the mere fact that other levels of government have legislated in respect of a subject matter does not preclude a municipality from acting. [Note the example of the bylaw respecting the use of pesticides in Quebec.] Basically, it is only if it would be impossible for a person to comply with both the federal or provincial law, on the one hand, and the municipal law, on the other, that the municipal bylaw would be struck down. To some degree this is reflected in section 11 of *The Municipalities Act*, which provides that if there is a conflict between a bylaw or resolution and this or any other Act or regulation, the bylaw or resolution is of no effect to the extent of the conflict.

- **To Whom Is the Authority Given?**

As a general rule, authority can only be exercised by the person or persons to whom it is given by the statute.

What this means is that it is necessary to check the statute authorizing municipal action to determine to whom the authority has been given. It may be council or a member of council, or it could be some other official such as, for example, the Administrator, a Weed Inspector, a Pest Control Officer, the Development Officer and so on.

The general rule is that a municipality is required to act through its council. See sections 5 and 79 of *The Municipalities Act*.

Council itself can only exercise the powers of the municipality by action taken in the proper form. This means:

- i) by resolution or bylaw (see section 5 of The Municipalities Act);
- ii) passed at a regularly constituted meeting (see sections 119 to 125 of The Municipalities Act);
- iii) by a majority of the members present (see sections 100 and 102 of The Municipalities Act); and
- iv) provided that quorum is present (see section 98 of The Municipalities Act).

However, councils do have the authority to delegate powers in some cases. See sections 126 and 127 of *The Municipalities Act*.

Individual members of council have no authority, except as expressly provided for by the legislature [see for example sections 92 (General duties of all members of council) and 93 (Additional duties of a Mayor or Reeve)] or delegated by the council.

- **Jurisdiction/What If Anything Must Be Done Before You Can Exercise the Power?**

I will discuss this more later under the duty of fairness. I simply note here that if a statute prescribes specific things that must be done prior to exercising a power (such as giving notice), then a failure to do those things will render the decision or action open to attack.

- **Jurisdiction/What Conditions Must Exist before You Can Act?**

Power may be delegated on conditional terms. That is, only if a certain state of affairs exists do you have the authority to act or make a decision. A good example of this is the exercise of the power to expropriate land, set out in *The Municipal Expropriation Act*. In order to proceed with an expropriation bylaw under section 3 of the Act, two conditions must be met, namely (i) the municipality must require the land for a valid municipal purpose and (ii) the

municipality must have been unable to acquire the land by agreement with the owner.

There may be situations where it is difficult to determine whether or not the situation with which you are faced comes within the provisions of the Act. What the courts have said in this regard is that the question as to the scope of the statutory provision is a question of law, and that they will intervene if a municipality tries to assume a power which it has not been delegated.

Having said this, the courts have also said that once it is determined that you have the power to act, they are to show a high degree of deference. Note in that regard the decision of the Supreme Court of Canada in *Nanaimo (City) v. Rascal Trucking Ltd.*, [2001] 1 S.C.R. 342, in which the court upheld a municipal council's declaration that a pile of soil constituted a nuisance.

PROCEDURAL FAIRNESS

- **Background**

Municipal action may also be subject to attack on the grounds of a failure to give an interested party a fair opportunity to have input into the decision-making process.

To explain, in some circumstances, you may be under a legal duty to give interested persons an opportunity to have input into the decision-making process before any action is taken that may be detrimental to their interests.

This obligation to give interested persons the right to participate in a decision-making process is generally referred to as the duty of fairness.

The duty derives from what is known as the “rule of natural justice”, which in turn comprised of two sub-rules, namely (i) the right to know the case against you and to be given an opportunity to answer it and (ii) the rule against bias. The duty of fairness relates to the first part of the rule.

These rights may be spelled out in the statute (ex. requirement for public notice before a decision is made or to give an interested party an opportunity to be heard before council). However it is necessary to be familiar with the common law in this regard as well as (i) statutes are sometimes silent as to procedure and (ii) the statutory requirements are not necessarily exhaustive – the duty of fairness may dictate more.

The rationale for such rights is that they can serve to enhance the quality of decision-making and the acceptability of the decision. The latter point is particularly important. People are more willing to accept decisions – and less likely to challenge them in court – if they had an opportunity to participate in the decision-making process.

As important as it is to ensure that those who may be affected by a decision have an opportunity to participate in the decision-making process, there is also a public interest in ensuring that decisions can be made in an expeditious and efficient way. Thus, the law in this area attempts to strike a balance between these competing interests.

- **When Does the Duty Arise?**

So when does a duty of fairness arise? As a general principle, a duty of fairness is said to arise whenever you are called upon to make (i) an administrative decision which is not of a legislative nature and (ii) which affects the rights, privileges or interests of an individual.

I will elaborate on each of these points.

Point (i) excludes from the scope of the duty:

- Decisions made in the exercise of private law powers (i.e. natural person powers). The traditional view in this regard is that when exercising powers of this nature a public authority is treated no differently than private individuals. That is, the ordinary laws of contract and property apply to government and citizen alike. Examples would be when making a decision as to whom you will hire or as to the purchase of some equipment.
- Decisions made in the exercise of your legislative functions.

Generally speaking, a decision is a legislative one when it creates norms or policy, whereas those of an administrative nature merely apply such norms to particular situations.

Having said this, statutes sometimes require public participation prior to enacting bylaws. An example of this is *The Planning and Development Act, 1983*, S.S. 1983-84, c. P-13.1 However, the courts have made it clear that they will not add to those procedures when the power in question is of a legislative nature.)

With respect to point (ii), the rights protected by the common law have been held to include private property rights. This would include the right to the use and enjoyment of one's property (thus the public interest in land use decisions).

- **What does it entail?**

As to what the duty of fairness entails, it depends on the decision involved. The greater the potential impact of a decision on the interested parties, the greater the degree of public participation expected. It may require you to (i) give notice, (ii) disclose evidence to be relied upon and (iii) give an opportunity to be heard.

1. Notice

It is a fundamental element of the duty of fairness that notice should be given to those entitled to participate that a decision is going to be made or an administrative action taken.

As to whom notice should be given and the method of giving notice, you must look first to the statute. If it is silent, you need to consider who is likely to be affected. If only a few, written notice to them would be prudent. If many, then notice in a local paper would likely suffice.

Notice should be given far enough in advance to give the interested parties sufficient time to prepare. That will of course vary according to the seriousness of the matter.

As for the content of the notice, it should contain enough information to permit the party to participate in a meaningful way. Thus, for example, if a decision is to be made respecting land use, the notice must identify the parcel in question and enough information about the proposed use to enable people to know whether they are likely to be affected.

Also, it is best if the potential decisions are noted (if not obvious) and the authority pursuant to which you are acting is noted.

2. Disclosure of Evidence

The general rule is that any information acquired by the decision-maker and upon which it intends to rely must be disclosed. There are exceptions, however these rarely arise in a municipal context. It is considered fundamentally unfair to make a decision that affects a person's interests based on information which he or she is not permitted to know about or respond to.

Council must not base its decisions on information gathered in private, and of which other interested parties are not aware. Fairness dictates issues are debated, and decisions made, in public. I will elaborate on this requirement later.

3. Opportunity to be Heard

In most municipal cases, it will suffice if interested parties are given an opportunity to be heard before council. Generally speaking, there is no need for an actual hearing unless it is required by statute.

It may even be sufficient to invite written submissions from interested parties.

Council has a right to put time limits on the length of oral submissions, so long as they do not unduly restrict the opportunity to be heard.

(Recall need to balance rights to participate with the need for efficiency in public administration).

BIAS

- **Background**

Municipal action may also be subject to attack on the grounds of bias.

As I noted earlier, the rule of natural justice is comprised of two sub-rules, namely (i) the right to know the case against you and to be given an opportunity to answer to it and (ii) the rule against bias. This part of my presentation will deal with the latter.

The rule against bias, in its simplest form, is that decision-makers must base their decisions, and be seen to be basing their decisions, on nothing but the relevant factors and the evidence that is properly before them. Factors such as the self-interest or the prejudices of the decision-makers must be excluded if the public is to have confidence in the decision-making process.

The difficulty with this rule is that everyone approaches issues with certain predispositions. This is particularly the case in the political arena, where someone may be elected by reason of his or her views on a particular issue. Thus, the rule against bias has evolved to take into account such considerations.

What might give rise to an apprehension of bias?

The two most common scenarios are:

- Where a decision-maker has a financial interest in the matter to be decided
- Where a decision-maker has already made up his or her mind before having heard from the interested parties

- **Financial Interest**

An example of a situation where one might have a reasonable apprehension of bias is where a decision-maker has a financial interest in the matter to be decided.

This is addressed in sections 141 to 146 of The Municipalities Act.

The key provision is section 143 of The Municipalities Act, which defines what constitutes a pecuniary interest.

Two possible scenarios are included.

The first is where you or a member of your family has a controlling interest in, or is a director or senior officer of, a corporation that could make a financial profit from or could be adversely affected financially by the decision.

The second is where you or a closely connected person could make a financial profit from or could be adversely affected financially by the decision.

Note that the term “family” includes the spouse, parent or child of the member.

A person is a “closely connected person” if he or she is your agent, business partner, family member or employer.

In the event you have a pecuniary interest in a matter, you must comply with section 144 of *The Municipalities Act*, which provides that:

- a) you must declare the pecuniary interest before any discussion of the matter;
- b) you must abstain from voting on any question relating to the matter;
- c) you must abstain from any discussion on the matter; and
- d) you must leave the room until discussion and voting on the matter are concluded.

Note there are some exceptions to this.

Firstly, if the matter is one in respect of which you as an interested person have the right to be heard, then you need not leave the room but may exercise that right in the same manner as person who is not a member of council.

Secondly, if the matter is the payment of an account for which funds have previously been committed, you need not leave the room.

Note it is important that the Administrator record any abstention or disclosure in the minutes of the meeting.

If a member of council fails to comply with these rules, he or she becomes disqualified from council. A member who is disqualified is supposed to resign immediately. If he or she does not do so, the council or a voter may apply to the Court of Queen’s Bench for an order determining whether the member has contravened the Act and, if so, declaring him or her to be disqualified. See section 148 of *The Municipalities Act*.

There are no legal consequences to a finding of a contravention alone. Your reputation, however, will not be enhanced. If the contravention has resulted in personal financial gain, then the judge may require you to make restitution. If the contravention resulted in personal financial gain and was deliberate, then the judge must declare your seat on council to be vacant. You would be disqualified from being nominated for or holding municipal office for three years after the disqualification and may be required to pay the costs of the court application.

2. Prejudice

The situations covered by sections 141 to 146 of The Municipalities Act are not the only situations in which a decision-maker could become disqualified due to bias.

Another common example is where a decision-maker has commented on a matter in such a way as to suggest he or she has prejudged the matter, even prior to a hearing. This often is alleged in the context of land use and planning decisions.

By way of example, a statement that one is opposed to Intensive Livestock Operations might well give rise to a reasonable apprehension of bias on the part of a developer seeking approval of the same.

In such circumstances, and because such decision-makers may well have been elected because they supported or opposed a particular point of view, the courts have said that the test must be applied in a way that is sensitive to the context in which the decision is being made.

Thus, the courts have said that members are permitted to hold firm views, provided they show themselves to be “amenable to persuasion”. To put it another way, the members must not have formed an irreversible view before they hear any evidence.

Speaking specifically of a municipal council, the Supreme Court of Canada said [in *Old St. Boniface Residents Ass'n Inc. v. Winnipeg (City)*, [1990] 3 W.W.R. 1170, per Sopinka J.] that a mere apprehension of bias will not suffice. Rather, someone challenging a decision would have to prove that there was a prejudgment of the matter to the extent that any representations to the contrary, would be futile. Statements by a member of council will not satisfy the test unless the court concludes that they were the expression of a final opinion on the matter, which could not be dislodged.

Note this rule was recently confirmed in the decision of Mr. Justice Wimmer in *Elite Swine Inc. v. Rural Municipality of Moosomin No. 121* of July 12, 2006.

ABUSE OF DISCRETION

- **Background**

Finally, municipal action may be subject to attack on the grounds of abuse of discretion.

The legislature has delegated to municipalities a number of discretionary powers.

Examples include the authority to close and lease road allowances, to require a person to contribute to the cost of building a road, to require a landowner to

remove objects placed either on a municipal road or on private land but close to a municipal road, to declare a building or excavation to be a nuisance, to compromise or abate taxes and to accept or reject an application for a discretionary use.

Discretion may be defined as the power to make a decision that cannot be determined to be right or wrong in any objective way. It involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

It might seem that when a particular decision is a discretionary one it could not therefore be subject to attack. Such is not the case. Indeed, an exercise of discretion can be challenged on a whole number of grounds.

Of particular significance in a municipal context are the following grounds:

- i) that the council exercised its discretion with an improper intention in mind;
- ii) that the council acted on inadequate material;
- iii) that there was an improper result, including discriminatory actions; and
- iv) that the council had fettered its discretion.

I will elaborate briefly upon each of these.

- **Improper Intention**

This includes acting for an unauthorized purpose, in bad faith or on irrelevant considerations.

This requires you to ask (i) what was the problem that the grant of authority was intended to address and (ii) what considerations are relevant to the decision to be made?

An example of this is a case where a council voted to rezone land with the result that the land decreased in value. As it happened, the municipality had wanted to acquire the land. Thus, the bylaw was struck down as having been enacted for an improper purpose, namely to decrease the cost to the municipality of acquiring the land.

Another example of this is where a council rejected an application for a development permit for a discretionary use, by reason of the objection of area residents. In and of themselves, the opinions of area residents are not relevant. It is only to the extent, that they related to the considerations listed in *The Planning and Development Act, 1983*, that such opinions would be relevant.

To explain, section 74 *The Planning and Development Act, 1983* says that a council can only approve an application for a development permit for a discretionary use if the facts presented establish that it:

- i) will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity;
- ii) will not be injurious to property, improvements or potential development in the vicinity;
- iii) complies with the applicable provisions of the zoning bylaw; and
- iv) will not be contrary to the development plan or the basic planning statement.

Thus, while it would have been acceptable to reject the application on the grounds that the proposed development would be detrimental to the health or convenience of people residing in the area, it was not acceptable to reject the application simply on the grounds that the neighbours were opposed to it.

- **Inadequate Material**

This ground arises where there was no evidence on a material point or where a council failed to consider relevant matters.

Using again the example of an application for a development permit for a discretionary use, I know of one instance where the bylaw required a council to consider whether there was a sufficient supply of water for the proposed development and what effect that use of water would have on others' use of the same supply. As it happened, the applicant furnished no information to address these questions. In the result, the council had no choice but to refuse the application. Had they done otherwise, it is clear that the decision would be liable to attack.

Improper Result (Discriminatory Actions)

As a matter of law, there is a presumption against discrimination. What this means is that unless the enabling statute specifically permits council to discriminate, (and there is some limited authority to do so - see c. 8(3)(b) of *The Municipalities Act*, in relation to your bylaw making power) they cannot. Allegations of this nature are often made. The bottom line is that there must be a rational basis, related to the purpose for which the authority has been given, for treating people differently.

- **Fettering Discretion**

The existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be decided on its own merits. Anything therefore which requires a council or official to exercise its discretion in a particular way may be viewed as illegally limiting the scope of the power.

Nonetheless, the courts have said that this does not preclude a council from adopting a general policy. If you are required to make a large number of discretionary decisions, it is practically necessary to adopt rough rules of thumb. This practice is legally acceptable, provided each case is considered on its merits.

Also, the courts have said that it is okay for a council to refer to the policy adopted by another government agency when deciding to exercise its own discretion, provided council does not proceed as if it is bound by that policy and fails to make an independent decision.

PUBLIC ACCOUNTABILITY

Open government allows for public scrutiny of public business. It is achieved in two ways, namely by conducting public business in public and by allowing public access to public records. I will briefly examine the laws that require open government in Saskatchewan.

- **Open Meetings**

Section 120 of *The Municipalities Act* states that councils and council committees are required to conduct their meetings in public.

As well, subsection 119(3) of *The Municipalities Act* provides that every person has a right to be present at meetings of councils or council committees, unless the person presiding at the meeting expels the person for improper conduct.

Section 120 of *The Municipalities Act* creates the following exceptions to the requirement for open meetings, namely if (i) the matter to be discussed falls within one of the exemptions in Part III of *The Local Authority Freedom of Information and Protection of Privacy Act*, (ii) concerns long-range or strategic planning or (iii) involves deliberating and making decisions on appeals.

Examples of matters which may be addressed in private include:

- Discussing information contained in a record that was obtained in confidence, implicitly or explicitly, from another government.
- Where public disclosure could prejudicially affect law enforcement and investigations.
- Advice from officials.
- Advice from your solicitor.

- **Access to Public Records**

Access to public records is provided both by *The Municipalities Act* and by *The Local Authority Freedom of Information and Protection of Privacy Act*.

The Municipalities Act

There is a long tradition in municipal legislation of rights to access municipal records, which continues in *The Municipalities Act*. These records include the following:

- Accounts paid. See section 117(1)(a) of *The Municipalities Act*.
- Assessment Roll. See section 213 of *The Municipalities Act*.
- Bylaws and resolutions. See sections 108(4) and 117(1)(a) of *The Municipalities Act*.
- Contracts. See section 117 (1)(a) of *The Municipalities Act*.
- Council and committee minutes and reports. See section 117(1)(c) of *The Municipalities Act*.
- Financial Statements. See section 185(3) of *The Municipalities Act*.

The Local Authority Freedom of Information and Protection of Privacy Act

The general rule is that the public has a right of access to all records in the possession of a local authority, subject only to the exceptions listed in Part III of the Act.

The process is that someone who wants access to a record makes a request in the required form.

The “head” of the local authority – the Reeve, unless someone else is designated – is to rule on the request. This requires a consideration as to whether or not the record sought fits within any of the exemptions in the Act.

If the decision is to refuse access, reasons must be given. The person seeking access has a right of appeal to the Information and Privacy Commissioner.

Of course, if rights of access are to have meaning, the records must be properly kept. It is the responsibility of the Administrator to keep official records, so as to safeguard the public’s right of access. See sections 108(4), 111 and 115 to 117 of *The Municipalities Act* in that regard.

CONCLUSIONS

I appreciate that this has been a fairly cursory review of the law in the areas covered.

It is my hope, however, that this will serve to at least raise your awareness of these issues, so as to reduce the risk that your decisions will be subject to attack.

For your future reference, a copy of my notes will be made available in the Legal Services section of the SARM website.

I would be pleased to answer any questions you may have, at this time.