

Type of Decision									
Meeting Date	Tuesday, June 12, 2018				Report Date	Saturday, June 9, 2018			
Decision Required		Yes	x	No	Priority	X	High		Low
Direction		Information Only		x	Type of Meeting	X	Open		Closed
<h2>Clerk's - Report #12/06/18/801- A</h2>									

Subject: Comments/Notes from Friday's Training

On Friday, June 8, 2018 I attended council approved training in Burk's Falls by Expertise for Municipalities and Wishart Municipal Law Group. Wishart and E4M are taking a unique position on providing municipal assistance by focusing on prevention of issues, preparation of legally enforceable documents through a supervised joint creation of required policy and by-laws and sharing of information.

All municipalities, no matter the size require legal expertise. Most municipalities are left to draft new policy on their own, or "borrow" from others due to the costs of having a law firm do them. Occasionally those documents will be challenged and the municipality could find itself in an indefensible situation. Through this process, municipalities work together to create a document that considers the unique challenges of each participant municipality to ensure a solid working document at session end which has been legally vetted.

The specific session attended this week focused on the new Code of Conduct – as required under Bill 68, but also updated current Codes for those municipalities who already have one in place. Additionally, a Complaint Protocol and the Bill 68 required Council/Staff Relationship Policy was drafted.

Every attendee received answers to their specific questions and had the opportunity to submit changes, enhancements etc. and question the existing content. In the end, each participating municipality will have a final document fully vetted and insured by a law firm to use in their municipality. When these documents are eventually needed, they will stand up in court.

The group's plan is to hold another session to have municipalities ensure that their Procedure By-Laws are up to date and complete – prior to new councils coming to seat in November.

Notes to the session which require attention or follow up:

1. Consideration of a subscription to Wishart Municipal Law Group for municipal legal services;
 - a. Benefits include access to education and training, expertise and shared services, routine checklists to meet to ensure legal compliance as well as legally enforceable policy and bylaw documents covered by the law firm's insurance;
2. Zoning – "If you have no maps, you have no zoning by-law – everything is legal non-conforming use" – need to discuss this issue further with legal counsel and likely amend our existing by-law;

3. Challenge with recent history – if your municipal lawyer is your investigator for Code complaints, and either the complainant or respondent eventually brings the issue to court – the municipal lawyer will be the first witness to be called – and could end up testifying against the municipality. Not a good position to be in. Also, no one other than a judge, or in the future under the new legislation an Integrity Commissioner (IC) can determine whether or not a council member has a conflict under the Municipal Conflict of Interest Act (MCIA).
4. Under new rules, an Integrity Commissioner will have powers under the Public Inquiries Act and compel testimony/witnesses, can subpoena documents and hold a public hearing.
5. New penalties for code infractions and/or Municipal Conflict of Interest Act to include: damages paid, suspension of pay, suspension from committees, not able to run in the next election, trespass, limited access to staff, removal from committees, suspension of access to municipal resources, ask for members' resignation etc. (HCM has already approved some of these sanctions in a previous policy. We will have to ensure that policies do not contradict each other. Some are not enforceable, but knowing that the remainder of council does not support an individual's actions is a strong statement.)
6. If a breach is found – Code or MCIA – the IC and/or Court can order damages as well as costs. If found to be in breach, a council member would likely be responsible for up to 50% of Council's costs as well as his/her own costs of defense. If the issue goes to court, a judge will likely follow an Integrity Commissioner's decision; not likely it would be overturned if proper process has been followed. Could be expensive for municipalities and council members alike.
7. MCIA – discussed "deemed" conflict if the issue is a conflict of a "body". This could include membership of council member and/or spouse on a board, committee, church group or club. If the body has a pecuniary interest, the person likely does too. The member can not then participate at the Council table. Need to be careful with budgets for things like Rec Committee and Library Board because technically they are "bodies" and those council members sitting on those committees/boards have a "deemed" pecuniary interest because the board/committee does. (Even though they do not personally.) Suggested that while doing budgets, these specific issues be separated out from the large document so that all council may participate in the larger document while those on committees/boards will be removed from discussion on those specific budget lines.
8. Precedent – situation of a group of council members – 4 of 5 were volunteer fire fighters. They each had to declare pecuniary interest as council members due to their membership on fire dept. This was ultimately taken before a judge, as per legislation – the judge granted an exemption that each could participate in the budget deliberations.

9. Consideration of indemnification clause – to protect individual council members from unfounded complaints against them – Council is able to reimburse the council member for costs of defense if found not to have contravened the code/Act. If they did breach the Code – they are responsible for their own costs and likely up to 50% of Council's costs – depending on judge's ruling.
10. The larger picture with respect to “dysfunctional” councils. People looking in from outside – if they are looking to invest or move to your area – and your council can't even govern itself – why would anyone want to invest or move there?
11. Council members need to watch language – instead of “the city/area/etc. is a mess” try “we are working on projects to improve xyz”. It makes a huge difference looking in from out.
12. Reminder to Council members – you are covered under s. 448 (1) of the municipal act – against liability for damages etc. for any act “done in good faith” in performance of “a duty” or authority under the Act. If you take it on yourself to operate outside of your legislated duty – you also take on that responsibility for liability. This is important to realize when deciding that a rule perhaps doesn't apply to an individual, this council, this municipality etc. There are legal and costly consequences on non-compliance with following legislated authorities.
 - a. The example provided was one where a new council member inundated staff with questions about day to day operations, outside of council authority. Council acts as a unit, not as individuals with respect to municipal business and decisions.
 - b. If Council has a challenge with a staff member, they are to bring the issue to senior staff, not the Council table. If the issue is with the CAO – bring to the Mayor.
13. Council is to make requests of staff, through the CAO for reports for items or issues it would like to review – not individual members of Council. Individual members can bring their request to Council either through a “Notice of Motion” or through Question session at the end of each meeting for Council direction to staff through the CAO.
14. Council should each term/year write out deliverables/expectations of the CAO and use those to complete a performance appraisal against. (HCM has been using this system with annual goals agreed to during PAs.)
15. A municipality is not a business – sometimes it may provide a service/event etc. that will lose money – but is still a positive. E.g. A city that holds a large event – lost money BUT – increased the visitors to the municipality substantially – had all accommodation businesses full – increased sales for stores, restaurants etc. Brought people to view their community – might move/invest there. Councils sometimes need to look at the larger picture.
16. Council has an obligation to protect staff members. E.g. On-line anonymous harassment on Facebook – municipality went to Court in California – received information – police searched and found individual responsible – settled with tens of thousands of dollars out of

court. Even though it was a significant expense to the municipality to carry this out - it is a legal obligation which must be understood by council, no matter the costs. Should a council not seriously take steps to prevent staff from harassment – the Ministry of Labour could become involved. If it was proved that an improper or insufficient investigation was completed – there could be MOL penalties to deal with as well as Code issues.

17. Council will need to budget for 2019 costs of Integrity Commissioner investigations. Examples provided where lawyers were involved ran from \$8,000 - \$175,000 per investigation. It is recommended that a new reserve be created for this purpose. Council needs to take seriously their obligations under the Code of Conduct, Council/Employee Policy and the Municipal Conflict of Interest Act or face these consequences. Remember – if found in contravention – the Council member will be made to pay damages to the municipality as well as their own defence costs. Appropriate education and training of new council members is important. The consequences of non-compliance could be serious.
18. I would suggest that with issues in the past in HCM – that advice be provided to determine what “deemed conflict” as a member of a “body” means in a court of law.
19. An acknowledgement form should be provided for each member to sign stating that they have read and understood the new policies. The policies are still in effect even if the member does not sign the form. Would be interesting to see how that would play out in court – by not signing, the member is pretty much stating that they disagree and will not abide by the Code or MCIA right from the beginning.
20. When a Council member has asked the IC for advice, the IC will retain that confidentiality until and unless the member makes part of the advice public. For example – the member can’t go to council/anyone and say – I spoke to the IC and he said I don’t have to xyz. At that point – the IC can then release his entire advice to protect his own integrity. Often when this happens, the individual has left out some significant piece of info – exceptions, inclusions etc. The IC needs to be able to protect him/her own credibility as well.
21. There needs to be a distinction between Code violation/complaints and Harassment complaints. Portions of an IC report are to be made public under the Municipal Act. Under the OHSA, Harassment complaints are to remain confidential. Make sure they are separate complaints if an issue falls under both policies/legislation.
22. New legislation now requires that a council pass a resolution detailing how it will deal with an IC report. It cannot just be received as information. Council is not mandated to act, but must make a decision on whether to act or not. This then may be used should the complainant/respondent take further legal action in the future.
23. An IC shall refer any matter identified during an investigation to other authorities and suspend his/her investigation until the matter is resolved elsewhere – Criminal Code violations, MCIA as opposed to Code infractions.

24. Information received by IC is protected from MFIPPA requests. Only the information the IC releases in the final report is public.
25. Bad faith complaints will be found to be more than frivolous and vexatious – will have some sort of malice etc. It is likely if this is determined by the IC, the recommendation would be that the municipality sue the complainant for costs. e.g. someone claimed that a senior staff member sexually harassed them and someone else. After the investigation it was determined that the complainant fabricated the entire incident simply because they wanted that staff member to lose their job.
26. Discussed the difference between making a claim against someone which was found to not meet the threshold of harassment – which is subjective with the complainant protected from reprisal; and making false claims which are subject to a legal response with potential litigation.
27. Frivolous and vexatious complaints will be determined as such by the IC and not investigated further.
28. When discussing budgets and access to the IC for Council members, it is suggested that a specific number of hours/dollars/issues be determined for each council member per year or term – once they have reached that threshold, they may access at their own expense. Still a work in progress.
29. If Council has an issue with the CAO and needs to address performance issues etc., the Mayor should request that the Clerk delegate his/her powers to the municipal solicitor, integrity commissioner, neighbouring clerk or retired clerk to act during any such closed meetings to meet the requirements under the Municipal Act. There must be a Clerk in any meeting of Council – the Clerk is the only person who may delegate his/her authority. It is not recommended that any other current staff member – including the deputy Clerk of the municipality act in this matter.

The policies reviewed and identified under Report #12/06/18/1203 – Bill 68 Changes are being completed by E4M and Wishart staff and will be available in their completed form for municipal adoption in the near future.