Right to Know

"Wisdom excelleth folly, as far as light excelleth darkness."

- Ecclesiastes 2:13

Introduction

The City of Regina was the first recipient of the Chief Justice E.M. Culliton Right to Know Award in 2006. This award recognized the City's "strong leadership in promoting the public's right to know, demonstrating a genuine commitment to respect The Local Authority Freedom of Information and Protection of Privacy Act, in letter and spirit". While the Award is an honour, it also sets a standard for the City to maintain.

Open government allows for public scrutiny of public business. It is achieved in two ways: by conducting public business in public; and by allowing public access to public records. This paper will examine the laws that require open government in Saskatchewan, with reference to case law, here and elsewhere.

Open Meetings

The principle that municipal government operates in public is evident both in practice and in legislation.[1]These laws affirm the principle of open government, while allowing for exceptions in appropriate circumstances which dictate that matters be considered in private.

The Cities Act

Subsection 95(1) of The Cities Act and subsection 120(1) of The Municipalities Act both state that:

"Subject to subsections (2), (3) and (4), councils and council committees are required to conduct their meetings in public."

Subsection 94(3) of The Cities Act and subsection 119(3) of The Municipalities Act both provide that:

"Everyone has a right to be present at council meetings and council committee meetings that are conducted in public unless the person presiding at the meeting expels a person for improper conduct."[2]

Council's ability to meet in private is limited to discussing matters within one of the exemptions in Part III of The Local Authority Freedom of Information and Protection of Privacy Act, deliberating on appeals and long-range or strategic planning.[3]Committees of Council may hold meetings in private, provided that the matter being considered falls within one of the statutory exemptions from open meetings.

Generally, neither Council nor its committees meeting in closed session may make final

decisions. Although since modified, these provisions date back to the early 1980s in recommendations of The Urban Law Review Committee and of the report of the former Chief Justice of Saskatchewan, E.M. Culliton, on freedom of information and protection of privacy. Mr. Culliton, in his 1983 report, discussed the purpose of a legislative restriction on private meetings:

"They [members of The Urban Law Review Committee] also said that there was a growing tendency to consider all committee meetings as being in camera meetings, and that while on occasion that was necessary, it was not always necessary. The practice of considering all committee meetings as closed meetings has given rise to allegations that councils do operate secretly.

"…This [legislation] would deny the right to make effective decisions in committee and would provide that such meetings be open except where the council decided that the public interest requires that it be private. Such a provision recognizes the principle of openness and at the same time, safeguards the necessary need of the council for in camera discussions."[4]

[5]Council can adopt its own Procedure Bylaw, but that bylaw must conform to the statutory rules.[6]

Enforcement

While these rules are largely self-regulating, in that it is for council to police itself, the Act does provide authority to check deviation from the rules governing meetings. The mayor or, in the case of rural municipalities, the reeve presides at meetings of council[7]and may exclude any person for improper conduct.[8]An individual member of council or a committee may raise a point of order or procedure, if the member believes the rules are not being followed. The chairman of each committee would have an obligation similar to that of the mayor or reeve to enforce the rules.

The Clerk or, in the case of rural municipalities, the Administrator, must attend all meetings of the Council and its committees and keep minutes.[9]The Clerk's role is to advise Council and committees of their responsibilities and to keep a proper record as an impartial non-participant. This is the official record of the proceedings, available for public inspection.[10]The extent of the Clerk's duty was the subject of comment by the Nova Scotia Supreme Court in 2005, referring to the equivalent provision in Nova Scotia's Municipal Government Act:

"The fact that municipalities are accountable, and required to act in good faith, and in accordance with certain standards of fairness and care, informs the extent of the Clerk's duty to record all proceedings of Council as mandated by subsection 33(2)(a) of the MGA."[11]

These rules, enshrined in legislation, are designed to ensure that the public's business is conducted in public. Where a municipal council or committee meets in contravention of these rules any elector may apply to the courts to uphold the rules.

Statutory Right

Although the courts, in recent times, appear favourably disposed to granting public access, it should be recognized that the right of a person to attend a meeting of committee or council is entirely statutory. In a 1915 judgment of the Ontario Court of Appeal, the Court acknowledged this point.

“The only point, we consider, is the right of an ‘inhabitant’ or ‘person’ to examine into the affairs of the city. We are of opinion that no rights exist except such as are expressly or by implication given by the statute. Our municipalities are in no way an evolution from the common law municipal corporations, but are product of statutory enactments, and in this respect differ from them.” [12]

The Court went on to refer to some English decisions which had upheld denial of public access to meetings of municipal council. Such right of public access has since been extended by statutory provisions such as sections 93 and 94 of The Cities Act and sections 119 and 120 of The Municipalities Act. The point is that such rights are entirely statutory in nature.

Court Challenges to Closed Meetings

Meetings of municipal council and committees held in private have been challenged on two grounds: failing to comply with the requirements of the statute to hold meetings in public; and decisions made or actions taken in bad faith.

The Manitoba Court of Appeal, in Buhler v. R.M. of Stanley[13], upheld the quashing of a bylaw to de-register a plan of subdivision on the basis that the action of council was taken in bad faith. The Court found that the decision of council to meet in private to consider the item was taken “for the express purpose of avoiding publicity and, more specifically, to prevent the applicant from becoming alerted to its intended object of declaring the plan in question no longer to be a registered plan of subdivision”. The Court of Appeal found that this amounted to bad faith justifying quashing of the bylaw. The Court of Appeal quoted with approval from the judgment of the chambers judge who stated that:

“The policy of the law, then, as I interpret the statute, is a standard of openness in municipal government intended to ensure public awareness of what a council is about in its conduct of municipal business.

In my view, in this instance, the action of the council was motivated by the improper objective of enacting the bylaw without disclosing that fact until it was accomplished. Deliberate and improperly motivated, it was a marked departure from the standard and, in my view, was action taken in bad faith. The bylaw should be quashed for that reason.”

The Ontario Court of Appeal, in Southam Inc. v. Economic Development Committee of the Regional Municipality of Hamilton - Wentworth[14], granted a declaration that the committee had exceeded its jurisdiction in holding a meeting in private. The municipal council had passed a

bylaw which provided that the public not be excluded from any meeting of a standing committee except by resolution of the committee to consider individual items on the private agenda. The Municipal Act provided that meetings, except meetings of a committee including a committee of the whole, should be open to the public. The committee had scheduled an "in camera workshop" to meet with staff in private at the next meeting to review past, present and future objectives as well as the committee's terms of reference. The clerk sent notice of the meeting to all members of the committee attaching reference documents. The meeting was not held in the usual committee room, but in another room in the building usually used as a lounge area. When a reporter for the Hamilton Spectator newspaper attended along with other representatives of the media, they were denied entry. When the newspaper brought legal action, the City claimed that the gathering was not a meeting of the committee and, therefore, the rules governing meetings did not apply. The Court rejected this defence, ruling it had:

"no difficulty in finding that what took place on September 26 was a meeting of the Economic Development Committee. . . . In the context of a statutory committee 'meeting' should be interpreted as any gathering to which all members of the committee are invited to discuss matters within their jurisdiction. And that is precisely what was being done on that occasion. No matter how the meeting might be disguised by the use of terms such as "workshop", or the failure to make a formal report, the committee members were meeting to discuss matters within their jurisdiction. What the committee was trying to do was to have a meeting in camera, something expressly forbidden under the bylaw."

The Court went on to state that:

"There is no doubt that members of the committee, meeting informally, can discuss questions within the jurisdiction of the committee privately, but when all members are summoned to a regularly scheduled meeting and they attempt to proceed in camera, they are defeating the intent and purpose of council's bylaw which governs their procedure."

The Ontario Divisional Court considered a similar situation in Southam Inc. v. Ottawa (City).[15]Ottawa City Council resolved to hold a two-day retreat at the Calabogie Resort. Similar events had been held since 1978. All members of council were invited to attend and all did but one who was sick. The first day had a detailed structured agenda for what was termed a "Council caucus" with staff in attendance. Agenda items included "overview of 1989 - 1993 capital expenditure plan", "infrastructure management strategy" and a "review of the next three years priorities by service area". The second day was restricted to members of council, although certain staff members were present. No topics were specified on the agenda for the second day. The evidence before the Court indicated, however, that there was discussion about the presence of councillors at official functions, decorum at council meetings, relations with city staff, the performance of the chief administrative officer and the question of additional salaries to be paid to councillors who were committee heads.

The Court concluded that the Calabogie events were council meetings and held that the decision of council to hold the meetings was contrary to its bylaw and the Municipal Act and exceeded the jurisdiction of council. (Ottawa was governed by legislation in its Municipal Act and bylaw similar to those in Saskatchewan.) In coming to its decision, the Court commented that:

“Clearly it is not a question of whether all or any of the ritual trappings of a formal meeting of council are observed: . . . The key would appear to be whether the councillors are requested to (or do in fact attend without summons) attend a function at which matters which would ordinarily form the basis of council’s business are dealt with in such a way as to move them materially along the way in the overall spectrum of a council decision. In other words, is the public being deprived of the opportunity to observe a material part of the decision making process?”[16]

Further, in as much as there may have been doubt as to what actually occurred, the Court ruled that the lack of “sufficient disclosure to the Court to allow us to conclude with certainty the precise nature of what occurred at the Calabogie events . . . must weigh against [Ottawa] in our assessment of whether these events were genuinely informal discussions . . . or were in essence meetings.” It would seem, therefore, that a failure to record the events or keep minutes may draw an adverse inference from the Court in the event of a challenge.

The Northwest Territories Supreme Court, in Yellowknife (City) Property Owners Association v. Yellowknife (City)[17], granted a declaration that weekly briefing sessions held in private by the senior administrative officer for members of municipal council contravened the statutory requirement that meetings be held in public, unless council through its committee resolved to meet in private. The senior administrative officer had developed a practice of briefing sessions where all members of Council could attend and hear his report on ongoing city matters and ask such questions of him as they wished. Decisions were taken at the briefing sessions by informal votes, sometimes by a show of hands, sometimes by a straw vote and most often by “eye contact”, where the mayor would look at each alderman to see if any objected. The Court cited the Ontario judgments in Economic Development Committee of Hamilton Wentworth and Southam v. Ottawa in holding that:

“It is clear that briefing sessions held in Yellowknife were meetings within the jurisdiction of council and that they dealt with matters which form the basis of the council’s business and were dealt with in such a way as to move them materially along in the overall spectrum of the council’s decision.

I therefore conclude that the briefing sessions here in dispute were wide-ranging and went far beyond updating aldermen about administration activities; these dealt with many matters within the jurisdiction of council where decisions were made and instructions given by the council to the administration, and where confidential issues were dealt with without the necessity of an in camera resolution required by section 22(2). Thus I conclude the briefing sessions were council meetings within the provisions of section 21, which were required, subject to subsection 22(2), to be held in public.”

The Ontario Court of Appeal, in RSJ Holdings Inc. v. City of London[18], quashed an interim control bylaw on the basis of its consideration at a closed meeting of Committee of the Whole, prior to its adoption at an open meeting of City Council. The Court held that the claimed exemption of “potential litigation” was not applicable, although the report on the bylaw was

accompanied by a report from the City Solicitor:

[25] A by-law, including an interim control by-law, is a type of subordinate legislation. It is not advice protected by privilege. The fact that the City solicitor supplemented the Panzer report with his own report does not change that fact. The solicitor's report may have been privileged and the Committee of the Whole may have been entitled to have discussed the solicitor's report in closed session, but appending a solicitor's report to other documents, such as the Panzer report, does not operate to cloak all of the documents with privilege.

The Court held that the scope of exemptions should be construed narrowly to promote the legislative policy of open government:

[16] Section 239(1) of the Act requires that all meetings shall be open to the public unless the subject matter being considered comes within an exception listed in subsection (2). In light of the increased powers of municipalities, the mandatory wording of s. 239 that meetings "shall" be open to the public except in narrowly defined situations, and the specificity of the exceptions, it seems clear that the purpose of these provisions is to ensure that, in general, municipal authority is exercised openly.

The Court's conclusion that the bylaw had been discussed, if not decided, at the closed meeting appears to have been influenced by the limited debate at the Council meeting:

[21] Fourth, in the space of 8 minutes, Council passed the interim control by-law and 31 other by-laws. There was a complete absence of public debate or discussion on the interim control by-law, reinforcing the inference that the Committee of the Whole had already discussed it.

The Nova Scotia Supreme Court, in Nova Scotia Human Rights Commission v. County of Annapolis[19], ordered members of Council to provide individual statements describing the discussion at an in camera committee meeting and explaining their reasons and factors leading to their vote to revoke an appointment to a citizen advisory committee, after the municipality stated it had no records regarding the matter in response to a request for information from the Human Rights Commission. While this judgement can be criticized on various grounds, it provides some good discussion on the scope afforded Council to meet in private:

[43] Closed meetings are intended to provide a forum for councils to discuss specified items in private, prior to making a decision. It is not difficult to see the utilitarian purpose (which promotes the interest of the public served by a municipality) for each of the listed exceptions in subsection 22(2). In most cases, with the possible exception of solicitor/client privilege and public security, the purpose, for which the discussions should be held in closed or private session, ceases once council has acted on the discussions.

[45] It would be inimical to responsible and accountable government to interpret the limited and specific exceptions expansively, or in a manner that would protect the conduct of councillors while acting in an illegal manner, or in bad faith, or not in accordance with the standards of conduct and care imposed upon them by law.

[46] … It is not difficult to imagine many scenarios where loss to the municipality could occur if a participant had inside information about the plans and intentions of a council and abused that private knowledge for his or her personal gain. Additionally, the scenarios are endless by which the disclosure of the intentions of council could result in loss to the municipality, if disclosed before council could act on them.

[47] Section 22 is clearly intended to remedy these types of situations, and to put the municipality, bound otherwise to discuss matters and act openly, on an equal – or at least not disadvantaged, footing with private persons, corporations or organizations, when it is fulfilling its legal obligation to act in the public interest.

[48] Nothing in subsection 22(2) states, or should be construed as implying, that the intent for authorizing discussions of some matters in private was to facilitate, or protect from disclosure and accountability, conduct that is illegal, or decisions or discussions that are made in bad faith or in breach of the standards of conduct and care to which the municipality is bound – in this case, conduct of councillors sitting as a council.

An article by Rick O'Connor, then solicitor for the regional municipality of Ottawa Carlton, titled Secret Meetings: Bad Faith published in the October 2000 edition of Municipal World reviewed judgments from Ontario in which the courts found decisions to meet in private constituted bad faith.[20]Mr. O'Connor concluded his article stating that these rulings show that the following acts or omissions by a municipality may result in a finding of bad faith:

- failing to provide notice of a council or committee meeting; - holding the meeting at an unusual, off-site location instead of City Hall; - failing to provide an agenda for the meeting; - using code names for municipal initiatives; - failing to provide access to a council or committee meeting; - failing to adhere to the open/closed meeting requirements of the Municipal Act; - failing to properly record the minutes of a meeting.

Summary

The following questions may be asked in determining whether a meeting will be held to be a meeting of council or a committee of council, as opposed to private discussions amongst persons who happen to be members of Council or one of its committees:

1. Are all members of the council or committee invited to attend? 2. Is the group dealing with matters within the jurisdiction of council or the committee? 3. Is there structured discussion? 4. Does the discussion promote the decision making process by materially moving along matters in the overall spectrum of council's or the committee's decisions?

If the answer to these questions is yes, then it is a meeting of Council which must be called and conducted in conformance with lawful procedures.