YOUNG ANDERSON
BARRISTERS & SOLICITORS

MEETINGS: SELECTED TOPICS

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I. INTRODUCTION

At the most fundamental level, the powers, duties, and functions of a municipality are to be exercised and performed by the elected municipal council, through the adoption of a resolution or bylaw at a duly constituted and held meeting. As a result, it is critical that municipal business be conducted at a validly constituted and conducted meeting.

In this paper, we discuss a number of issues relating to municipal meetings which could be the basis of a judicial challenge to municipal business, including public notice requirements, open meeting requirements, meeting procedure requirements, controlling inappropriate decorum at meetings, and electronic meeting requirements.

While, this paper expressly addresses issues relating to municipal meetings which could be the basis of a judicial challenge to municipal business, our comments apply equally to regional board meetings by virtue of the referenced *Community Charter* provisions being made applicable by the *Local Government Act* to Regional Districts.

II. PUBLIC NOTICE REQUIREMENTS

When it comes to municipal council meetings, ensuring that the public notice requirements for a validly held meeting are met is relatively straightforward.

For example, section 127(1) of the *Community Charter* simply requires that a municipal council make available to the public a schedule of the "date, time and place of regular council meetings" and give notice of the availability of the schedule in accordance with section 94 at least once a year.

However, under section 127(2) of the *Community Charter*, the notice requirements for special meetings imposes a further obligation on the municipal council. For special council meetings, the notice must be given at least 24 hours before the time of the meeting, by posting a copy at the regular council meeting place and at the public notice posting places identified in the applicable procedure bylaw, and leaving a copy for each council member at the place to which the member has directed notices be sent. In addition to setting out the date, time and place of the meeting, the notice must "describe in general terms the purpose of meeting".

Particular note should be made of the requirement under section 127(2) of the *Community Charter* for the notice of a special meeting to contain a general description of the purposes of a special meeting as the fulfilment of that requirement may be the subject of a judicial challenge.

The courts have declared zoning and official community plan bylaws to be invalid where the notice of public hearing for the bylaw failed to set out, in general terms, the purpose of the bylaw. The courts have done so on the basis that compliance with all aspects of the notice requirement is a statutory prerequisite to the valid adoption of the bylaw.

There is little doubt that the courts would likewise declare business conducted at a special meeting to be invalid where the notice of the special meeting failed to set out, in general terms, the purpose of that meeting. As a result, care should be taken when drafting the notice of a special meeting to ensure that the description of the purpose of the meeting is sufficiently detailed that a member of the public would be in a position to reasonably understand the nature of the matters to be addressed at the special meeting and, on that understanding, be able to reasonably determine whether to attend the meeting.

In light of the requirement under section 127(2) of the *Community Charter* for the notice of a special meeting to contain a general description of the purposes of a special meeting, we recommend that, wherever possible, the agenda for the meeting should be appended to the notice. By doing so, a municipality can significantly reduce the risk of not meeting the requirement to include a general description of the purposes of the meeting.

In addition, given the requirement under section 127(2) of the *Community Charter* for the notice of a special meeting to contain a general description of the purposes of a the meeting, new matters should not be added to the agenda for the meeting after the notice has been given unless the notice can be amended at least 24 hours prior to the start of the meeting, or all members of the municipal council are present at the meeting and they unanimously vote to add the new matter to the agenda and to waive the notice requirement for its addition to the agenda.

III. OPEN MEETING REQUIREMENTS

A. What Does "Open to the Public" Mean?

Section 89 of the *Community Charter* provides that all meetings of a municipal council must be "open to the public", except as provided in Division 3 of Part 4 of the *Community Charter*.

The courts have set aside the business of a municipality conducted at a meeting where it was established that the exterior doors to the municipal offices were locked, and the public could not access the room where the municipal council was meeting and conducting the business. In that case, the Court was satisfied that the meeting was not "open to the public"[1].

[1] *Marion Community Homes Corp. v. Kingston*, (1999), 7 M.P.L.R. (3d) 258 (Ont. S.C.J.)

What of circumstances where members of the public have free access to the place where the municipal council is meeting, but the capacity of that place is insufficient to accommodate all members of the public who wish to attend the meeting and observe the proceedings of council. Is that meeting of the municipal council “open to the public”?

The requirement that a meeting must be “open to the public” is capable of several interpretations. At the very least, it means that the public at large must not be excluded from the meeting. In addition, though, it could also mean that every member of the public wishing to attend the meeting must be able to attend the meeting.

There is no caselaw that directly considers the scope of the requirement that a municipal council meeting be open to the public. However, there is caselaw that considers the scope of the requirement that a courtroom be open to the public. In that context, the Supreme Court of Canada stated the following:

> At this point, however, I should like to make a number of caveats to the recognition of the importance of public access to the courts as a fundamental aspect of our democratic society. First of all, this recognition is not to be confused with, nor do I wish to be understood as affirming a right to be physically present in the courtroom. Circumstances may produce a shortage of physical space, such that individual members of the media and the public may be denied physical access to the courts. In such circumstances, those excluded may have to rely on those present to relay information about the proceedings.[2]

In other words, although The public at large has a right to attend, that does not mean every member of the public is entitled to be present.

In *London (City) v. RSJ Holdings Inc.*, the Supreme Court of Canada described the purpose of the requirement for municipal council meetings to be open to the public as follows:

> Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law.[3]

[2] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 S.C.R. 480, at para. 27
[3] [2007] 2 S.C.R. 588 at para. 38

Given that one of the fundamental purposes of both public access to the courts and public access to municipal council meetings is democratic legitimacy, it could be argued that, to the extent that the requirement for public access to the courts does not carry with it the right of the public to be physically present in a courtroom, the requirement for public access to a municipal council meeting also does not carry with it the right of the public to be physically present in the meeting room.

While the above argument is available to a municipality where the validity of a council meeting is being challenged on the basis of the meeting space being insufficient to allow all members of the public wishing to attend the meeting to physically be in attendance at the meeting, there is a risk that the courts would not apply the same standard to the municipal council as it would apply to itself.

In the circumstances, we recommend that, where a municipality is aware that a particular matter being considered by its council has garnered significant public interest, the municipality hold all meetings relating to the matter in a venue that is sufficiently sized such that all members of the public who wish to physically attend the meeting may do so. In our view, where the municipality has taken reasonable steps to accommodate the physical attendance of all interested members of the public at the meeting, but has not been able to find a venue that can accommodate all of those individuals being in attendance, the courts will be more likely to find that the municipality met the open meeting rule. In addition, in such circumstances, the courts will be more likely to find that the open meeting rule was met by the municipality where the public were able to observe the meeting electronically either at another location hosted by the municipality or from their own premises. The courts would likely view the live-streaming of the meeting as being a manner in which the municipality could ensure that the goals of the open meeting rule, of accountability and transparency in the democratic process, have been met by the municipality.

We note that our comments above relate to the requirement that a municipal council meeting be open to the public, and are not directed at the requirements of a statutory public hearing, which include the obligation to provide a reasonable opportunity to be heard to every person who believes their interest in property to be affected by the bylaw that is the subject of the hearing. In our view, that requirement may place a greater onus on municipalities to provide a physical space for the hearing that can accommodate all members of the public who wish to attend the hearing.

B. Procedure for Closing a Meeting to the Public

Section 92 of the *Community Charter* provides that, before holding a meeting or part of a meeting that is to be closed to the public, the municipal council must state, by resolution passed in a public meeting, the fact that the meeting or part is to be closed, and the basis under the applicable subsection of section 90 on which the meeting or part is to be closed.

To ensure the validity of closed meetings, and to ensure the confidentiality of information discussed at a closed meeting, municipalities must ensure that they follow the requirements of section 92 of the *Community Charter* to properly close the meeting to the public.

It should be noted that section 92 of the *Community Charter* requires that a municipal council include the "basis under the applicable subsection of section 90" of the *Community Charter* on which the meeting is being closed to the public in its resolution closing the meeting to the public. While it is common practice for municipal councils to simply set out in the resolution closing a meeting to the public the subsection of section 90 under which a meeting is being closed to the public, we recommend that the council also provide an explanation of why the subsection is applicable. The explanation may be brief, but should provide the public with sufficient information to assess whether the specified subsection reasonably applies.

As for the bases for closing a meeting to the public, we recommend that the resolution closing a meeting to the public include all bases on which the meeting may be closed to the public. While the British Columbia Supreme Court, in *Barnett v. Cariboo (Regional District)*, did not set aside a censure decision of the Regional Board where the resolution closing the meeting did not reference the subsection of section 90 of the *Community Charter* that would have applied to the censure decision (i.e., labour relations or other and employee relations), but did reference a subsection that applied to another agenda item, we do not recommend such a selective process. Indeed, even in that case, the Court commented that the Regional District's position was "disconcerting" and that it had only "technically" complied with the requirements of section 92 of the *Community Charter*[4].

C. Specific Matters Required to be at an Open Meeting

1. Censure

When it comes to censure and the requirements of the open meeting rule, it is important to specifically consider the nature of the matter being addressed through censure. While some matters being addressed through censure are capable of being addressed at a closed meeting, not all such matters are.

It is clear from the decision in *Barnett v. Cariboo (Regional District)* that the censure of a municipal council member for misconduct relating to an officer or employee of the municipality may be addressed at a closed meeting of the council. This is so because such censure is a matter that relates to labour relations or other and employee relations, which section 90(1)(d) of the *Community Charter* expressly authorizes to be addressed at a closed meeting.

That being said, censure of a municipal council member for misconduct relating to another council member would not fall within section 90(1)(d) of the *Community Charter*, as a council member is not an employee of the municipality. Indeed, a review of the other subsections of

[4] 2009 BCSC 471, at para. 34

section 90 indicates that such censure does not automatically fall within the scope of the matters for which a meeting may be closed to the public. If such a censure matter is to be addressed at a closed meeting, it will be necessary to find a subsection of section 90 that is reasonably engaged by the particular censure matter. For example, a breach of confidentiality would likely fall within the subsection of section 90 that applied to the original discussion of the confidential information at a closed meeting.

2. Remedial Action Requirements and Business Licence Suspension/Revocation

The imposition of remedial action requirements and the suspension or revocation of a business licence are matters that must be conducted at an open meeting of the municipal council. There is no basis under section 90 of the *Community Charter* on which such matters may be addressed at a closed meeting. This is consistent with the quasi-judicial nature of such decisions, requiring a heightened level of transparency and accountability.

The foregoing being said, to the extent that a municipal council requires legal advice when dealing with remedial action requirements or business licence matters, the council is entitled to receive that advice at a closed meeting in accordance with section 90(1)(i) of the *Community Charter*.

IV. MEETING PROCEDURE REQUIREMENTS

While failure to comply with a statutory meeting procedure may prove fatal to the validity of a municipal decision, the courts have taken a different approach to non-statutory meeting procedures. This approach is reflective of the fact that the Province has, through section 124 of the *Community Charter*, left it to each municipal council to establish its own procedures.

Section 124 of the *Community Charter* requires that every municipality establish, by bylaw, the general procedures to be followed by council and council committees in conducting their business. Such bylaws must:

- Establish rules of procedure for council meetings, including the manner by which resolutions may be passed and the manner by which bylaws may be adopted in accordance with Division 3 of Part 5 of the *Community Charter*;
- Establish rules of procedure for meetings of council committees;
- Provide for the taking of minutes of council meetings and council committee meetings, including requiring certification of those minutes;
- Provide for advance public notice respecting the time and date and, if applicable, the place of council committee meetings and establish the procedures for giving that notice;

- Identify places that are to be public notice posting places for the purposes of section 94 of the *Community Charter*;

- Establish the procedure for designating a person under section 130 of the *Community Charter*;

- Establish the first regular council meeting date referred to in section 125 (1) of the *Community Charter* as a day in the first 10 days of November following a general local election.

The courts have held that municipalities have broad discretion in the regulation of their own procedures, that it is not for the courts to dictate the manner in which municipalities manage their internal affairs, and that, in the absence of statutory obligation, or misconduct, the internal regulation of the affairs of a municipality is a matter for the municipality and for it alone.

In this context, there are a number of cases where the courts have held that the failure of a municipal council to observe its own procedures is only an irregularity and is not fatal to the decision made.

Notwithstanding the generosity of the courts with respect to failures to observe internal procedures, municipal councils should endeavour to comply with the procedural requirements set out in the applicable procedure bylaws.

V. CONTROLLING INAPPROPRIATE DECORUM AT MEETINGS

Inappropriate decorum during municipal proceedings has been raised before the courts as a basis for seeking an order declaring invalid municipal business conducted during those proceedings. While these court challenges have mainly been brought in the context of public hearings, there is room for such a challenge to be brought outside of that context. For example, where a matter being considered by the council at a meeting engages the right of an individual to be heard, the council's decision may be challenged on the basis that inappropriate decorum deprived the individual of that right. Such an argument could be made, for instance, where the council was reconsidering the refusal of a development permit by staff, and members of the public opposed to the issuance of the permit behaved at the meeting in a manner that could reasonably be construed as creating a hostile environment for the applicant on reconsideration.

Section 133 of the *Community Charter* provides the primary authority for addressing inappropriate decorum at a municipal council meeting. Section 133 provides that:

- If the person presiding at a council meeting considers that another person at the meeting is acting improperly, the person presiding may order that the person is expelled from the meeting; and,

- If a person who is expelled does not leave the meeting, a peace officer may enforce the expulsion order as if it were a court order.

There are a number of aspects to section 133 of the *Community Charter* that should be noted.

First, the power to expel a person is only available at council meetings. The power is not available at committee meetings, meetings of other municipal bodies, or public hearings held outside of a council meeting.

Second, the power to expel persons may only be exercised by the person presiding at the meeting.

Finally, the person presiding at the meeting may only expel another person if the presiding person considers the other person to be acting improperly. Of particular note is that the language of section 133 of the *Community Charter* is subjective; it specifically references the view of the presiding member. In other words, the Province has left it in the discretion of the presiding member to determine whether particular behaviour is improper. As a result, we expect the courts will provide significant deference to the presiding person's exercise of the discretion. That being said, if a court determines that the presiding person's exercise of discretion is unreasonable (i.e., that no reasonable person could have come to the same conclusion), the court will intervene. Generally speaking, the decision should not be made based on the sensitivities of the presiding member towards the person's conduct, but should be made based on an objective view of that conduct.

When considering whether to expel another person from a municipal council meeting, the presiding person should be measured in their response to improper conduct. The presiding member should immediately address any improper conduct when it first occurs by identifying the improper conduct and advising the person engaged in it that, if it continues, they will be expelled from the meeting. If the improper conduct continues, the presiding person should advise the person engaged in it that, if they persist in it notwithstanding having now been warned twice, they will be expelled from the meeting. If the improper conduct continues, the presiding officer should expel the person from the meeting.

Once a person has been expelled from the meeting, the presiding member should stand down the proceedings until the expelled person leaves. If the person refuses to leave the meeting, the presiding member should have staff contact the local police for their assistance in removing the expelled person from the meeting. Only after the expelled person has left the meeting, either on their own accord or with the assistance of the police, should the presiding member recommence the proceedings.

A question that arises quite often in the context of the power of the presiding person to expel a person from a municipal council meeting is whether the presiding person has the power to expel another council member. The language of section 133 of the *Community Charter* is quite broad; authorizing the expulsion of "another person" at the meeting, and does not include any express limitations. There does not appear to us to be any justification for reading down the

power of expulsion under section 133 to not apply to other council members. That being said, we caution that, on judicial review of a decision of a presiding person to expel another council member from a meeting, the courts will likely approach the matter differently from the expulsion of a member of the public. When it comes to the conduct of council members, the courts will likely require greater tolerance for the conduct of other council members given that they were elected to represent the public and their expulsion will directly affect the democratic process. In addition, before expelling another council member, the presiding person should provide the council member with several warnings that their conduct is improper and, if it persists, will result in expulsion.

All of the above focuses on the power to expel persons under section 133 of the *Community Charter*, which is limited to municipal council meetings and to a particular meeting. But, what about persistent improper conduct over multiple meetings and improper conduct at other municipal proceedings?

Support for a broader right to protect municipalities from disruptive conduct may exist in the incidental powers provision in section 114(4) of the *Community Charter*, which states that:

> A council has all necessary power to do anything necessary or conducive to the exercise or performance of any power, duty or function conferred on a council or municipality by this or any other enactment.

There are no court cases that consider the breadth of the power under section 114(4) of the *Community Charter* in this regard. However, there are two cases that, in our view, lend support to a broad interpretation of the section 114(4) power.

First, in *Port Coquitlam (City) v. Osberg*, the Court supported the right of a municipality to impose a ban on a member of the public's attendance over multiple municipal council and committee meetings[5]. Ms. Osberg had disrupted council and committee meetings by outbursts over several years resulting in an initial injunction not to attend at or interfere with council meetings until such time as the mayor ceased to hold office. After Ms. Osberg was found in contempt of court on several occasions, and after further abusive interruptions by her at committee meetings, the Court broadened the injunction to prohibit Ms. Osberg from entering city hall except to attend at the main reception desk. The Court stated that the city, for the benefit not only of the mayor and other civic officials, but also for the benefit of the public to whom they were responsible, had the right to protect civic government from the conduct engaged in by Ms. Osberg over a six-year period.

[5] [1998] B.C.J. No. 1005 (QL)

Second, in *Regina v. Brent Health Authority, ex parte Francis*, the English Court of Queen's Bench concluded that a statutory body had a common law power to prevent the public, or some part of it, from attending its meetings to avoid disorderly conduct or misbehaviour that had marked earlier meetings[6]. The Court characterized this as a power necessary for self-preservation.

One final word of caution, where a person attending municipal proceedings has a right to be heard, the municipality should be cautious in exercising any power to expel the person from the proceedings. The courts will strive to protect the person's right to be heard, and will likely only uphold their expulsion, and consequent deprivation of the right to be heard, in very clear cases.

VI. ELECTRONIC MEETING REQUIREMENTS

On June 1, 2021, the Province passed the *Municipal Affairs Statutes Amendments Act* ("Bill 10") to amend the *Community Charter*, S.B.C. 2003, c. 26, to broaden the powers of municipalities to use electronic or other communication facilities to conduct their business. The Province intended the broader powers created by Bill 10 to be available to be used in place of the temporary relaxation of the open meeting rule and the temporary powers to use electronic or other communication facilities for municipal business conferred on municipalities under Ministerial Order No. M192 ("Order M192"). Pursuant to Bill 10, municipalities are granted the authority to:

- Provide in their procedure bylaw for the conduct of meetings of Council and/or its committees, whether regular meetings or special meetings, by means of electronic or other communication facilities;
- Conduct a public hearing by means of electronic or other communication facilities; and,
- Conduct Board of Variance meetings by means of electronic or other communication facilities.

Order M192 expired on September 28, 2021, and Bill 10 came into force on September 29, 2021.

With the expiry of Order M192, the open meeting rule is once again in full force and effect; Bill 10 does not make any changes to the open meeting rule. Thus, as of September 29, 2021, the default rule that all meetings of a municipal council, committees of council, a municipal commission, a parcel tax roll review panel, the board of variance, an advisory body established by council, a body that under the *Community Charter* or another Act may exercise the powers of the municipality or council must be open to the public has been reinstated.

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[6] [1985] 1 All E.R. 74

In other words, the public must have in-person access to all such meetings unless the meeting can properly be closed to the public under section 90 of the *Community Charter*, the meeting is a council or committee meeting which is authorized by the applicable procedure bylaw to be held by means of electronic or other communication facilities, or the meeting relates to a public hearing or is of a board of variance and is authorized by the *Local Government Act* to be conducted by means of electronic or other communications facilities.

A. Council and Committee Meetings

With the coming into force of Bill 10, municipalities have the power to confer upon themselves, through an amendment to their procedure bylaw, the authority to conduct municipal council and committee meetings by means of electronic or other communication facilities.

To authorize municipal council and committee meetings to be held by means of electronic or other communication facilities, the procedure bylaw must:

- Authorize council and committee meetings to be conducted by means of electronic or other communication facilities;
- Provide for advance notice to be given to the public of the following:
    - That the meeting is to be conducted by means of electronic or other communication facilities;
    - The way in which the meeting is to be conducted by means of electronic or other communication facilities; and,
    - The place where the public may attend to hear, or watch and hear, the proceedings that are open to the public; and,
- Establish the procedures for giving the required notice to the public.

Where a municipal council or committee meeting is to be conducted by means of electronic or other communication facilities, the facilities must permit the participants to hear, or watch and hear, the meeting and, except for portions of the meeting that is closed to the public, the facilities must permit the public to hear, or watch and hear, the meeting.

With respect to the place where the public may attend to hear, or watch and hear, the proceedings that are open to the public, we note that this requirement is for a physical location to be provided by the municipality for such purposes. This does not necessarily require that the physical location be a single room sufficiently sized to accommodate all members of the public who want to attend in person. The place could be the municipal hall, with the public being directed to additional rooms if the main room set aside for the purposes of observing the proceedings becomes full.

B. Hybrid Council and Committee Meetings

Many municipalities have been discussing the potential use of “hybrid” meetings to conduct municipal business, at which some municipal council or committee members are physically present and some are participating virtually.

The *Community Charter* makes no provision for a “hybrid” meeting. That being said, a municipality could use its powers to hold municipal council and committee meetings by means of electronic or other communication facilities to effectively hold a “hybrid” meeting. Where a council or committee meeting is to be held by means of electronic or other communication facilities, there is nothing to prevent one or more of the council or committee members from being in-person at the place where the public may attend to hear, or watch and hear, the proceedings, and attending the meeting electronically from that place. Such a procedure would allow for those council or committee members, and members of the public, who do not wish to be in person in the same location to attend the meeting electronically, while also allowing those council or committee members, and members of the public, who wish to be in person in the same location to do so.

C. Public Hearings

With the coming into force of Bill 10, municipalities have the express authority (under section 465(1.1) of the *Local Government Act*) to conduct a public hearing by means of electronic or other communication facilities. Municipalities do not have to take any steps, by bylaw or otherwise, to confer this authority on themselves; this authority is statutorily conferred on them.

On and after September 29, 2021, all that is required for a municipality to conduct a public hearing by means of electronic or other communication facilities is that:

- In directing that a public hearing be held in relation to a proposed bylaw, the municipal council direct that the public hearing be conducted by means of electronic or other communication facilities;
- The electronic or other communication facilities enable the public hearing’s participants to hear, or watch and hear, each other; and,
- The notice of public hearing must state the way in which the hearing is to be conducted by means of electronic or other communication facilities.

It is imperative that the electronic or other communication facilities be available to every person who is entitled to participate in the public hearing.

D. Board of Variance Meetings

As with public hearings, with the coming into force of Bill 10, municipalities have the express authority (under sections 541(2) and 543(3) of the *Local Government Act*) to conduct a board of variance meeting by means of electronic or other communication facilities. Again, a municipality does not have to take any steps, by bylaw or otherwise, to confer this authority on itself; this authority is statutorily conferred on it.

On and after September 29, 2021, all that is required for a municipality to conduct a board of variance meeting by means of electronic or other communication facilities is that the notice of the meeting must state that the meeting is to be conducted by means of electronic or other communication facilities and the way in which the meeting is to be conducted by those means.

As the open meeting rule expressly applies to board of variance meetings, it is imperative that the electronic or other communication facilities be open to the public, unless the meeting can properly be closed to the public under section 90 of the *Community Charter*.

E. Meetings of all Other Bodies

The meetings of a municipal commission, a parcel tax roll review panel, an advisory body established by a municipal council, and a body that under the *Community Charter* or another Act that may exercise the powers of the municipality or council must be open to the public and must be conducted in-person in accordance with the open meeting rule. These meetings cannot be conducted by means of electronic or other communication facilities.

VII. CONCLUSION

In conclusion, it is fundamental to the validity of municipal business that it be conducted at a validly constituted and conducted meeting. In this paper, we have addressed a number of issues relating to municipal meetings which could be the basis of a judicial challenge to municipal business, including public notice requirements, open meeting requirements, meeting procedure requirements, controlling inappropriate decorum at meetings, and electronic meeting requirements.

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