

Council as an Employer
Traps, Perils and Tips



Overview

- **s.448 – Protection from Liability**
- **Governance – s. 224, 227 and Tips**
- **Harassment, Bill 132**
- **Local Harassment Case**
- **Traps**
- **Tips**

s.448 – Protection from Personal Liability

448. (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority. 2001, c. 25, s. 448 (1).

Liability for torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent. 2001, c. 25, s. 448 (2).

The Role of Council – Municipal Act

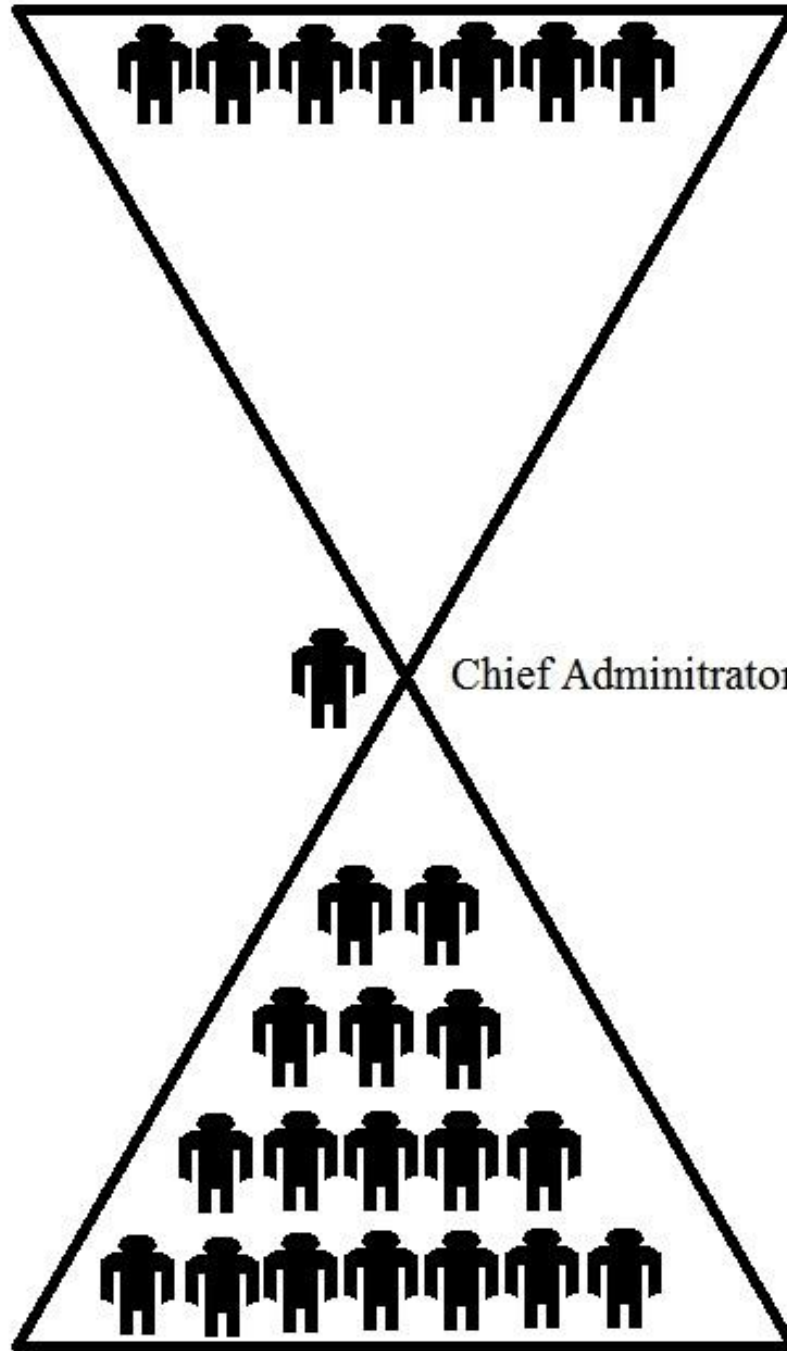
In the Municipal Act, the Role of Council is Defined:

s.224. It is the role of council,

- (a) to represent the public and to consider the well-being and interests of the municipality;
- (b) to develop and evaluate the policies and programs of the municipality;
- (c) to determine which services the municipality provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
- (d.1) to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality;
- (e) to maintain the financial integrity of the municipality; and
- (f) to carry out the duties of council under this or any other Act.

Who Does Council Direct?

- The Chief Administrator is the top employee of the corporation, but reports only to the Council.
- The Council has only 1 direct report, the Chief Administrator.
- Advice and Reports are provided to Council by many staff members, and this often results in Council believing that all senior staff (and in some cases all staff) report to them, but in reality only the CAO is responsible to Council for all matters that are before them.



City Council

Chief Administrator

Municipal Employees

How do Council and Administration Differ

- *“Councils and their administration have different roles within the municipality, but their roles have common goals and purposes. In general, it is the role of the elected council to represent the community and set the direction and policy for the municipality, and it is the role of staff to manage people and resources to achieve council’s vision.”* Municipal Affairs and Housing (MAH)

Council is **NOT** the Administration

Municipal administration – In the *Municipal Act*

s.227. It is the role of the officers and employees of the municipality,

(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any Act and other duties assigned by the municipality.

Who Directs Implementation of Council's Wishes?

- Only the Chief Administrator of a Municipality – i.e. C.A.O. or other single individual who is at the top of the organizational chart.



What about when Council does “Direct Staff”?

- *Council Resolutions often “Direct Staff” to take certain actions*
 - Regardless of how the resolution, motion or by-law is worded, legally, the Council is directing the Chief Administrator to ensure that whichever action is being directed gets done.

Administration Have Legislated Roles

- S.227 of the Municipal Act states:

It is the role of the officers and employees of the municipality,

(a) to implement council's decisions and establish administrative practices and procedures to carry out council's decisions;

(b) to undertake research and provide advice to council on the policies and programs of the municipality; and

(c) to carry out other duties required under this or any act and other duties assigned by the municipality.

Council Must Ensure Policies are Being Implemented

- The Ministry of Municipal Affairs and Housing states that:

“There is a fine line between council’s overall stewardship of the municipality and the administration’s management of day-to-day activities. Council monitors the implementation of its approved policies and programs, but the practical aspects of its implementation and administration are a staff responsibility.”

Council must collectively direct action

- Only Council, by resolution, motion or by-law can direct the Chief Administrator to take an action.
- Individual Councillors **cannot** direct the Chief Administrator or any Municipal Staff members to take an action.
- Council cannot, as mentioned before, direct staff below the Chief Administrator to take any action.
- Council can, and should request reports from various departments to ensure that policy decisions and directions are being implemented.

How do you oversee administration without administering?

- “Nose in, hands out”. In other words, inquire about matters at Council, seek reports, seek recommendations but do not direct and definitely do not participate in Municipal work
- Set goals – Strategic Plans, Asset Management Plans, etc.
- Establish policies on implementation of directives;
- Have staff report back to Council to ensure ongoing progress is being made in the implementation of Council directives.

How Can Staff be Protected From Liability for the “Direction” They’ve Been Given

- *S.448(1) of the Municipal Act*
 - *Protects employees from Liability if they were following standard practice and acting in good faith*
 - *Individual employees are not proper Defendants in claims which should really be against the municipality itself.*
 - *Nemmour v. Durdle [2015] O.J. 3074*

Nemmour v. Durdle

- Mr. Nemmour sued Mr. Tanner, the “Acting Director of Hostel Service, Municipality of Toronto” for the poor standard of services at City shelters (Durdle was a co-defendant who was a Salvation Army employee). Nemmour also complained that the City’s complaint process was too discretionary.
- Justice Myers concluded the lawsuit was frivolous and vexatious because it “cannot succeed”.
- Myers J stated that “If Mr. Nemmour actually has a claim for negligence, it is not against the executives of the City.” ... “He might be able to sue the City, or more likely, seek Judicial Review against it.”
- Myers J awarded costs against Nemmour.

Council Must Collectively Direct Action

- Only Council, by resolution, motion or by-law can direct the Chief Administrator to take an action.
- Individual Councillors **cannot** direct the Chief Administrator to take an action.
- Council cannot, as mentioned before, direct staff below the Chief Administrator to take any action,
 - When they do so, what they are really doing is directing the CAO to direct staff below him or her to take that action.

Liability for Council's Actions

- The Municipal Corporation is liable for a Council's actions.
- When a CAO was wrongfully dismissed by a Council in British Columbia, the CAO successfully sued the Municipality, which was liable for damages. *DeGagne v. Williams Lake (City)*, [2015] B.C.J. No. 994

DeGagne v. Williams Lake (City)

- DeGagne was interviewed and offered employment with City of Williams Lake as their CAO
- DeGagne's contract had that he could be terminated with 1 month's pay in lieu of notice during the 6 months probationary period or 6 months' pay in lieu of notice notice during his first year of employment
- DeGagne was terminated before his first day, but after he signed his contract
- Court ruled DeGagne was entitled to 6 months pay in lieu of notice as it was not terminated "during the probationary period"

DeGagne Sued for Defamation and Punitive, Special and Aggravated Damages

- The Court found that the actions of the Mayor and Council in dismissing DeGagne had not reached the requisite threshold for punitive, special or aggravated damages, but that they could have. Had they reached the requisite threshold, the Municipal Corporation would have been liable to cover those exceptional costs.
- The Court determined DeGagne had not been defamed by the Mayor in disseminating an anonymous letter the Mayor had received about DeGagne to senior staff for their consideration.

Workplace Harassment and Bill 132

- Bill 132 furthered changes to the rules about workplace violence, harassment and sexual harassment that started with the Bill 168 amendments to OHSA.
- It required policies be compliant as of September 8, 2016
- Many municipalities are not compliant yet
- This should be a major priority for Chief Administrators

Workplace Harassment and Bill 132

- Bill 132 amended the OHSA definition of "workplace harassment" is being expanded to include:
- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
- (b) workplace sexual harassment.
- NOTE that the changes also specifically address "coaching and supervising" by stating that "reasonable action" taken by an employer or supervisor relating to the management and direction of workers or the workplace is *not* workplace harassment.

Workplace Harassment and Bill 132

- "Workplace sexual harassment" is now defined in the legislation to mean:
- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expressed, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
- (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome. This is similar to the definitions in the Ontario Human Rights Code.

Workplace Harassment and Bill 132

- Employers have to establish written policies setting out how they will respond to harassment and sexual harassment in the workplace.
- Employers must review this program "at least annually" and the program must:
 - (a) include procedures for workers to report incidents of workplace harassment to a person other than the employer, or the supervisor if the employer or the supervisor is the harasser;
 - (b) set out how incidents or complaints of workplace harassment will be investigated and dealt with;

Workplace Harassment and Bill 132

- (c) confirm that information in the complaint and investigation (including identifying information) will be confidential and not be disclosed except for the purposes of investigating or taking corrective action or as otherwise required by law; and
- (d) set out how a worker who has allegedly experienced workplace harassment and the alleged harasser (if he or she is also a worker for the employer) will be informed of the results of the investigation and of any corrective action that has been taken.

Workplace Harassment and Bill 132

- The OHSA now requires employers to investigate incidents and complaints of harassment in a manner that is "appropriate to the circumstances" and to report back on the outcome of that investigation to the complainant
- There is a significant emphasis on investigations and ensuring they are conducted appropriately – there does appear to be a push toward using external third party investigators rather than internal investigations

Workplace Harassment and Bill 132

- Employers must provide training to Council and their Employees with respect to the new workplace harassment policy and program.
- The Ministry of Labour now has authority to order an employer to have an "impartial person possessing such knowledge, experience or qualifications as are specified by the inspector" conduct an investigation into allegations of workplace harassment and provide a written report of his or her findings. The impartial investigation is at the employer's expense.
 - These investigations are expensive and often complex and lengthy.

Workplace Harassment and Bill 132

- A thorough Municipal Workplace Harassment Policy should cover all possible scenarios, including:
 - employees harassing fellow employees,
 - managers harassing employees,
 - employees harassing managers,
 - the Chief Administrator harassing managers or employees,
 - employees or managers harassing the Chief Administrator and even
 - Councillors harassing managers, employees, or the Chief Administrator.

Bill 132 Cont'd

- Any Harassment Policy must set out who to report to if it is a supervisor who is accused of harassing employees (required under Bill 132)
- We recommend:
 - Municipal Policies should also include who to report to if the Chief Administrator is accused of harassing employees
 - Municipal Policies should also include who to report to if the Chief Administrator is being harassed and especially if the harasser is the Mayor, a Councillor or multiple Councillors.
 - Municipalities can hire third party investigators or can come to agreements with neighbouring municipalities to investigate complaints when they involve Councillors or the Chief Administrator being accused of harassment. Like Mutual Aid for Harassment Complaints.

Consequences of Non-Compliance

- The OHSA sets out MAXIMUM penalties for failure to comply with the Act or an Order of an inspector, Director or Minister. These include:
- Fines to individuals of up to \$25,000 or imprisonment for a term of up to 12 months, or both; or
- For Corporations (Read “Municipalities”), fines of up to \$500,000
- CAOs Keep in mind that Municipal Employees are YOUR Employees. YOU have an obligation to protect your staff from Harassment.

Councillors Do Occasionally Harass Staff

- A Zone 7 municipality has gone through a harassment issue where the CAO was being harassed. Interestingly, a spouse of one of the Councillors filed a harassment complaint against the CAO, and the CAO filed a harassment complaint against the spouse and the Councillor. (the spouse was the Chair of a Municipal Committee (SPIC)).
- The spouse had been requesting special treatment from the Mayor and CAO with respect to significant tax arrears on their home
- The Mayor and CAO refused to give special treatment to the Councillor and spouse, which resulting in the harassment complaint.

Local Harassment Case Cont'd

- The municipality retained a Third Party conduct an investigation which concluded that the CAO had been harassed
- In addition to the significant costs of the investigation, the Municipality was liable for the CAO's legal costs in defending against the harassment complaint by the spouse.
- In a separate (but related) Superior Court proceeding involving the same parties, the spouse and the Councillor were Ordered to pay costs of the Municipality for that proceeding.
- Investigation was wrapped up with Council Resolution

REGULAR COUNCIL MEETING

RESOLUTION

Tuesday, August 9, 2016

Resolution # RC16174	Meeting Order: 12
Moved by: [REDACTED]	Seconded by: [REDACTED]

WHEREAS [REDACTED] and [REDACTED] filed a complaint to Mayor and Council against CAO [REDACTED] with various allegations on November 12, 2015;

AND WHEREAS a complaint of harassment was filed against Councillor [REDACTED] on November 14, 2015;

AND WHEREAS a complaint of harassment was filed against [REDACTED] on November 14, 2015;

AND WHEREAS Norpro Security and Investigations was retained by the Municipality to investigate and provide findings on all of the above noted complaints;

AND WHEREAS Norpro Security and Investigations conducted an investigation by reviewing many documents, policies and pieces of correspondence and by interviewing or attempting to interview 17 witnesses ([REDACTED], [REDACTED] and [REDACTED] from the Ministry of Municipal Affairs and Housing all refused to interview);

AND WHEREAS Norpro Security found that there was ample evidence that [REDACTED] Councillor [REDACTED] did in fact harass CAO [REDACTED] in an effort to obtain a personal benefit to avoid paying municipal taxes or avoid enforcement of their municipal tax arrears;

AND WHEREAS Norpro Security reported that [REDACTED] and Councillor [REDACTED] did not participate in the investigation and failed to provide any evidence or information to substantiate or provide specifics of their complaint against CAO [REDACTED];

AND WHEREAS Norpro Security found that there was no evidence to support the [REDACTED]'s complaints against [REDACTED] and the complaints were therefore found to be unsubstantiated;

AND WHEREAS the investigation revealed harassment by the [REDACTED] against other members of municipal staff;

REGULAR COUNCIL MEETING

RESOLUTION

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AND WHEREAS the investigation revealed that [REDACTED] manipulated his position as Chair of the Strategic Plan Implementation Committee in order to obtain information unethically and improperly to obtain information for his own personal use to create a job for himself to repair or rebuild the [REDACTED];

AND WHEREAS the investigator concluded that Councillor [REDACTED] failed to declare a conflict of interest with respect to meetings on November 30, 2015 and December 10, 2015 in which enforcement of her tax arrears and the above noted complaints were discussed and that Councillor [REDACTED] ought not have participated in these specific meetings that it may have put her in an obvious conflict of interest;

AND WHEREAS [REDACTED] and Councillor [REDACTED] commenced an application in the Superior Court of Justice against the Municipality in an apparent attempt to continue their harassment of CAO [REDACTED] and other members of the Municipality;

AND WHEREAS the application was withdrawn without any evidence being put forward by [REDACTED] and Councillor [REDACTED];

AND WHEREAS the Municipality, as a result of the actions of Councillor [REDACTED] and [REDACTED] has had to incur significant expenses and dedicate considerable resources in dealing with and responding to their misconduct which expenses would not have been incurred had Councillor [REDACTED] and [REDACTED] complied with their obligations pursuant to the *Municipal Act, 2001*, the *Municipal Conflict of Interest Act*, the *Occupational Health and Safety Act* and the *Municipal Code of Conduct*;

AND WHEREAS Council takes very seriously its legal obligations to provide a workplace free from harassment and will not tolerate workplace harassment of any kind;

AND WHEREAS Council is determined and duty bound to protect its employees from this established pattern of harassment by Councillor [REDACTED] and [REDACTED];

AND WHEREAS Council has an obligation to protect and prevent unnecessary expenditures of public funds;

AND WHEREAS Council has found that Councillor [REDACTED] has acted in breach of her oath as a Councillor and against the best interests of [REDACTED];

RESOLUTION

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NOWTHEREFORE BE IT RESOLVED that the Council of the Corporation of the Municipality of Wawa does hereby enact the following:

1. Apart from during Council Meetings, Councillor [REDACTED] is to communicate with municipal staff solely by email to an email address to be provided. No other form of communication shall be permitted nor responded to; and
2. Councillor [REDACTED] is to immediately return her keys and key FOB to the municipal offices; and
3. Councillor [REDACTED] is not to access the municipal offices except to attend at the Front Desk to pick up her Council packages or make bill payments and to attend Council Chambers via the public entrance; and
4. Councillor [REDACTED] is not to enter the interior of the municipal offices for any purpose without prior authorization from Council; and
5. To carry out her role as a Councillor, Councillor [REDACTED] is permitted to attend all Council meetings, Policy Meetings, Corporate Planning Meetings and any special meetings of Council but will not be permitted to travel on municipal business and be reimbursed by the Municipality for any expenses incurred; and
6. Councillor [REDACTED] is hereby removed from all committees that she has previously been appointed to; and
7. Councillor [REDACTED] will not act as Deputy Mayor; and
8. Councillor [REDACTED] is to cease all harassing behaviour against CAO, [REDACTED] forthwith; and
9. [REDACTED] is to cease all harassing behaviour against CAO, [REDACTED] forthwith; and
10. [REDACTED] is hereby removed as Chair of the Strategic Plan Implementation Committee and will not be a member of that committee or any other committee with the Municipality of Wawa; and

RESOLUTION

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11. All communication between [REDACTED] and the Municipality must be solely by email to an email address to be provided. No other form of communication shall be permitted nor responded to; and
12. [REDACTED] shall not have any direct or indirect communication with [REDACTED] and
13. [REDACTED] shall immediately cease holding himself out as in any way representing the Municipality.

	MAYOR AND COUNCIL	YES	NO
<input checked="" type="checkbox"/> CARRIED	[REDACTED]		
<input type="checkbox"/> DEFEATED	[REDACTED]		
<input type="checkbox"/> TABLED	[REDACTED]		
<input type="checkbox"/> RECORDED VOTE (SEE RIGHT)	[REDACTED]		
<input type="checkbox"/> PECUNIARY INTEREST DECLARED	[REDACTED]		
<input type="checkbox"/> WITHDRAWN	[REDACTED]		

MAYOR AND COUNCIL			
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

TRAPS!

- The CAO is the Employer and could be personally responsible for harassment against staff
- Harassment by Council MAY be seen as constructive dismissal
- Demeaning comments/actions by a Councillor toward staff could be the foundation of a defamation action, both constructive dismissal and defamation could result in liabilities by the Municipality
- Harassment would NOT be protected conduct pursuant to s.448
- Failure to ensure or recommend compliance with Bill 132 may not be protected by s.448

TIPS!

- Due Dilligence would be a defence to a MOL Prosecution pursuant to OHSA
- CAO should be reporting to Council on need for compliance with Bill 132
- CAO should advise Council about their role as employer and potential Municipal liabilities in this regard
- Confront bullying early. The message that the behaviour is unacceptable must come from the top (CAO)
- Support staff concerns
- Deal with problems in private – use “I” statements

TIPS!

- I am disappointed with the working relationship with staff. We come to work and intend to do the best we can but demeaning remarks in public are disheartening and demoralizing. It damages morale and further could be seen as harassment which could incur damages against the Municipality. What can we do to work better together?
- Follow up with an email confirming the unacceptable behaviour
- “You sound upset, what happened?”
- “I will look into your concerns. I would like to set up an appointment to discuss roles of Council and staff so we can work together to meet our responsibilities.”

TIPS!

- Code of Conduct – ensure it has clear requirements regarding acceptable and unacceptable conduct. Train staff and Council
- Implement conflict resolution strategies before conflicts arise including involving third parties where there are relationship/role/working relationship conflicts.
- Highlight trust/teamwork problems that exist and require work to resolve
- Consider using a third party to help identify issues/behaviour that needs to start/stop/change
- Establish Roles and Responsibilities

TIPS!

- Establish a process for setting priorities, planning and budgeting
- Teambuilding for staff and separately for Council
- Then get together to discuss and work productively
- Develop action plans and follow up dates
- Treat complaints seriously and promptly
- Encourage a respectful workplace
- Do not ignore problems
- When in doubt, seek advice – from peers, AMCTO and legal

Q&A



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