

October 9, 2018

REFERENCE NO:

125928-0004

Attention: Yann Boissonneault
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Dear Yann:

Re: The Exchange Group Report and Legal Implications

PLEASE REPLY TO:

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We were engaged to request the review of the employment and activities of the former Chief Administrative Officer ("C.A.O.") for the Rural Municipality of Reynolds (the "Municipality"). By resolution, the Council of the Municipality hired The Exchange Group to investigate several concerns raised by more than a few council members. This opinion provides an overview of the law relating to C.A.O.'s and their duties and provides legal commentary on the findings of The Exchange Group analysis.

In Manitoba, the *Municipal Act Part 4* sets out the appointment, duties and responsibilities of a C.A.O.

**PART 4
CHIEF ADMINISTRATIVE OFFICER, DESIGNATED OFFICERS AND CODE
OF CONDUCT FOR EMPLOYEES**

CHIEF ADMINISTRATIVE OFFICER

Establishment of position of C.A.O.

125(1) Every council must establish by by-law the position of chief administrative officer and must appoint a person to the position.

Majority of number of members required

125(2) The appointment of a person as chief administrative officer and any suspension or revocation of the appointment must be approved by a majority of the number of members comprising the council.

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C.A.O. entitlement in certain circumstances

126 A chief administrative officer whose appointment is revoked without cause is, subject to any written agreement between the council and the officer, entitled to reasonable notice or to compensation instead of reasonable notice.

C.A.O.'s responsibilities

127(1) The chief administrative officer

- (a) is the administrative head of the municipality;
- (b) is responsible for ensuring that the policies and programs of the municipality are implemented;
- (c) is responsible for advising and informing the council on the operation and affairs of the municipality;
- (d) except as the council may decide otherwise, is responsible for the management and supervision of the employees of the municipality;
- (e) carries out the powers, duties and functions assigned to a chief administrative officer by the council or by this or any other Act; and
- (f) must notify the council if money of the municipality is spent or invested contrary to a by-law or resolution or this or any other Act.

C.A.O.'s administrative duties

127(2) The chief administrative officer must ensure that

- (a) the minutes of every council meeting are made without note or comment;
- (b) the by-laws and minutes of council meetings and all other records and books of account of the municipality are kept safe and in accordance with Division 1 (Retention and Disposition of Municipal Records) of Part 9;
- (c) the revenues of the municipality are collected;

- (d) money belonging to or held by the municipality is deposited in the bank, credit union, caisse populaire, or trust corporation designated by the council;
- (e) the accounts for authorized expenditures of the municipality are paid;
- (f) accurate records and books of account are kept of the financial affairs of the municipality; and
- (g) any information requested of the municipality by the minister is provided within a reasonable time.

C.A.O. duties re council committees

127(3) Except as the council may otherwise decide, the chief administrative officer must carry out, with necessary modifications, the duties referred to under in subsection (2) in respect of council committees.

The Core duties of a C.A.O. are generally described as follows:

1. Promote the Municipality's Mission and Values.
2. As a member of the Corporate Leadership Team, participate in Corporate Planning and Policy Development.
3. Plan, organize, and manage the C.A.O.'s Office.
4. Establish and maintain an effective working relationship with staff, administration, members of Council, and the public.
5. Undertake strategic and business planning initiatives and other studies to improve organizational efficiency and productivity as required.
6. Recruit select and train staff.
7. Prepare annual budget; control expenditures, optimize various revenue sources and ensure cost effective operations are implemented and maximized.
8. Maintain a high profile and public relations function in the community and province demonstrating a personal commitment to Municipal values and Guiding Beliefs.

9. Serve as an effective liaison with Community Organizations and Provincial and Local Governments.
10. Maintain a constant awareness of new trends and developments in the municipal leadership field.
11. Ensure workplace health & safety and perform two recorded inspections annually.
12. Demonstrate strong self-management skills and further personal development.
13. Undertake performance management reviews for direct reports at least annually (or more often as required).
14. Complete general administrative (special) projects assigned.

RESPONSIBILITIES LINKED TO THE MUNICIPALITY'S STRATEGIC PLAN

Use the strategic outcomes, goals and strategies validated by Council this year. Examples include:

1. Cultivate economic prosperity - Build a strong foundation to support sustainable growth
2. Cultivate an historic, creative, and active community
3. Cultivate a Green Community - Promote a sustainable community
4. Cultivate Excellence in Government
5. Cultivate Sustainable Infrastructure and Services
6. Cultivate a Safe, Healthy and Inclusive Community
7. Collaborate with regional partners
8. Develop organizational capacity and maintain fiscal responsibility

Council relies on staff members to advise on policy matters. This is particularly so for the C.A.O. The C.A.O. is the conduit through which this advice flows to Council. The

C.A.O. might also need to provide councillors with advice they would rather not hear. In these cases, the C.A.O. needs to ensure this advice is provided appropriately. For all these purposes it is imperative that the C.A.O. remain neutral and loyal to all council members and the municipality.

In most instances the C.A.O. is the only employee of council. The concept of a "sole employee" allows council to provide instructions to that one employee and expect that he or she will carry out its instructions. The C.A.O.'s job is to ensure that the employee's carries out the will of council efficiently. This provides an important accountability link between council and their C.A.O.

In some cases, a C.A.O. may develop a cozy relationship with one or more councillors or members of the public. This has the effect of shutting the full council out of the decision-making process and preferring one member of the public's interests over council's. It also violates the principle that the C.A.O. works for council, not for individual councillors.

The C.A.O.'s position in the public service can be precarious. He or she must carry out the instructions of council in a loyal and conscientious manner. Experienced C.A.O.'s will remind both staff and councillors that staff members need to avoid favouritism or even the appearance of favouritism. Whatever their differences in experience and abilities, all councillors should be treated equally by staff. Most successful C.A.O.'s promote a formal relationship between municipal staff and elected representatives, especially during public meetings or business dealings. **It is also essential to treat council as a collective decision-making body, not as a collection of individuals. Likewise, C.A.O's are not hired to play a political role.** They are paid to research policy issues, to give council their best judgment, and to accept and implement effectively whatever council decides, even if it is something staff did not recommend – especially if it is something staff did not recommend.

C.A.O's must work diligently to prevent discordant positions among council members. There are many reasons councils should discourage acrimonious debate and personal attacks. It looks bad for elected representatives. The public does not want to see municipal officials air their grievances with one another in a public forum. They expect them to do the job they were hired or elected to do.

Municipal government operates in a political arena, with all that that implies. A councillor may properly accuse staff of being incorrect, lacking in research or creativity, being insensitive to community concerns, or being too slow to deal with an issue. Staff may not like it, but they have broad shoulders and it is the right of the democratically elected representative to say such things if they are warranted.

A C.A.O. must play a strong leadership role, regardless of the size of the local government they are administering. In his or her capacity as head of the administration, the C.A.O. directs a team of department heads, supervisors, technicians and support staff to manage the affairs of the municipality and to deliver services. In smaller municipalities, the C.A.O. may take on other roles or functions. The important point to be noted is that the C.A.O. leads the administration and is ultimately the C.A.O. who is accountable to the council for the administration and how it performs.

In addition to the standard duties and obligations, the C.A.O is an officer of the corporation and is also a fiduciary which has significant responsibilities. A C.A.O as administrative head of the municipality is an officer of the corporation. As such a C.A.O. owes to the municipality and municipal council a high degree of honesty, discreteness and impartiality. Canadian Courts have confirmed this fiduciary duty is owed by C.A.O.'s. As a fiduciary of the municipality there are extraordinary responsibilities of utmost good faith, honesty, discreteness and impartiality. A fiduciary is a person who holds a legal or ethical relationship of trust with one or more other parties (person or group of persons). It is someone who has undertaken to act for and on behalf of another in circumstances which give rise to a relationship of trust and confidence. A fiduciary's duty is the highest standard of care in equity or law. A fiduciary is expected to be loyal to the person or persons to whom they owe a duty, there must be no conflict of duty.

McInerney v. MacDonald, [1992] 2 SCR 138, 1992 CanLII 57 (SCC)

The onus is upon the C.A.O. to supply council with information that was reasonable, complete and sufficient, for council to make informed decisions in the execution of its responsibilities and duties. The C.A.O. has the general standards of loyalty, good faith (to all of council) and avoidance of a conflict of duty and self-interest.

In Ottawa (City) v. Letourneau, 2005 CanLII 1407 (ON SC),

In Ottawa (City) v. Letourneau, 2005 CanLII 1407 (ON SC), Caputo J. outlines the fiduciary responsibilities of a C.A.O.

[163] In addition to the former Municipal Act, By-law No. 41-74 and the Declaration of Office, Letourneau was governed by the three main duties imposed on professional persons within the context of fiduciary relationships: (a) the duty of full disclosure, (b) the duty to maintain all confidences, and (c) the duty to avoid situations where a conflict of interest

arises which may undermine the professional person's obligation to act in the beneficiary's best interest.

The Honourable Mr. Justice Horace Krever & Marion Randall Lewis, "Fiduciary Obligations and the Professions" in *Fiduciary Duties: Special Lectures of the Law Society of Upper Canada 1990* (Scarborough: Thomson Professional Publishing Canada, 1991) 279 at 282.

Municipal officers should conduct themselves with the same honesty, discreteness and impartiality as is supposed to characterize the acts of those entrusted with judicial duties.

Kovinic v. Niagara Falls (City), supra at para. 58.

[165] As C.A.O., the onus was on Letourneau to ensure that Nepean Council was supplied with information that was reasonable, complete and sufficient, in order for Council to make informed decisions in the execution of its responsibilities and duties.

Bulley v. Cape Breton (Regional Municipality), [2001] N.S.J. No. 298 at para. 40 (S.C.)

[166] As a fiduciary, Letourneau was subject to the general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. Letourneau was precluded from obtaining for himself, either secretly or without the approval of the municipal corporation, any property belonging to the municipality.

Canadian Aero Service Ltd. v. O'Malley, supra at 381-382.

[167] There is a very high standard on public officials to conduct official business in an irreproachable manner. Conflicts of interest are serious matters of principle in the conduct of municipal affairs. Consequently, the requirements of the law must be observed both as to the particular matter and also for reasons of public confidence in the administration of municipal government. The legal standard is the objective standard of a reasonable person in the place and circumstances of the respondent.

Sheehan v. Hart, [1993] O.J. No. 1726 (Gen. Div.) at para. 11.

[160] Letourneau owed a fiduciary duty to the municipal corporation as he was an "officer" of the municipal corporation according to Part VI of the former Municipal Act. A municipal officer is one who holds a permanent position of responsibility with definite rights and duties prescribed by statute or by-law. As

distinguished from a servant employed by a municipality, an officer has, in the performance of his or her duties, some discretionary authority and has a responsibility to perform vital duties of the corporation; a mere servant has only a duty to obey orders.

Rogers, at para. 54.1; Re Board of Education for City of Toronto & Doughty, 1934 CanLII 90 (ON SC), [1935] 1 D.L.R. 290 at 292-93.

Application of the law to the facts determined by The Exchange Group

General

Fundamental failure of the core duties of a C.A.O.

There was considerable concern and questions raised by several Council members about the basic skill set and organization of the former C.A.O. In a performance evaluation completed by Council, 58% of comments in the survey revealed either poor performance or needed improvement. Council was sufficiently concerned with the delay in getting things done, with the disorganization and the complaints of the C.A.O. that they hired Roger Bouvier. Mr. Bouvier is a subject matter expert in Manitoba on Chief Administrative Officer obligations and duties. The Exchange Group Report Part A summarizes the Bouvier report and Council had cause for concern with the performance of their C.A.O.

Mr. Bouvier confirmed in his report there was poor organization, poorly organized resolutions, a lack of information and general disorganization of the meetings. **The Exchange Group Report Part A, Section 6 i through ix.** Having seen limited progress following the 2015 report Council rehired Mr. Bouvier in 2016. Mr. Bouvier returned and set 31 goals. **The Exchange Group Report Part A Section 8**

Several Council Members reported that they knew that the former C.A.O.:

1. would fail to provide information,
2. would provide misinformation,
3. would be unresponsive to Council's request,
4. would pit one Counsel Member against the other
5. Because of her personal views would frustrate the plans of the Council and prevent proper strategic plans of Council.

The Exchange Group Report Part A Section 7, a through h.

6. Council complained that financial information was not presented properly
7. Some Council Members were concerned with the Waste Management financial records. When challenged the former C.A.O. wrote a provocative and self-serving resignation.

The Exchange Group Report Part A Section 14

8. Council repeatedly denied a salary increase to the former C.A.O. primarily related to poor performance.

The Exchange Group Report Part A Section 15 to 25

Overtime, Sick and Vacation time and return from Vacation. **The Exchange Group Report Section B, C, D and G.**

Council had expressed concern on the overtime that the former C.A.O. was accumulating. It is unclear why such overtime was required. **The Exchange Group Report Part A Section 7.** Two matters arise from the report. First, it is unclear how the former C.A.O. had time to work on other outside matters and required overtime to work her C.A.O. position with the Municipality. Secondly, the current C.A.O. has nominal overtime.

Council mandated that the former C.A.O. take holiday time to reduce the financial obligations of the Municipality. Upon her return, the former C.A.O. publicly exposed her concerns regarding the interim C.A.O. and the Reeve. **The Exchange Group Report Part I, Items 110 to 115.** The accusations appear to be unfounded. These grievances, real or perceived, should not have been put in a public meeting, on a regular council agenda. They should have been in camera and dealt with by the Personnel Committee. This, plus the many other concerns raised by Council, breached the C.A.O.'s duty of loyalty to Council.

Release of information to 3rd parties The Exchange Group Report Section G

The Exchange Group Report **Section G items 79 to 101** sets out several practices not in keeping with a C.A.O and their duties to council. Releasing agenda's and documents prior to council review is simply unacceptable and breaches the C.A.O's duty to council. Of even more concern is the information contained potential in camera and personnel information. The information is repeatedly release to one person or group of persons. It appears as if the former C.A.O. had forged a "cozy" relationship with the ratepayer. This clearly breaches the former C.A.O's fiduciary duties.

Instructing an employee to lie to Council
The Exchange Group Report Section H. Items 102 to 109.

The instruction to an employee to lie to Council flagrantly breached the former C.A.O.'s fiduciary duties. The position of a C.A.O is one of trust. Instructing an employee on how to manipulate Council is a very serious offence and primary grounds for dismissal.

Hiring and dealing with the Building Inspector
The Exchange Group Report Section K Items 140 to 167

Sections 131.1(1) through 131.1(2) of the Municipal Act prescribe that municipalities shall pass an employee code of conduct. No employee code of conduct was passed. The Municipal Act however mandates that an employee (including a C.A.O.) must avoid advancing the private interests of another person.

Conflict of Interest

EMPLOYEE CODE OF CONDUCT

Employee code of conduct:

131.1(1) A council must establish a code of conduct for employees of the municipality that includes conflict of interest rules.

Content: conflict of interest rules

131.1(2) The conflict of interest rules must

(a) set out the types of conduct that are prohibited, which must include prohibiting an employee from

- (i) using information that is obtained as a result of his or her employment and that is not available to the public to further, or seek to further, his or her private interests or those of his or her dependants, or to seek to improperly further another person's private interests, or
- (ii) using his or her position to seek to influence a decision of another person so as to further the employee's private interests or those of his or her dependants or to improperly further another person's private interests; and

(b) specify the procedure an employee is to follow if the employee suspects that he or she may be in a conflict of interest and the procedure for resolving a conflict.

The actions of the former C.A.O. of participating in the meeting involving her partner, informing Council regarding her partner's qualifications was a clear conflict of interest. If a code had of been drafted this unfortunate incident may have been avoided. Mr. Bouvier advises that he found the actions of the former C.A.O. as wanting.

The Exchange Group Report Sections L, M, O, and P

Multiple concerns were raised by Council regarding the C.A.O. regarding various commissions and The Exchange Group Report sets out many concerns respecting how the former C.A.O. dealt with the Recreation Commission and the Waste Management Commission. Certain pay structures were confusing and unclear to Council and to the commissions.

Refusing to be responsible for the Public Works employee is a serious breach of the C.A.O's duties.

Requesting Council to inspect roads is a very unusual request of a C.A.O. Council Members are not staff members. CouncilMembers may or may not know of what is required for road maintenance and repair.

Authorizing the construction of a road prior to Council approval is a significant breach of the C.A.O's duties and authority.

The position of a C.A.O. and their fiduciary duties cannot be overstated. Fiduciaries are held to a very high standard and in almost every category the former C.A.O. has failed to meet the standard. These failures lead to serious and appropriate consequences for the former C.A.O.

Yours truly,

DD WEST LLP

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