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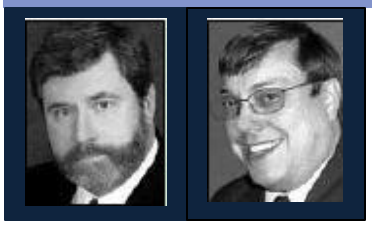

A house divided

by Steve Bauld and Kevin McGuinness

Municipalities are a kind of corporation. It is therefore interesting to compare the responsibilities imposed upon the directors and officers of a business corporation with those that are imposed upon the city council and staff of a municipality. In the case of the former, subsection 134(1) of the Ontario *Business Corporations Act* provides that every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,

> *(a) act honestly and in good faith with a view to the best interests of the corporation; and*
> *(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*

This, we would submit, is the same standard as should guide both councillors and municipal staff. They are there to represent and to further the interests of the municipality as a collective entity. They are not there to represent or assist local business, local workers, the ward or other bailiwick by which they were elected or in which they reside, or any other person or entity, or the special interest group or cause of the moment, save and except that they may do so in a manner consistent with these fundamental duties to the municipal corporation for which they serve. It is particularly critical that the exclusivity of staff and council responsibilities be made both express and manifest in relation to the purchasing function. While the directors and officers of a corporation cannot ignore the legal rights of the persons with whom a business corporation deals, the law is quite clear that when the foregoing duties are said to be owed to the "corporation" by that is meant the shareholders of the corporation from time to time. Thus, in the case of a business corporation, there is an undivided duty of loyalty to the corporation, and a clear identification of the corporation with a specific set of stakeholders.

Nevertheless, no comparable certainty of purpose exists in the case of a municipal corporation. Ontario's *Municipal Act* contains no analogue to subsection 134(1). Instead of directing the council and staff to further one clear purpose, such as the best interests of the municipality, they are variously directed "to be responsible and accountable governments," and "to enhance the municipality's ability to respond to municipal issues." Section 244 of the Act directs the 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.

Such diverse responsibilities raise the question of whether the public, whose well-being and interests are required to be represented under clause (a) constitute a separate line of responsibility from the "policies and programs" that council are directed to develop and evaluate under clause (b), the services that they are to provide under clause (c) and so forth. In a business corporation, the very business that the corporation conducts is incidental to the underlying obligation of furthering the best interests of the corporation – that is of its shareholders. The business is a means to an end. Taking Section 244 at face value, in the case of a municipal corporation, both the governance structure – under clauses (d), (d.1) and (e) – and the programs and services that the municipality provides, each seem to be autonomous areas of concern, distinct in some way from the public. The interests of the public are not paramount; they are merely to be considered.

Even the public itself is an ambiguous entity. In various parts of the Act, the municipality is identified not only with the "public," but with its electors, its residents or inhabitants, and its ratepayers. Moreover, whereas the staff of a business corporation are ultimately accountable to the same shareholders as the directors, the staff of a municipality are directed by section 277 of the *Municipal Act* to act in a supporting capacity to the municipal council – as if the council on the one hand had some identity or interest separate and apart from the municipality on the other.

The divided loyalty imposed by the *Municipal Act* itself on municipal corporations permeates every aspect of municipal operations. At many municipalities, this divided loyalty is further complicated by municipal bylaws, which add even more subject areas with which staff must be concerned. It is not difficult to see how such confusion came about.

Section 271(1)(b) of the *Municipal Act*, 2001 (now repealed) required a municipal procurement policy to specify the goals to be achieved by using each type of procurement process. The wording of some municipal by-laws in itself often suggests some confusion on the part of council as to whether the municipality is there for the advancement of the interests of its residents or its suppliers. For instance, one Ontario region sets out 12 purposes, goals and objectives that are to underlie the execution of the purchasing function for that region. The bias in the list of such purposes towards being fair to suppliers (as opposed to driving a hard deal for the benefit of taxpayers) is self-evident.

"The purposes, goals and objectives of this By-law and of each of the methods of Purchasing authorized herein are:

a) to encourage competitive bidding;
b) to ensure objectivity and integrity in the Purchasing process;
c) to ensure fairness between bidders;
d) to maximize savings for taxpayers;
e) to offer a variety of Purchasing methods, and to use the most appropriate method depending on the particular circumstances of the acquisition;
f) to the extent possible, to ensure openness, accountability and transparency while protecting the best interests of the Corporation and the taxpayers of the Regional Municipality of Niagara;
g) to obtain the best value for the Corporation when procuring Goods and Services."

In a sense, this is shocking – for it is contrary to virtually every principle of corporate governance for the staff of a corporate entity to be told to place more or the same emphasis on defending the rights of others as they are told to place on defending the rights and interests of their employers.

Bylaws that put the interests of suppliers on a par with or ahead of the interests of the municipality appear to be inconsistent with sections 2 and 8 of the *Municipal Act*, which indicate that the purpose of municipal purchasing policies and procedures is, or ought to be, to get the best deal possible for the municipality, taking into account the need to formalize purchasing procedures in order to mitigate the risk of employee misconduct.

They also fly in the face of commercial common sense. In buying goods and services, a municipality is simply a consumer. Our entire economic system is based upon the notion of autonomous traders and customers, each carrying on business with a view towards his or her own best interest. Essentially, for everyone else than a supplier to the public sector, a trader, consultant, builder or other supplier of goods and services is entitled to no better treatment from its customers than its market strength allows it to exact. Not so with the supplier to a municipality; staff are instructed not to try to drive the price down, but rather "to encourage competitive bidding; … to ensure objectivity and integrity in the purchasing process; [and] … to ensure fairness between bidders." Only when these steps have been taken, is any thought to be given to the taxpayer.

Nevertheless, one can hardly blame a municipal council that becomes confused as to the direction to take when identifying the duties of municipal staff. If one reads through the hundreds of judicial decisions that have been handed down in recent years with respect to the subject of municipal procurement, it is rare to find a case in which the idea of putting the municipality (or other public authority) first is even mentioned.

On the other hand, it is possible to find quite a bit of case law in which the idea is implicitly rejected, in order to give precedence to the needs or interests of suppliers. The problem is that a provision such as the one set out above simply reinforces that attitude. By placing so much emphasis on supplier interest in its own purchasing bylaw, the municipality reinforces the approach that the courts have taken. Thus, when litigation arises in relation to some aspect of procurement, any court that looks at the municipality's own purchasing bylaw will see clear direction given, not only to take supplier interests into account, but (if the ordering of the section is intended to give any direction) to place fairness to suppliers ahead of the interests of taxpayers.

Such over-emphasis on supplier interests entrenches a division of loyalty as a matter of law. Instead of being directed to put the interests of the municipality first, the municipal staff are being directed to make sure that its suppliers are fairly treated.

A house divided, so the *Bible* tells us, cannot stand. Maybe it is time for municipal councils to take a good hard look at their purchasing by-laws to see whether they are diverting staff from best serving the interest of the municipality as a corporate entity.

Steve Bauld spent many years as purchasing manager at the City of Hamilton and served recently as vice president of the Ontario General Contractors Association.
Kevin McGuinness is a lawyer with Ontario's Attorney General.

Together they have collaborated on several books about procurement and leadership, and will have a new edition of the *Municipal Procurement Handbook* released this fall. They are regular contributors to *Summit* magazine.