

COMMENTARY

An Overview of the Proposals for a New Municipal Government Act for Alberta

*Francis M. Saville, Q.C. and Barbara Cotton**

Introduction

A Municipal Statutes Review Committee was established in 1987 in Alberta with a mandate to examine the emerging trends in the province and elsewhere and “make recommendations on legislation appropriate to Alberta municipal government in the last decade of the 20th century and into the 21st century.”¹ In March of 1991 the Committee submitted its final report, entitled *Municipal Government in Alberta, A Municipal Government Act for the 21st Century*, to the Minister of Municipal Affairs,² and a Bill incorporating the proposals for a new Municipal Government Act is targeted for introduction to the Legislative Assembly of Alberta in the spring of 1992.³

The work of the Committee has resulted in recommendations for sweeping changes to the *Municipal Government Act*,⁴ some of which go to the very heart of the concept of what a municipality is and what it can do. This commentary will provide an overview of the major changes proposed for the new Act, as, if enacted, these proposals would introduce many fundamentally new provisions. Many of these provisions would, to the knowledge of the authors, be unique in Canada and are thus likely of general interest as they could “portend of things to come.”

* Francis M. Saville, Q.C. is a senior partner and Executive Co-Chairman of Milner Fenerty, a large Alberta law firm, and practices extensively in the municipal law area; Barbara Cotton is the firm Research Director.

¹ Alberta Municipal Statutes Review Committee (Glen Clegg, M.L.A., Chairman), *Municipal Government in Alberta, A Municipal Government Act for the 21st Century* (Alberta: The Committee, 1991)j.

² This report was submitted to the Minister of Municipal Affairs on March 14, 1991.

³ Telephone interview with Tom Forgrave, Assistant Deputy Minister, Municipal Administrative Services Division, Department of Municipal Affairs, May 7, 1991, and June 10, 1991.

⁴ R.S.A. 1980, c. M-26

Natural Person Powers

One of the most substantive changes proposed for the new Act is to confer “natural person powers” upon municipalities. Under the current Alberta Act and other statutes throughout Canada municipalities are creatures of statute and can only exercise those powers that are specifically conferred upon them. Thus, the current Alberta Act has an extensive “shopping list” of the powers that a municipality can exercise; municipalities are also currently empowered by a large number of other provincial statutes. These statutory municipalities can only do those things that are set out in the current Act’s shopping list or in other provincial statutes.

The proposal to confer natural person powers upon municipalities is quite innovative. If it is enacted, municipalities in Alberta would be the only ones in Canada to have such powers, although there are many jurisdictions in which municipalities have such powers in the United States. If such powers were conferred, municipalities would be able to do anything that an individual can do, subject to any derogations from this broad power that may be set out in the new Act. (There are very few derogations from the “natural person powers” in the proposed Act.)

The proposals are also innovative in that they explicitly recognize that a municipality can act on the basis of policy concerns. Thus, in addition to conferring the powers of a natural person upon a municipality, the proposed Act states that a municipality can “have the functions . . . that the municipality decides for itself as a matter of policy” as well as “duties . . . that the municipality imposes on itself as a matter of policy.”⁵

“Spheres of Jurisdiction” By-law Making Powers

Although under the proposals a municipality will have the powers of a natural person, a person does not have the power to make laws. The proposed Act therefore

⁵ Above, note 1, s. 4 at 14.

confers by-law making powers on municipalities.⁶ These by-law making powers are very broad, however, and are drafted so as to give a general description of the areas, or “spheres of jurisdiction”, in which a municipality may enact by-laws without listing in detail every subject on which a by-law can be enacted. (Under the current Act the by-law making powers are conferred in exhaustive detail.) Under this approach municipalities will have complete by-law making powers within the spheres of jurisdiction as long as there is no conflict with provincial or federal laws.

Creation of a New Local Governance Commission

The proposals introduce a new tribunal, the Local Governance Commission, which will largely replace the role currently being fulfilled by the Alberta Local Authorities Board.⁷ This Commission will consider applications for annexation, incorporation, amalgamation, dissolution or another change in status of a municipality. Apparently the Commission is modeled after a tribunal in the state of Virginia and will be comprised of individuals, who cannot be politicians, appointed by the provincial Cabinet. The Commission members will be appointed for a 5-year term, subject to reappointment, and will be supported by a Commissions staff.

The proposed Act clearly states that the purpose of the Commission is “to facilitate resolution of any issue or dispute between the municipalities by the municipalities themselves” and, more broadly, to “perform any other function given to it by the Minister.”⁸ The Commission is specifically empowered to “help municipalities to solve differences between them” and is given broad powers to “investigate, analyze and make findings of fact about the probable effect on municipalities, and the people residing” therein, of a proposal for annexation, etc.⁹ The proposed Act further states that “in exercising its powers, duties, functions, the Commission must be guided by any

⁶ Ibid., Part 6, Sub-Part I at 124-130.

⁷ Ibid., Schedule 2 at 203-208.

⁸ Ibid., s. 1 at 203.

⁹ Ibid., s. 9 at 205.

principles, standards or criteria established by the Minister.”¹⁰ This provision has been criticized as opening the door to a politicalization of proceedings before the Commission.

Mandated Negotiation between Municipalities

Apparently it was the view of the Municipal Statutes Review Committee that proceedings before the Local Authority Board had become far too adversarial.¹¹ As a result, the proposals create a broad role for negotiation between affected municipalities in proceedings before the Local Governance Commission. For example, a municipality may specifically request that the Commission “assist in the negotiation of any agreement between it and one or more other municipalities.”¹² The Commission is obliged to report to the Minister within six months, “as a normal rule,”¹³ from the receipt of an application or request to assist in the negotiation of an agreement. The Minister of Municipal Affairs and provincial Cabinet are empowered to “make any orders and give any directions necessary to implement the Commission’s recommendations.”¹⁴

The Commission is also empowered to “declare negotiations . . . terminated” if:

1. it finds that none of the parties are willing to continue to negotiate;
2. 3 months have elapsed with no substantial progress toward an agreement;
or
3. over 12 months have elapsed from the original date of the request to assist with negotiations.¹⁵

¹⁰ Ibid., s. 10 at 205.

¹¹ “Millions of Tax Bucks at Stake in Annexation Battle” *Edmonton Journal* (22 January 1990); “More Co-operation Urged to Solve Annexation Battles” *Edmonton Journal* (20 February 1991).

¹² Above, note 1, s. 13 at 206, 207.

¹³ Ibid., s. 13(3)(d) at 207.

¹⁴ Ibid., s. 15 at 208.

¹⁵ Ibid., s. 14 at 207, 208.

Specific Proposals for Annexation

(i) Overview

Annexation proceedings were singled out by the Municipal Statutes Review Committee as being clearly too adversarial in nature.¹⁶ As a result, the proposals set out a detailed procedure for annexation proceedings before the Local Governance Commission which specifically incorporate the mandated negotiation process.¹⁷

The proposed Local Governance Commission would replace the role of the Local Authorities Board in the annexation process. Subpart 2 of Part 4 of the proposed Act deals specifically with “Annexation of Land” and states that its purpose is to “provide ways of altering the boundaries of municipalities to ensure efficient and effective long-range planning and responsive and accountable municipal government.”¹⁸

Annexation proceedings are commenced by a municipality giving written notice of its proposal to the other municipalities affected and to the Commission. The notice must state whether the initiating municipality wants to negotiate the annexation directly with the other municipalities or whether it wants the Commission to convene negotiations. If the proposal is for direct negotiations between the municipalities, the proposal must also provide for public meetings with the owners of the land affected and a method of keeping the owners informed about the progress of negotiations. Schools, local authorities and the regional planning commission must also be notified of the annexation proposal. There is also an obligation on the initiating municipality to keep the Commission informed of the progress of the direct negotiations.

Direct negotiations between the municipalities can be “abandoned” at any time in favour of asking the Commission to convene negotiations.¹⁹

¹⁶ Above, note 1.

¹⁷ Above, 1, Part 4, Sub-Part 2 at 47-58.

¹⁸ Ibid., 2. 47 at 47.

¹⁹ Ibid., s. 49(6) at 43.

After direct negotiations have been completed the “affected municipalities” must complete a “negotiation report” which sets out

1. the public consultation process involved;
2. a summary of any views expressed by the public;
3. the result of the negotiations;
4. any matters agreed to; and
5. any matters *not* agreed to and still outstanding.

The negotiation report must be signed by all the municipalities or certified by the initiating municipality as accurate with an explanation as to why the other municipalities have not signed it.²⁰

The negotiation report is to be submitted to the Local Governance Commission for review. The Commission is specifically obliged to review the report “to ensure that any principles for annexation prescribed by the Minister have been followed.”²¹ This provision may also be of concern on the basis that it may allow some leeway for the Minister to “play politics” in the course of establishing the guiding principles.

In the event the Commission convenes the negotiations between the affected municipalities (rather than direct negotiations ensuing between municipalities), the Commission must issue an “annexation report.”²² There are no provisions in the proposed Act stipulating what the report must contain.

Once the Commission either receives a negotiation report or issues an annexation report, the initiating municipality is invited to make a formal application for annexation. At least one or more public meetings in the affected area must then be held. After these

²⁰ Ibid., s. 51 at 44.

²¹ Ibid., s. 53(2) at 45.

²² Ibid., s. 55(1) at 45.

public hearings, and after consideration of the various reports, the Commission must report to the Minister and:

1. recommend whether or not the land should be annexed;
2. include recommended terms and conditions; and
3. recommend “any matters necessary or desirable to implement its recommendations.”²³

(ii) *Imposition of a duty to negotiate in “good faith”*

The proposals also expressly stipulate that direct negotiations between the affected municipalities following the commencement of annexation proceedings must be conducted in “good faith.” It provides for a specific sanction for a municipality that “does not meet or negotiate the proposal in good faith”: the other municipality may ask the Local Governance Commission to take over the negotiations.²⁴ The imposition of a duty to negotiate in good faith may be of some concern, however, as good faith is a fairly broad and ambiguous legal term. The introduction of this provision raises the spectre of future legal actions between municipalities with one municipality claiming damages and/or perhaps specific performance of an alleged negotiated agreement on the basis of an alleged breach of this duty. Such an action could also conceivably extend to an action against specific individuals involved in the negotiating process for their alleged breach of the duty to negotiate in good faith.

(iii) *Obligation of the Minister to be guided by the Commission report*

The Minister is empowered in these proposals to make recommendations with respect to the proposed annexation to the provincial Cabinet following receipt of the Commission’s report. Of particular interest, however, is the fact that the proposals specifically oblige the Minister “to be guided by the report of the Local Governance

²³ Ibid., s. 55 at 45, 46.

²⁴ Ibid., s. 50 at 43, 44.

Commission” in making his or her recommendations to Cabinet. Moreover, “if the Minister proposes to make substantially different recommendations from those in the Commission’s report the Minister must inform the affected municipalities of the reasons for doing so before making recommendations” to Cabinet.²⁵

This is a significant and, in the authors’ opinion, welcome change from the current Alberta Act in that the current Act contains no statutory restrictions on the recommendations that the Minister may make to Cabinet following a report of the Local Authorities Board. Indeed, a decision of the Local Authorities Board following an annexation proceeding is of no effect unless approved by Cabinet and Cabinet is empowered to vary the order or disapprove the Board order entirely.²⁶ The proposal would thus seem to go a long way in requiring the Minister to pay attention to the recommendations reached by the Local Governance Commission following what would undoubtedly be a thorough hearing of the issues. At the very least, the proposed provisions would compel the Minister to articulate his or her reasons for failing to follow the recommendations of the Commission and thereby create a record open to public and, conceivably, judicial scrutiny.

Empowerment of the Local Governance Commission and Cabinet to Recommend Revenue, Cost and Tax Sharing Agreements

Under the current Alberta Act, the Local Authorities Board is only empowered to recommend tax sharing agreements made between two or more municipalities within the limited circumstances set out in section 114(2) of the Act; i.e., only if the purpose of the agreement is to “reflect the extent to which each municipality provided services either directly to the person or to his employees.” The proposed Act confers significantly broader powers upon the Local Governance Commission and the Cabinet, however. The Commission is empowered to “investigate, analyze and make findings of fact” about the “probable effect” of a proposal to “enter into revenue, cost or tax sharing agreements

²⁵ Ibid., s. 56(2) at 46.

²⁶ Above, note 4, s. 21.

between municipalities”²⁷ and to make recommendation in this regard in seemingly unlimited circumstances. The provisions of the proposed Act dealing with annexation proceedings further empower Cabinet, “on the recommendation of the Minister,” to order a municipality “to share its revenue with another municipality” or “to share in paying the costs of another municipality” “for the purpose of phasing in the effects of an annexation order.”²⁸ Thus the proposed Act significantly extends the powers currently bestowed upon the Local Authorities Board.

Greater Public Participation

One of the most notable features of the proposed Act is its extensive provisions which allow for greater public participation in the municipal government process. Apparently one of the goals of the Municipal Statutes Review Committee was to “prompt municipalities to do more of their business in public,”²⁹ and they have largely achieved this. Thus the proposed Act, which is written in what is colloquially called “plain language,” includes a Part entitled “How Can I Influence What my Municipality Does?” This Part obliges a municipality to provide information following the request of any person “unless there is a good reason for withholding information.” The proposed Act does specify in some detail when a “good reason to withhold” would arise, but further provides that “a municipality may release information when public interest consideration outweigh a reason for withholding it.”³⁰

The proposed Act mandates that public hearings must be held in many circumstances, including an application for annexation, and further grants a right to “affected” persons to be heard by the municipal council at such public hearings.³¹

The proposed Act further empowers the Attorney General to appoint an inquiry into the affairs of a municipality or the conduct of a councillor or other person having an

²⁷ Above, note 1, Schedule 2, s. 9 at 205.

²⁸ Ibid., s. 58 at 46, 47.

²⁹ “Act Would ‘Muzzle’ Alderman” *Edmonton Journal* (May 28 1991).

³⁰ Above, note 1, Part 3 at 3-27.

agreement with the municipality following the request of at least 10 per cent of the electors in a municipality.³² Electors are also granted extensive petition powers under the proposed Act, whereby they can petition a municipal council about “any power, duty or function of the municipality,” subject to certain exceptions.³³ There are also specific provisions allowing for petitions to amend or appeal a by-law or resolution or to pass a new by-law or resolution.³⁴ Moreover, although the current Act states that council meetings must be held “openly,” the proposed Act explicitly states that council meetings must be held “in public,” subject to certain exceptions, and that the public has a right to be present at council meetings.³⁵ The proposed Act also contains provisions requiring the advertisement of certain by-laws, resolutions and public meetings.³⁶

Councillors’ Duty of Confidentiality

Somewhat in contrast to the proposals which allow for greater participation of the public, the proposed Act also places a duty on councillors to “keep in confidence matters discussed in camera at council meetings . . . until the matter is discussed at a public meeting.”³⁷ This proposal is somewhat controversial and has already garnered a significant amount of media attention. It will be interesting to see whether it survives the policy and legislative review processes on its way to enactment as a legislative provision.

A New Approach to Challenging By-laws

The current Alberta Act allows for an application to the Court of Queen’s Bench to quash a by-law, order or resolution of a municipal council. An application to quash a by-law must, in general, be made within 2 months from its date of passing.³⁸

³¹ Ibid., s. 11 at 19.

³² Ibid., s. 12 at 20.

³³ Ibid., Part 3, Division 2 and 3 at 20-27.

³⁴ Ibid., Part 3, Division 3 at 24-27.

³⁵ Ibid., Part 5, Sub-Part II, Division 3 at 68, 69.

³⁶ Ibid., Part 6, Sub-Part I, Division 8 at 92-94.

³⁷ Ibid., s. 71(g) at 55.

³⁸ Above, note 4, s. 414.

The proposed Act introduces a new method of challenging by-laws: an appeal on a by-law can be made to the Alberta Court of Appeal, with leave, on a question of law or a question of jurisdiction. Although the appeal must generally be launched within 60 days after the by-law receives third reading, a judge may extend this limitation in “special circumstances.” The proposed Act still provides, however, that a by-law or resolution is not to be declared invalid “because it is thought to be unreasonable.”³⁹

Reduced Liability of Municipalities

Although many of the provisions in the proposed Act with respect to the liability of municipalities are analogous to those in the current Alberta Act, the proposed Act does introduce a provision which is intended to reduce the liability of municipalities for damages arising from the breakdown or malfunction of sewer, drainage or water systems or roads or dykes.⁴⁰ Moreover, in the event a municipality is found liable for nuisance, the proposed Act stipulates that the municipality must be given the choice between paying damages for future loss or removing the cause of the loss.⁴¹ The proposed Act further provides that a municipality cannot be held liable for failure to act, nor can it be held liable for its systems of inspection or maintenance.⁴² It further provides that a damage award against a municipality in excess of \$250,000 must be made payable by periodic payments.⁴³

The proposed Act also provides for some protection from liability for councillors and municipal officers.⁴⁴

³⁹ Above, note 1, Part 6, Sub-Part I, Division 3 at 87, 88.

⁴⁰ Ibid., s 315 at 170.

⁴¹ Ibid., s. 316 at 170.

⁴² Ibid., ss. 317, 318 at 171.

⁴³ Ibid., s. 320 at 172.

⁴⁴ Ibid., Part 9, Division 2 at 173, 174.

Conclusion

The Municipal Statutes Review Committee has proposed some far-reaching provisions for a new Municipal Government Act for Alberta. The proposals must embark on two review processes before they become law, however: an internal policy review by the Department of Municipal Affairs and a legislative review following introduction of a Bill to the Legislative Assembly of Alberta, targeted for the spring of 1992. In the event these proposals are incorporated in a new Act they will introduce many fundamental innovations, including the conferment of “natural person powers” upon municipalities and their empowerment to enact by-laws within general “spheres of jurisdiction.” A new tribunal with a “peacemaking” role will be created and this tribunal will have the power to mandate negotiations between municipalities. The tribunal will also be empowered to recommend revenue, cost and tax sharing agreements between municipalities affected by annexation proceedings, and these recommendations can be enforced by an order of Cabinet. Other innovations will include the imposition of a duty on municipalities involved in annexation proceedings to negotiate in “good faith” and an obligation on the Minister of Municipal Affairs to be guided by the recommendations of the new tribunal in making his or her recommendations with respect to annexation to the provincial Cabinet. A much greater public participation in the municipal government process would also be mandated by the new Act.

Given the far-reaching nature of these proposals, they are likely of general interest, as they could well trigger similar legislative innovations throughout Canada.