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FILE NO: 51103-1000

BY EMAIL – scottreidmp@gmail.com
August 28, 2018

Scott Reid
Blueberry Creek Forest School
41 Mill Street
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Dear Mr. Reid:

Re: Legal Opinion On The Legality of Tay Valley's Proposed Procedural By-Law

You have asked us for our legal opinion on whether the municipal council of Tay Valley Township (the "TVT") has the legal power to enact subsection 7.7 of its proposed *Draft By-Law2018-0XX "To establish the Rules Governing the Orders and Proceedings of Council and Committees of the Corporation of Tay Valley Township"* (the "Proposed Procedural By-law").

Subsection 7.7 of the Proposed Procedural By-law purports to empower the Reeve of TVT, sitting as *"Chair"* of the TVT Council, to eject elected TVT councillors from Council meetings, with the assistance of the Ontario Provincial Police, whenever they either *"criticize"* his views and actions, or those of other councillors supportive of him, or engage in any other forms of conduct that the majority of council consider to be *"disruptive or distracting"* to the political or legislative agenda for that meeting.

If enacted, subsection 7.7, by its plain wording, would effectively enable the Reeve, and a majority of councillors loyal to him, to expel their opponents on Council whenever the latter voiced criticisms of them, or of their agenda, or engaged in conduct which they subjectively considered to be either *"disruptive or distracting"* to them or to their agenda. In so doing, subsection 7.7 would permit the stifling of political dissent at Council meetings, and the elimination of the votes of elected councillors, whose constituents opposed the majority's agenda, whenever that dissent was considered by that majority to be *"distracting"* to their purpose.

In so doing, subsection 7.7 purports to grant the Reeve extraordinary powers, which he currently does not enjoy under the provisions of the *Municipal Act,* and which would enable him to muzzle, if not silence all opposition to his future actions.

We have reviewed the procedural by-laws of most of the principal municipalities in Ontario; none of them grant such powers to the Reeve or Mayor. While those by-laws frequently prohibit *"offensive, disrespectful and unparliamentary"* language, none prohibit criticism at council meetings or otherwise try to interfere in the democratic deliberations between elected councillors, before a decision is taken at council, in the manner done by subsection 7.7.

In our opinion, the TVT does not have the legal power to enact subsection 7.7, and to thereby grant such extraordinary powers to the Reeve to curtail the freedom of expression, the attendance at council meetings, and thereby the voting rights, of other duly elected municipal councillors. It is our view that:

(i) Subsection 7.7, as currently worded, is plainly *ultra vires* the powers granted to the TVT pursuant to subsection 238(2) of the *Municipal Act;* and

(ii) Subsection 7.7 contravenes the *Canadian Charter of Rights and Freedoms,* in a way that is inconsistent with the principles of a *"free and democratic society"* as set forth in section 1 of that *Charter.*

(i) Subsection 7.7 of the Proposed Procedural By-law is *ultra vires* subsection 238(2) of the *Municipal Act*

In our view, subsection 7.7 of the Proposed Procedural By-law is *ultra vires* subsection 238(2) of the *Municipal Act* for two different reasons: (a) it purports to confer on the TVT Council a power that has been explicitly denied to councils by the other parts of the *Municipal Act* and the courts; and in addition (b) it appears, on its face, to be calculated to eliminate dissent, such that its enactment would be in bad faith.

(a) Subsection 7.7 purports to confer on the TVT Council a power that has been explicitly denied to councils by the other parts of the *Municipal Act* and by the courts

Subsection 238(2) of the *Municipal Act* requires municipal councils to enact procedural by-laws for governing *"the calling, place and proceedings of meetings"*. However in doing so, those councils cannot adopt procedural by-laws that explicitly grant themselves powers that have been explicitly denied to them by other sections of the *Municipal Act,* and by the courts.

Subsection 241(2) of the *Municipal Act* provides that no person can be ejected from a municipal council meeting, pursuant to that *Act* unless that person is engaged in *"improper conduct."* *"Improper conduct"* has been interpreted by the courts as conduct that goes far beyond merely *"criticizing"*, or voicing disagreement with, the actions or the views of a mayor, a reeve or other councillors, and that is, at a minimum, highly and objectively *disruptive,* from a procedural

standpoint, of the meeting itself. As stated by the Saskatchewan Queen's Bench in *Bruno (Town) v Schmeiser,* 2004 SKQB 207 [*Bruno*] at paragraphs 25-26:

> *"If in the opinion of the Mayor or his designate presiding at a given meeting, the conduct of the Councillor or member of the public is so disruptive as to be "improper conduct", the chairperson may order the expulsion and exclusion of the offender from Council Chamber..."* (Emphasis added)

The courts have repeatedly concluded that municipal councils act illegally when they purport to expel people prematurely or for conduct that falls short of such extreme forms of *"improper conduct"* (see *Bruno (Town) v Schmeiser, supra*). Needless to say, the mere fact of *"criticizing"*, or voicing disagreement with the actions or the views of a reeve and of other councillors does not meet the definition that the courts have consistently given to *"improper conduct."*

Indeed, *"criticism"* even in a court of law has long been seen as a protected right. As stated by Lord Atkin in the seminal British decision of *Ambard v Trinidad & Tobago (AG)*, [1936] AC 322 at 335:

> *"But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."* (Emphasis added)

It is a well-established rule of statutory interpretation that a statute is to be read as a whole (see *Schofield v Glenn*, [1928] SCR 208 (Supreme Court of Canada)), and consequently that the statutory power granted to an administrative body to enact regulatory or procedural powers for itself is implicitly circumscribed by other more specific statutory provisions in the same statute, and by existing jurisprudence. As posited by Ian MacFee Rogers in *The Law of Canadian Municipal Corporations* (*2d* ed.) at section 65.1 that:

> *"All powers of local authorities must be exercised in conformity with the provision of their incorporating statute... Nevertheless, while municipal bodies may be granted powers which in their terms are very broad, it is clear that, in the exercise of their discretion, they are subject to limitations other than those imposed by statute. Restrictions of this nature are attached by the common law to the exercise of the powers of local authorities and arise by their very nature as public corporations called into existence by the province for the purpose of advancing the welfare of the inhabitants of a defined locality."*

For that reason, no municipality can invoke subsection 238(2) to expand its procedural powers to include powers that have already been implicitly denied or tightly circumscribed by subsection

241(2) and by the courts themselves, when defining the common law. In other words, no municipality can invoke subsection 238(2) of the *Municipal Act* to enact a procedural by-law that has the effect of expanding its powers to eject municipal councillors in circumstances other than the *"improper conduct"* in subsection 241(2). As stated by the Ontario Superior Court in *Gammie v South Bruce Peninsula (Town)*, 2014 ONSC 6209 [*Gammie*] at paragraphs 66-67:

> *"66. Section 241 of the Municipal Act expressly permits the head of Council, or other presiding officer, to expel a person for improper conduct at a Meeting...*
>
> *67. Where a specific power is given in a statute, other than as an instance of a more general power, it cannot be applied arbitrarily with a broader and more general effect... The 2013 Resolution, in banning Mr. Gammie from all municipal meetings and all municipal property, involved an exercise of powers beyond those granted to a municipality by s. 241. It was therefore beyond the Town's jurisdiction."* (Emphasis added)

In *Gammie*, supra, the court indicated that under subsection 241(2) of the *Municipal Act*, *"the head of council"* is only entitled to expel, or eject, people in very extreme circumstances, such as when they engage, at the council meeting itself, in violent or threatening behavior that is either highly disruptive of the meeting, or that causes other members of council to experience well-founded fears for their physical security *at that meeting*.

Accordingly, subsection 238(2) does not permit the TVT, or any other municipal council, to enact a procedural by-law granting itself the power to expel councillors other than in the case of *"improper conduct", as that expression has been narrowly circumscribed by the courts* in past jurisprudence. By logical extension, it cannot be disruptive to refuse to leave a meeting when one's conduct cannot be considered *"improper"*. Any procedural by-law whereby a municipal council purports to grant to itself an expulsion power that *exceeds* the power already defined by the jurisprudence, by purporting to permit expulsion simply when the Reeve or other councillors are *"criticized"*, is *ultra vires*, and therefore unlawful.

(b) **Subsection 7.7 appears, on its face, to be calculated to eliminate political dissent, and therefore its enactment would be in bad faith.**

It is a well-established principle that the power of a municipal council to enact procedural by-laws under subsection 238(2) must be exercised in good faith, rather than for the ulterior purpose of eliminating dissent, or muzzling a political opponent (Rogers: *The Law of Canadian Municipal Corporations* (2d ed.) at section 65.1). As stated by the Ontario Superior Court in *Gammie, supra*, at paragraphs 69-71, a procedural resolution or by-law to expel someone is *not* adopted in good faith where it is *"calculated to eliminate dissent, or to eliminate a political opponent."* Where it appears that the resolution or by-law is being proposed largely for that purpose, then it exceeds the statutory jurisdiction contemplated by subsection 238(2) and is therefore *ultra vires* the municipal council's power to enact.

Subsection 7.7 is being proposed in the immediate aftermath of Councillor Judy Farrell's repeated refusal, over the Summer, to be silenced at Council meetings, or to apologize for her public statements, or to cooperate with demands, by the Reeve of TVT, that she frequently exclude herself from council meetings. There are reasonable grounds for concluding that one of the principal purposes of the proposed adoption of subsection 7.7 this Fall, is to facilitate her exclusion from future Council meetings, and/or to make it more difficult for her, and others, to continue to criticize the Reeve's actions and views. Parts of subsection 7.7 appear to be proposed as part of an attempt to curtail the future attendance rights of a single identifiable councillor. As such, it appears to us that the proposed enactment is arbitrary and unreasonable, and that it therefore fails to meet the test of good faith that is a precondition to the legal exercise of the power provided to council pursuant to subsection 238(2) of the *Municipal Act.*

(ii) **Subsection 7.7 of the Proposed Procedural By-law contravenes the *Canadian Charter of Rights and Freedoms*.**

Even if subsection 7.7 of the Proposed Procedural By-law were consistent with subsection 238(2) of the *Municipal Act,* it would still be unlawful because it clearly contravenes sections 2(b) and 7 of the *Canadian Charter of Rights and Freedoms.*

(a) Subsection 7.7 contravenes section 2(b) of the *Charter*

The Ontario Superior Court of Justice has repeatedly ruled that section 2(b) of the *Canadian Charter of Rights and Freedoms* protects political expression at municipal council meetings. In *Gammie,* supra, the court expressly recognized that section 2(b) guarantees the freedom to express oneself at municipal council meetings, and to do so freely. In *Bracken v Niagara Corp. (Regional Municipality),* 2015 ONSC 6934 [*Bracken*] at paragraph 56, the court held that *"the [Appellant's] s. 2(b) right is to actually be able to attend and participate* ***in*** *open public Council meetings if he is not violent or threatens violence and abides by the applicable rules."* (Emphasis added)

More generally, the Ontario Superior Court of Justice has ruled that freedom of political expression is fundamental to a democratic government. In *R v Kopyto,* 1987 CarswellOnt 124, the court stated at paragraph 195 that:

> *"The concept of free and uninhibited speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of election campaigns, Parliamentary debates and campaigns for the establishment of new public institutions or the reform of existing practices and institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened." (Emphasis added).*

(b) Subsection 7.7 contravenes section 7 of the *Charter*

The Ontario Superior Court has also ruled that any ejection of a person from a municipal council meeting, pursuant to subsection 241(2) of the *Municipal Act,* constitutes a *prima facie* contravention of that person's constitutionally entrenched right to life, liberty and security of the person, as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. In *Gammie, supra,* the court ruled, at paragraph 106, that:

> *"Banning an individual in a public space.....engages section 7 of the Charter when the individual is using the public place in a manner consistent with the public purpose for that space. The 2013 Resolution* [which banned the Appellant from the premises of a Council meeting] *deprived* [the Appellant] *of his liberty and security of his person."*

(c) The restrictions in subsection 7.7 are not justifiable under section 1 of the *Charter*

Section 1 of the *Charter* stipulates that:

> *"1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrated in a free and democratic society."*

In our view, no court could find that the restrictions that Subsection 7.7 place on a councillor's freedom of expression, in section 2(b) of the *Charter,* and on his or her liberty, in section 7 of the *Charter,* were *"reasonable limits ... as can be demonstrated in a free and democratic society."*

It is a well-established principle of Canadian constitutional law that for a municipal resolution or bylaw to be demonstrably *"reasonable... in a free and democratic society"* pursuant to section 1 of the *Charter,* the restrictions that the resolution or bylaw places on freedom of expression and liberty:

(i) *"must be rationally connected to the important objective that the limitation is designed to serve"*; and
(ii) *"must impair the right or freedom in question as little as possible."*

Based on *Gammie* and other judicial decisions, it is clear that the Ontario Superior Court is unlikely to find that subsection 7.7 of the Proposed Procedural By-law meets the aforementioned test. There is no rational connection between maintaining essential order in Council meetings and ejecting a municipal councillor simply because he or she *"criticized"* the actions, or political views, of the Head of Council. It is not because one *"criticizes"* other councillors, when expressing him or herself, that this necessarily results in a breakdown of order at the meeting; conversely, it is not by ejecting that councillor that the order of the meeting will necessarily be restored.

Nor is there any rational connection between maintaining essential order at meetings and forcing a councillor to actually *apologize* for his or her criticism or distracting behavior. A formal *apology* for one's behavior, in itself, does nothing to ensure that the behavior is not repeated.

Furthermore, subsection 7.7 confers powers on the Head of Council to curtail political expression and liberty that go far beyond what is strictly necessary for the maintenance of order at any normal Council meeting. The maintenance of order at council meetings can ordinarily be achieved without requiring councillors *"to leave their seat and the Meeting Room for the duration of the Meeting"*, as explicitly contemplated by subsection 7.7. As stated by the Ontario Superior Court in *Gammie, supra*, at paragraph 102, to be legal, pursuant to section 1 of the *Charter,* a municipality's procedural resolution or by-law restricting freedom of expression or liberty:

> *"...must impair ...that freedom as little as possible, and only to the extent necessary to promote its objective effectively."*

In our opinion, the Ontario Superior Court would likely conclude that the objective of maintaining order at council meetings could be achieved just as effectively, in ways that would constitute *less* of an impairment of individual rights, namely – for example – by ordering disruptive councillors to cease talking, thereby leaving them in their seats, and in the meeting room, to observe – and participate silently in – the remainder of the proceedings. The fact that this alternative method of maintaining order would have *less* of an impact on their ability to participate in the council meeting signifies that Subsection 7.7 fails the second prong of the test under section 1.

It is also our opinion that in situations where the offending councillor refused to be silent, the Superior Court would conclude that the objective of restoring order at council meetings could be achieved by simply ordering the offending councillor to quit the meeting *until such time as he or she had agreed to behave properly,* as opposed to excluding him for the entire *"duration of the Meeting",* as explicitly contemplated by subsection 7.7. Such measures would obviously impair the individual's 'liberty' and freedom to participate far less than excluding him or her for the entire duration of the meeting, thereby providing another reason why Section 7.7 fails the second prong of the test under section 1, that is to say the 'minimal impairment' subtest enunciated by the Supreme Court of Canada in its decision in *R v Oakes* [1986] 1 SCR 103.

The legal right to criticize public officials is an inherent, and judicially recognized, part of any free and democratic society. As courts have repeatedly indicated, any sweeping attempt to expressly prohibit, or significantly curtail, such criticism (in the manner that is explicitly contemplated by subsection 7.7) is far from being consistent with the fabric *"of a free and democratic society"* and is in fact *prima facie* inconsistent with that society and its fabric.

For these reasons, we are confident that subsection 7.7 of the Proposed Procedural By-law as currently constituted, is illegal, and that it would be found to be so if challenged in court.

Yours very truly,

Alan M. Riddell