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## PRIVILEGED & CONFIDENTIAL

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File No. 124958

Nathalie Gougeon, CPA, CA, CIA, CRMA  
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City of Ottawa  
101 Laurier Avenue West  
Ottawa, ON K1P 1J1

Ms. Gougeon:

**Re: Legal Opinion re Statutory Authority of the Ottawa Auditor General to Review Decisions of City Council**

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We have been asked to provide a legal opinion with respect to the extent of the authority of the Auditor General for The Corporation of the City of Ottawa (the “**City**”) pursuant to subsection 223.19(1) of the *Municipal Act, 2001*.<sup>1</sup>

In particular, we have been asked to consider and opine upon whether, based on the aforementioned statutory authority, the Auditor General is restricted from calling into question or reviewing the merits of the policies and objectives of City Council (“**Council**”) as set out in a provision of the Auditor General’s appointment by-law.

### Materials Reviewed

In order to provide our opinion, we have reviewed the following materials:

- By-law No. 2021-5, A by-law of the City of Ottawa to establish the position and duties of Auditor General of the City of Ottawa, including statutory powers, and to repeal By-law No. 2013-375, as amended, and predecessor by-laws.
- Report to the City Audit Committee prepared by Denis Desautels and Teresa Anderson entitled “Enabling the Audit Function to Contribute Fully to Effective Accountability: Report prepared for the Audit Committee of the City of Ottawa” (July 2003).
- Extracts of relevant meeting minutes of committees of Council.
- Reports of municipal judicial inquiries, including the Toronto Computer Leasing Inquiry and Toronto External Contracts Inquiry.

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<sup>1</sup> S.O. 2001, c. 25.

- Transcripts of debate in the Ontario Legislative Assembly (ie. Hansard) regarding legislation relevant to our opinion.

We have also reviewed the relevant provisions of Part V.1 of the *Municipal Act, 2001*, in addition to such applicable case law and other secondary sources that we believed to be pertinent to our opinion.

## I. Background

You are the duly-appointed Auditor General for the City. Council appointed you by Motion No. 46/2 on December 18, 2020. You formally assumed the role of Auditor General for the City on February 1, 2021.

Your role and responsibilities as Auditor General are primarily set out in two separate enactments. First, section 223.19 of the *Municipal Act, 2001* authorizes a municipality to establish the position of a Auditor General. This provision is found in Part V.1 - Accountability and Transparency of the *Municipal Act, 2001*, and is located alongside other provisions setting out certain statutory powers and duties of an Auditor General.

Second, the City has passed By-law No. 2021-5, being “a by-law of the City of Ottawa to establish the position and duties of Auditor General of the City of Ottawa, including statutory powers, and to repeal By-law No. 2013-375, as amended” (the “**By-law**”).

The By-law was passed pursuant to the City’s statutory authority under subsections 223.19(1) and (3) of the *Municipal Act, 2001* to appoint an Auditor General and to assign powers and duties to the Auditor General.

Sections 6 and 7 of the By-law set out your powers and responsibilities, which primarily mirror the provisions of the *Municipal Act, 2001*. However, subsection 6(6) of the By-law provides as follows:

### Section 6 – Audits

...

- 6 (6) The Auditor General shall not call into question or review the merits of the policies and objectives of Council.

An identical provision appeared in the first iteration of the By-law, being By-law No. 2005-84, passed February 23<sup>rd</sup>, 2005, which pre-dated Part V.1 of the *Municipal Act, 2001* and the creation of any statutory auditor general role.

On its face, subsection 6(6) appears to limit the Auditor General’s authority to review certain decisions which are made by Council. We understand that the concern is that this provision may be interpreted as preventing the Auditor General from reviewing decisions of Council. Such a result would appear to be inconsistent with the central purpose of establishing the position of an Auditor General for the City, which is to hold Council and its administrators accountable for “the quality of stewardship over public funds and for achievement of value for money in municipal operations”.

## II. Analysis

### A. Governing Legislation

Part V.1 of the *Municipal Act, 2001* is a relatively recent grant of statutory powers to municipalities. Part V.1 sets out express authority for municipalities in Ontario to establish and appoint four accountability officers having certain powers and responsibilities.

In particular, section 223.19 grants a municipality the authority to appoint an Auditor General. The general role of an Auditor General is broadly defined in section 223.19 as follows:

#### **Auditor General**

**223.19** (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an Auditor General who reports to council and is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.

...

(2) Despite subsection (1), the responsibilities of the Auditor General shall not include the matters described in clauses 296 (1) (a) and (b) for which the municipal auditor is responsible.<sup>2</sup>

The *Municipal Act, 2001* also provides a municipality with broad authority to assign powers and responsibilities to an Auditor General:

#### **Powers and duties**

(3) Subject to this Part, in carrying out his or her responsibilities, the Auditor General may exercise the powers and shall perform the duties as may be assigned to him or her by the municipality in respect of the municipality, its local boards and such municipally-controlled corporations and grant recipients as the municipality may specify.

We note that such power is expressly “subject to” Part V.1 of the *Municipal Act, 2001*. As such, a municipality’s authority to assign powers and responsibilities – and an Auditor General’s ability to carry out such powers – must be consistent with Part V.1.

### B. Lack of Case Law Considering Auditor Generals

We are aware of three judicial decisions considering section 223.19 of the *Municipal Act, 2001*.<sup>3</sup> These cases comment on but do not otherwise interpret the scope of the powers or authority of an Auditor General.

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<sup>2</sup> Clauses 296(1)(a) and (b) of the *Municipal Act, 2001* require a municipality to appoint a licensed auditor who is responsible for, among other duties, conducting annual audits of the accounts and transactions of the municipality and providing an opinion on the financial statements. Subsection 223.19(2) of the *Municipal Act, 2001* therefore creates a “carve-out” from the general role of an Auditor General.

We suspect that the lack of case law interpreting this provision can be explained as follows. First, audit proceedings are generally less adversarial and less likely to be litigated than, for example, an investigation by a municipal integrity commissioner, where there have been a number of judicial proceedings considering the authorities and responsibilities of an integrity commissioner under Part V.1.

Second, in general, the position of Auditor General is discretionary, not mandatory.<sup>4</sup> In contrast, amongst municipalities, only the City of Toronto is required to appoint an Auditor General.<sup>5</sup> As such, fewer appointments may have resulted in fewer audit proceedings and, as a corollary, fewer instances where an Auditor General's powers have been challenged and considered by a court.

### C. Legislative History of Part V.1

In light of the paucity of case law on this point, we have reviewed the legislative history of the provisions at issue to seek to discern their meanings.

Section 223.19 of the *Municipal Act, 2001* – and Part V.1 more broadly – was added to the *Municipal Act, 2001* through the *Municipal Statute Law Amendment Act, 2006*.<sup>6</sup>

Prior to the *Municipal Statute Law Amendment Act, 2006*, a municipality did not have express statutory authority to establish the position of an Auditor General. Some municipalities did take steps to appoint an Auditor General, among which were the City and the City of Toronto. However, these early municipal Auditor Generals were perceived to lack a strong statutory mandate and investigative tools having the force of law.

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<sup>3</sup> See *McCartney v. Ottawa (City)* (2010), 71 M.P.L.R. (4th) 286 (Ont. S.C.J., Master); *Friends of Lansdowne Inc. v. Ottawa (City)* (2012), 98 M.P.L.R. (4th) 1 (Ont. C.A.); and *Inzola Group Limited v. City of Brampton* (2019), 85 M.P.L.R. (5th) 283.

We are also aware of decisions of the Information and Privacy Commissioner of Ontario considering this and related provisions under the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A. Those decisions relate to aspects of privacy and confidentiality of records created by an auditor general and do not assist in interpreting the scope of an auditor general's authority.

<sup>4</sup> In contrast, Bill 68, the *Modernizing Ontario's Municipal Legislation Act, 2017*, S.O. 2017, c. 10, introduced a requirement that as of March 1, 2019, all municipalities must establish a code of conduct, and also to appoint a municipal integrity commissioner.

<sup>5</sup> See s. 177(1) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A:

#### **Appointment of Auditor General**

**177 (1)** The City shall appoint an Auditor General. [emphasis added]

The authority in the *Municipal Act, 2001* is permissive.

<sup>6</sup> S.O. 2006, c. 32 (Bill 130). During the same session of the Legislature, the Provincial government also introduced Bill 53, the *Stronger City of Toronto for a Stronger Ontario Act, 2006*, S.O. 2006, c. 11, which would create the contemporary *City of Toronto Act, 2006*. Although introduced as separate items in the Legislature, both bills were characterized by strengthened accountability and transparency regimes. Many portions of Bill 130 reflected the language and legislative intent behind the earlier Bill 53.

## **1. Toronto Judicial Inquiries**

The genesis for Part V.1 of the *Municipal Act, 2001* (and related provisions in the *City of Toronto Act, 2006*) was the report of Justice Denise E. Bellamy following the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry.<sup>7</sup>

The judicial inquiry was requested by Toronto City Council to investigate instances of impropriety and ethical lapses by staff and members of council in the City of Toronto's procurement processes. The recommendations outlined in Justice Bellamy's report highlighted the need for stronger statutory accountability powers, and also laid the foundation for the municipal accountability officers enshrined in statute today.

Having said that, Justice Bellamy's report did not go into great detail about the role or importance of Auditors General, or the detailed functions they should carry out. We do note, however, that Justice Bellamy's report acknowledges the role of Toronto's Auditor General (a non-statutory accountability officer at the time) in uncovering the Toronto's computer leasing scandal, and also referenced his April 2003 Procurement Process Review Report which was presented to Toronto City Council.

## **2. Legislative Debates and Discussions**

The legislative debates on Bill 130 indicate that the main thrust for the introduction of Part V.1 of the *Municipal Act, 2001* (and related provisions under the *City of Toronto Act, 2006*) was to strengthen the municipal accountability framework with more effective accountability officers.

The purpose of these new statutory features was described by then Minister of Municipal Affairs and Housing, the Honourable John Gerretsen, in his introduction of Bill 130 in the Legislative Assembly:

Our goal is to give municipal governments the respect they deserve and the tools and instruments they need to meet the challenges of today's competitive economy.

We want to enable municipal governments to become more accountable, responsible partners with the provincial and federal governments for years to come...The proposed amendments would also enable a strengthened accountability framework. If the bill were passed, a council would have the flexibility to pass bylaws to deal with the financial management of the municipality, its accountability and the transparency of its operation.<sup>8</sup>

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<sup>7</sup> See generally, *Toronto Computer Leasing Inquiry / Toronto External Contracts Inquiry Report, Volume 2: Good Government* (Toronto: City of Toronto Publications, 2005) (Commissioner Denise E. Bellamy).

<sup>8</sup> Ontario, Legislative Assembly, *Hansard*, 38th Leg., 2nd sess. (June 15, 2006) at 1340-1350 (Hon. John Gerretsen).

Our review of the legislative debates on Bill 130 do not indicate any substantial discussion on the scope of the authority to be given to a municipal Auditor General. However, complimentary legislation, Bill 53, the *Stronger City of Toronto for a Stronger Ontario Act, 2006*,<sup>9</sup> featured a mandatory City Auditor General, with an identical mandate.<sup>10</sup>

Much of the Legislature's debate and discussion on Bill 53 reflected the same themes underlying the *Municipal Statute Law Amendment Act, 2006*. The debates reflect the theme of strengthening the accountability framework,<sup>11</sup> and acknowledge the importance of the City of Toronto's existing Auditor General as uncovering the computer leasing scandal.<sup>12</sup>

During debates on Bill 53, MPP Norman Sterling (a member of the Opposition Party) criticized the bill for only granting enhanced accountability powers to the City of Toronto and not other municipalities:

...The City of Toronto has been very progressive in that regard and has set up its own Auditor General department. Under their structure, the Auditor General carries out value-for-money audits. That's where the auditor goes in, looks at a program and says, "Are the taxpayers getting their value out of this particular program?"

I only wish that the City of Ottawa would do the same. If in fact the City of Ottawa does not do that in the future, I suggest that I would support a bill from the Minister of Municipal Affairs, or I would bring forward a bill, that would enforce an Auditor General with value-for-money auditing ability. I think it's important for large municipalities to have that kind of check with regard to the expenditures of the city...Therefore, I would suggest that an Auditor General be implemented in all of those municipalities and not just the City of Toronto.<sup>13</sup>

The above passage from Hansard indicates how the Legislature viewed the statutory role of a municipal Auditor General.

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<sup>9</sup> Bill 53, *An Act to revise the City of Toronto Acts, 1997 (Nos. 1 and 2), to amend certain public Acts in relation to municipal powers and to repeal certain private Acts relating to the City of Toronto*, 2nd sess., 38th Leg., Ontario, 2005 (assented to June 12, 2006).

<sup>10</sup> Subsection 178(1) of the *City of Toronto Act, 2001* provides that the role of the City Auditor General is to assist "city council in holding itself and city administrators accountable for the quality of stewardship over public funds and for achievement of value for money in city operations." We note that this provision is nearly identical to s. 223.19(1) of the *Municipal Act, 2001*.

<sup>11</sup> Ontario, Legislative Assembly, *Hansard*, 2nd sess., 38th Leg. (December 14, 2005) at 1350 (Hon. John Gerretsen).

<sup>12</sup> Ontario, Legislative Assembly, *Hansard*, 2nd sess., 38th Leg. (June 15, 2006) at 1620 (Mr. Michael Prue).

<sup>13</sup> Ontario, Legislative Assembly, *Hansard*, 2nd sess., 38th Leg. (February 27, 2006) at 1710 (Mr. Norman W. Sterling).

## **D. Interpretation of Statutory Authority**

Given the lack of judicial decisions directly on point, defining the scope of an Auditor General's powers under section 223.19 of the *Municipal Act, 2001* is an exercise in statutory interpretation.

In dealing with a question of the meaning of a statutory provision, the courts have consistently directed that the statute must be interpreted in accordance with the modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>14</sup>

A proper interpretation of section 223.19 of the *Municipal Act, 2001* must consider the ordinary meaning of the words of the enactment, read within their entire context, the object of the legislation, and the Legislature's intention in enacting it.

### **1. Objective and Purpose**

The objectives of Part V.1 of the *Municipal Act, 2001* and the Legislature's intention in establishing statutory accountability officers establish a helpful contextual background for a consideration of the scope of the Auditor General's powers. The objective of Part V.1 of the *Municipal Act, 2001* is undoubtedly to enhance the accountability mechanisms of municipal government.

Previously, accountability officers did not enjoy the same broad range of tools to hold municipal governments to account. Furthermore, not being statutorily mandated, they theoretically existed at the whim of councils. Part V.1 of the *Municipal Act, 2001* provides express statutory authority under which accountability officers operate, which strengthen their ability to take councils, members of council, and municipal staff to task for ethical and other lapses.

The legislative purpose animating the role of the Auditor General is, in our view, demonstrated by its legislative context and history. The position of Auditor General does not simply exist to review financial statements or to attest to compliance with accounting standards.<sup>15</sup> Rather, the authority for the position was established to allow municipalities to better review the delivery of municipal programming and services, and to consider and assess whether municipal taxpayer money has been spent prudently.

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<sup>14</sup> Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., (Toronto, Butterworths, 1983) at 87; ["Driedger"]. The modern principle has been frequently applied by the Supreme Court of Canada (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 599, at paras. 26-27) and all the courts throughout Canada.

<sup>15</sup> See s. 223.19(2) of the *Municipal Act, 2001*.

## 2. Ordinary Meaning and Context

In our view, the key component of the Auditor General’s authority in subsection 223.19(1) is contained in the following wording:

...is responsible for assisting the council in holding itself and its administrators accountable for the quality of stewardship over public funds and for achievement of value for money in municipal operations.  
[emphasis added]

The initial phrase “assisting the council in holding itself and its administrators accountable” indicates the relationship between Auditor General and council is one of collaboration and counselling, as opposed to a more adversarial or confrontational position.

The latter phrase sets out two distinct components of the Auditor General’s role: “quality of stewardship over public funds” and “achievement of value for money in municipal operations.” The Legislature’s distinction between these two components reflects an intentional choice that these parts bear separate and distinct meanings.<sup>16</sup>

### (a) “...*quality of stewardship over public funds*”

In our view, this component of subsection 223.19(1) can be interpreted as enabling the Auditor General to review the financial and spending decisions of Council.

The plain and ordinary meaning of “stewardship” connotes the careful and responsible management of something entrusted to someone.<sup>17</sup> “Quality of stewardship” accordingly means how well one performs such stewardship duties. Inherent in the phrase “quality of stewardship” is a value judgment: one must consider what the appropriate standard of stewardship is, and whether that standard has been met.

In relation to municipal corporations, the core “stewardship” function belongs to a municipal council, through members of council, as the ultimate decision-makers. Much of the literature on the role of municipal councillors reflects this concept of stewardship over public resources. For instance, the Ministry of Municipal Affairs and Housing, in its official publication *The Ontario Municipal Councillor’s Guide*, describes the “stewardship role” incumbent on municipal councillors:

#### **Stewardship role**

Council’s objectives are to ensure that the municipality’s financial and administrative resources are being used as efficiently as possible.

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<sup>16</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada Inc., 2014) (online), Ch. 8 Part 1, §8.32:

It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning and different words have different meanings. [emphasis added]

<sup>17</sup> Merriam Webster Dictionary (online), *sub verbo* “stewardship”.

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

...

To be effective in this stewardship role, council may wish to have processes in place to help ensure that:

- policies adopted by council are being implemented
- staff are administering services and programs as council intended
- rules and regulations are being applied correctly and consistently
- funds are being spent only as authorized, and the municipality's resources (financial and otherwise) are being used appropriately and as efficiently as possible

Establishing and following such policies and guidelines helps council leave the day-to-day details for staff to manage. Council is freer to deal with exceptional situations, ensure that policies are current and listen to issues raised by the public to represent the broader community interest.<sup>18</sup>

In summary, "quality of stewardship", in its legislative context and with a view to its purpose, should be interpreted according to whether or not a municipal council is effectively and efficiently deploying municipal resources through its decision-making.

**(b) "...value for money in municipal operations"**

"Municipal operations," while not defined, can and should be understood as the various day-to-day activities that a municipality undertakes and deploys to administer its services and programs. Distinct from the "stewardship" role of council, these actions would be taken mostly at the level of municipal staff in carrying out the directions and policies of council.<sup>19</sup> This aligns well with the express wording in subsection 223.19(1) in reference to the Auditor General being "responsible for assisting the council in holding itself *and its administrators* accountable."

The ordinary meaning of "value for money" connotes spending an amount of money on a good or service commensurate with its quality. However, the particular context of this phrase must be taken into account. "Value for money" has very particular meaning in public sector management. It is a particular type of audit function used by public sector entities to measure the utility derived from government spending, activities and programs.

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<sup>18</sup> See Ontario Ministry of Municipal Affairs and Housing, *The Ontario municipal councillor's guide (2018)*, Part 1. Role of council, councillor and staff, online:

<https://www.ontario.ca/document/ontario-municipal-councillors-guide/1-role-council-councillor-and-staff>

<sup>19</sup> See the role of the municipal administration as set out in s. 227 of the *Municipal Act, 2001*.

It is used to promote answerable, honest and productive government activity which encourages accountability.<sup>20</sup>

This aspect of the Auditor General's role is therefore best understood as determining whether taxpayers are delivered, vis-à-vis the municipal administration, levels of services and programming which are commensurate with the level of taxation paid. While the exact metrics and considerations can change, the question is simply "what are taxpayers getting out of their tax dollars?"

The Legislature's distinction between the "value for money" element of the Auditor General's role with the "quality of stewardship" indicates that there must be some difference in these two components.<sup>21</sup> The "value for money" component is understood as a particular form of public sector auditing, aimed at determining the utility derived from municipal operations.

### **3. Conclusion**

In summary, the purpose and history of the legislation, in addition to the specific language chosen in subsection 223.19(1), indicate an intention that the Auditor General has the authority to, at the very least, review the financial decision-making of the municipal council. If an Auditor General is not enabled to do so, their role would be limited to merely overseeing the municipal administration of funds. This would defeat the overarching objective of the legislation and render one of the two aspects of the statutory role as superfluous.

#### **E. Interpretation of the Auditor General By-law**

The second component of our opinion requires a consideration of the provisions of the By-law and, in particular, the purported limitation on the powers of the Auditor General.

As a delegated legislative instrument, the By-law (like all municipal by-laws) must be interpreted in accordance with the modern approach to statutory interpretation.<sup>22</sup> The correct approach to interpreting subsection 6(6) of the By-law must consider the words in their entire context, the object of the By-law and Council's intention in passing it.<sup>23</sup>

In its contemporary form, the By-law was passed pursuant to the City's authority under subsections 223.19(1) and (3) of the *Municipal Act, 2001*. On a review of its content, the By-law can be understood as doing two things: exercising the City's discretion to establish the position of Auditor General, and assigning powers and duties to the Auditor General. As noted, the City's authority to pass the By-law is expressly "subject to" Part V.1 of the *Municipal Act, 2001*.

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<sup>20</sup> See e.g. Office of the Auditor General of Canada, *Value-for-Money Audit Manual*, (January 2000) at p.3; online: <https://publications.gc.ca/collections/Collection/FA3-30-2000E.pdf>

<sup>21</sup> *Sullivan on the Construction of Statutes*, *supra* note 16, at §8.36.

<sup>22</sup> See *Montreal (Ville) v. 2952-1366 Quebec Inc.* (2005), 15 M.P.L.R. (4th) 1 (S.C.C.). See also *Ashburner v. Adjala-Tosorontio (Township)* (2016), 53 M.P.L.R. (5th) 1, at para. 54 (Ont. Div. Ct.).

<sup>23</sup> See *Driedger*, *supra* note 14.

Section 6 of the By-law generally sets out the duties and responsibilities of the Auditor General. Subsection 6(6) however is, on its face, a limitation on the Auditor General's functions: "The Auditor General shall not call into question or review the merits of the policies and objectives of Council." In our review of other Auditor General by-laws and equivalent federal and provincial statutes, we have not been able to find any similar limitation on the role of an Auditor General.

Taken as a whole, the meaning of this provision is ambiguous. It is capable of bearing multiple interpretations as to what types of Council decisions it covers, and the extent to which the Auditor General is prohibited from being critical of the merits of such decisions. As such, the context and legislative intent of the provision must be considered.<sup>24</sup>

## 1. Legislative History

Our research indicates subsection 6(6) of the By-law originated at the same time the City established the Auditor General position. The role of the City's Auditor General – and the predecessor version of the By-law – was developed by the City with the assistance of Mr. Denis Desautels, the former Auditor General of Canada, during a period of time covering 2003 through early 2005. The predecessor version of the By-law was established before the statutory accountability officers were authority in Part V.1 of the *Municipal Act, 2001*, and, in particular, section 223.19.

In 2003, Mr. Desautels presented a report to a joint meeting of the City's Corporate Services and Economic Development Committee and Audit Committee held on July 28, 2003 on how to improve the function of the City Auditor's office.<sup>25</sup> At this meeting, members of Council and Mr. Desautels discussed the proposed role of the Auditor General. Questions and discussion were recorded in the meeting minutes, which, in our view, serve as a quasi-official transcript of sorts of the meeting.

The minutes indicate discussion on the appropriate role of the Auditor General in relation to decisions made by Council:

Councillor Chiarelli noted the reference to value judgement and value for money in the report and inquired about the difference between the two. He cited the disposal of surplus City property instead of turning the land over for social housing, for example. Mr. Desautels stated that Auditors should refrain from making value judgements and would have to ensure that in the audit process, decisions are implemented with due regard to all issues. Auditors should establish criteria they would use when conducting audits and discuss those criteria with the people they are auditing.<sup>26</sup>

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<sup>24</sup> *Montreal (Ville) v. 2952-1366 Quebec Inc.*, *supra* note 22, at paras. 9-12.

<sup>25</sup> See Denis Desautels and Teresa Anderson, *Enabling the Audit Function to Contribute Fully to Effective Accountability: Report prepared for the Audit Committee of the City of Ottawa* (Ottawa, University of Ottawa, Centre on Governance: July 2003).

<sup>26</sup> City of Ottawa, Corporate Services and Economic Development Committee and Audit Committee, Minutes of Joint Committee Meeting July 28, 2003, p. 10. ["Meeting Minutes"].

Councillor Chiarelli's comments and his example express concern with giving deference to Council's policy decisions. We view the phrase "value judgment" in this context as applying one's own political preferences in a "what would I have done" fashion, or second-guessing the objectives set by Council.

The meeting minutes indicate further discussion as to the Auditor General's roles in evaluating the decisions of Council which are policy- or goal-setting in nature:

Councillor Stavinga was interested in the comment made that while the Auditor General must refrain from value judgements, it is Council's role to establish, through policy, the objectives of the municipality. Through that process and working with staff and determining various objectives that need to be defined, she wondered whether targets would be met. Mr. Desautels responded by stating Council must balance the various objectives and achievement of the results. The councillor recognized that due to limited financial resources, Council cannot respond to all of them and choices must be made. She believed it would be difficult for the Auditor General to challenge that other than to highlight to Council that if it does not do one thing there will be a price to pay in the future. Mr. Desautels stated that the calls she was referring to are made for elected officials and the Auditor General's role is to determine how those decisions would have been achieved; Auditors should not second guess the decisions of elected representatives.<sup>27</sup>

The discussion between Councillor Stavinga and Mr. Desautels indicates that while it is Council's role to balance and prioritize various objectives, the Auditor General's role would be to advise on whether municipal resources have been deployed to effectively achieve those goals.

In our view, this discussion is perhaps the best indicator of legislative intent underlying subsection 6(6) of the By-law. When subsection 6(6) was first adopted, the intent of Council was not to shield itself from scrutiny for all of its decisions, but rather to acknowledge that the role of the Auditor General is not to "second guess" the decisions of democratically elected individuals or question how finite resources are allocated to respond to various causes.

## **2. Textual Analysis**

While Council discussions offer some indication of how this provision was intended to function, the text of subsection 6(6) must be interpreted as it appears in the By-law.<sup>28</sup> A textual analysis of the By-law indicates there may be multiple possible interpretations of this provision. Breaking down subsection 6(6) in accordance with the typical "subject-verb-object" sentence structure does not immediately clarify what function each word has in the overall sentence. Furthermore, the words and phrases used in this provision do not

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<sup>27</sup> Meeting Minutes, *supra* note 26, p. 13.

<sup>28</sup> See Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto, Thomson Reuters: 2019) (loose-leaf release no. 11, November 2021) (online), ch. 9 XIII § 9:58; ["*Law of Canadian Municipal Corporations*"].

have fixed definitions or clear and unequivocal meanings. However, the provision must be given some meaning that gives effect to Council's intent in enacting it.

The plain and ordinary meaning of "call into question or review" connotes being critical of or scrutinizing some thing. These phrases bear no specific technical or legal meaning. This could conceivably range from making public comments, to conducting an audit, or even challenging the legality of something in court. However, it is not clear exactly what type or level of scrutiny was intended to be captured by this phrase.

The object of the sentence in subsection 6(6) appears to be "the merits of the policies and objectives of Council." In this provision, the word "merits" forms part of what appears to be some form of a possessive noun (i.e. "merits" belonging to "the policies and objectives"). The common meaning of "merits" is the quality of being good or worthy. That being said, which set of values inform goodness or worthiness is not immediately clear, and must be ascertained from the context.

"Policies and objectives" are not defined, nor are they necessarily terms of art. In the municipal context, these can be best understood as fundamental and direction-setting decisions, and not necessarily detailed or fact-specific decisions. Policy decisions involve reconciling a number of social, political, and economic factors in order to strike an appropriate balance. "Objectives" also reflect a choice among competing priorities or goals. This can be exemplified as follows: whether to offer house league hockey as part of the municipalities recreational programming is a policy decision; which supplier to purchase a Zamboni from and on what terms is not.

Taken together in context and with a view to Council's intent, the best meaning we can ascribe to the phrase "the merits of the policies and objectives of Council" is the political values assigned to a decision of Council which selects some objective among competing goals or priorities.

We also note that the language in subsection 6(6) of the By-law does not expressly use the word "decisions." Had Council intended that this provision apply to all of its decisions – both general and fact-specific – the principles of statutory interpretation suggest that it would have done so by expressly including the word in this provision.<sup>29</sup> That being said, we understand this provision has been interpreted as applying to all decisions of Council.

It is a principle of municipal by-law interpretation that an ambiguity in the by-law can be construed with reference to the statutory authority under which the by-law was enacted.<sup>30</sup> In this case, subsection 6(6) of the By-law should be construed in light of section 223.19 of the *Municipal Act, 2001*, which is the City's current authority to establish an Auditor General.

As noted above, the very purpose of establishing the office for and appointing an Auditor General is to assist the Council in holding itself and its administrators accountable with respect to stewardship over public funds. It goes without saying that municipal monies are authorized to be spent, one way or another, by virtue of the decisions that are made by

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<sup>29</sup> See *Sullivan on the Construction of Statutes*, supra note 16, at §8.90.

<sup>30</sup> See *Law of Canadian Municipal Corporations*, supra note 28, at § 9:57.

Council, which are subsequently implemented by municipal staff. As such, any interpretation or application of subsection 6(6) of the By-law that would prohibit the Auditor General from reviewing or considering the merits of any decision of Council would seem to be fundamentally inconsistent with the core legislative purpose underlying the office and functions of the Auditor General.

However, there may be some plausible interpretations of subsection 6(6) which gives effect to the purposes of both the By-law and the *Municipal Act, 2001*. For example, the *Municipal Act, 2001* does not require the Auditor General to question the political priorities of the Council of the day – whether to prioritize housing over public health, transportation infrastructure over recreational programs. These types of general decisions have no absolute or technically correct solution, but rather reflect political decisions on the allocation of finite municipal resources. These decisions also better reflect the “policies and objectives” of Council. However, once Council commits itself to a particular course and engages in specific financial decisions, the Auditor General may consider whether taxpayers are getting good value for those programs, and whether Council and staff are efficiently and effectively managing the City’s financial resources and deployed them to achieve these goals.

There is no bright line and while we cannot provide an exhaustive list as to the types of Council decisions which may fall on either side of this line, our opinion should be construed as providing guidance as to how to interpret the provisions of the By-law harmoniously with the intent of the *Municipal Act, 2001*.

## F. Conflict Doctrine

Should the only plausible interpretation of subsection 6(6) of the By-law be that the Auditor General cannot be critical of or review any decision made by Council, we are of the view that the By-law may conflict with the purpose of section 223.19 of the *Municipal Act, 2001*. As a consequence, the By-law would be inoperative to the extent of this conflict and would not constrain the Auditor General’s authority to review decisions of Council that related to its stewardship over public funds.

Section 14 of the *Municipal Act, 2001* provides that a municipal by-law is without effect to the extent it conflicts with provincial legislation, including the *Municipal Act, 2001*.<sup>31</sup>

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<sup>31</sup> Section 14 of the *Municipal Act, 2001* provides as follows:

**Conflict between by-law and statutes, etc.**

**14 (1)** A by-law is without effect to the extent of any conflict with,

- (a) a provincial or federal Act or a regulation made under such an Act; or
- (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

(2) Without restricting the generality of subsection (1), there is a conflict between a by-law of a municipality and an Act, regulation or instrument described in that subsection if the by-law frustrates the purpose of the Act, regulation or instrument.

A conflict can be demonstrated in two ways. The conventional understanding of a conflict is where it is impossible to comply simultaneously with both the provincial statute and the municipal by-law.<sup>32</sup> In our view, the broad wording of the two enactments in the present situation does not relate to “impossibility of dual compliance.”

The second and more applicable ground of conflict is frustration of purpose. A conflict may be evidenced where the municipal by-law frustrates the legislative purpose of the provincial statute.<sup>33</sup> Fundamentally, this is an interpretative exercise. The question becomes whether the municipal by-law, or a provision thereof, is incompatible with the purpose of the superior law, having regard for the statutory framework, the purpose of the superior legislation, and the alleged incompatibility of the municipal by-law.<sup>34</sup>

As set out above in this opinion, the purpose of section 223.19 of the *Municipal Act, 2001* – and Part V.1 more broadly – is to enhance the accountability of municipal governments by setting out statutory accountability officers with a greater range of powers to enable municipal self-discipline and self-restraint.

Subsection 223.19(1) in particular does this through the establishment of an Auditor General, whose role it is to help a council “hold itself” accountable, in part, for the quality of stewardship over public funds, meaning the prudence of its money-related decision. Council is the ultimate municipal decision-maker in respect of spending decisions and cannot shirk its financial obligations by requiring oversight of municipal staff only. The buck stops with council.

If Council’s intention in enacting subsection 6(6) of the By-law was truly that the Auditor General could never review any of its policy decisions and objects, how would the Auditor General assist Council in “holding itself...accountable for the quality of stewardship over public funds”? The Auditor General could not effectively review whether Council exercised a level of care and prudence over municipal resources without questioning its spending decisions.

Although the Auditor General would still retain some oversight in relation to “value for money” or performance audits of municipal administration, half of the express statutory function of the Auditor General would be ousted by the By-law.

The By-law should be not interpreted as prohibiting the Auditor General from reviewing all decisions of Council, as such an interpretation would frustrate the purpose of subsection 223.19(1) of the *Municipal Act, 2001* and, more generally, the accountability scheme set out in Part V.1. In our view, subsection 6(6) of the By-law is in conflict with the *Municipal Act, 2001*, enabling the Auditor General to review decisions of Council that relate to quality of stewardship.

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<sup>32</sup> See *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 at para. 48 (S.C.C.); cited in *London Property Management Assn. v. London (City)* (2011), 90 M.P.L.R. (4th) 30 at para. 36 (Ont. S.C.J.).

<sup>33</sup> *Croplife Canada v. Toronto (City)* (2005), 10 M.P.L.R. (4th) 1 at para. 63 (Ont. C.A.).

<sup>34</sup> *East Durham Wind, Inc. v. West Grey (Municipality)* (2014), 28 M.P.L.R. (5th) 1 at para. 32 (Ont. Div. Ct.); citing *Laferrrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, at para. 66.

### III. Conclusions

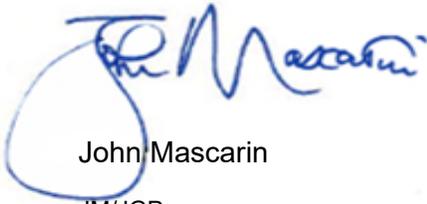
Based on the foregoing, it is our opinion that the Auditor General does have statutory authority to review and be critical of (from a public sector management perspective) certain decisions of Council. The express language of the *Municipal Act, 2001*, in addition to its history and purpose indicate that a municipal auditor general was intended to have some oversight role as to the financial decisions of Council when undertaken in its stewardship role over municipal resources.

Our conclusion remains unchanged in light of the By-law. Subsection 6(6) should be given an interpretation which is consistent with and does not detract from the overall purpose of Part V.1 of the *Municipal Act, 2001*. A proper interpretation of the By-law would not prohibit the Auditor General from reviewing all decisions of Council, but rather, should be limited to prevent the Auditor General from making political value judgments as to the broader priorities and causes selected by Council from among competing factors.

If subsection 6(6) can be interpreted as prohibiting the Auditor General from questioning all decisions of Council, which we do not agree with, it may be inoperative to the extent it conflicts with the legislative purpose of section 223.19 of the *Municipal Act, 2001* in articulating the role of the Auditor.

Yours truly,

AIRD & BERLIS LLP



John Mascarin

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