Your World – Competing Pressures

- Costs associated with providing fire protection services escalating
- Increasing pressure on municipalities to deliver fire services in a sustainable manner

- What types of services are really needed?
- What level of service is appropriate?
- How else can we provide these services?
Why Do We Care?

- Unions increasingly calling into question the service delivery decisions of municipalities
- Media attention leading to public scrutiny
- Being prepared for disaster
  - Minimize damage, manage risk, limit liability

Why Do We Care?

- A number of high profile cases draw attention to liability issues facing municipalities:
  - Elliott Lake
  - Muskoka Heights
  - Whitby/East Gwillimbury
  - L’Isle-Verte
  - Meaford

- What can we learn from others’ experiences?
Municipal Liability for Fire Services

- Prior to 18th century, municipalities could not be found liable for negligence
- Today, municipalities are no longer immune from liability
- However, certain decisions of a municipality are subject to more limited review
- Municipalities must nevertheless comply with contractual and statutory responsibilities
Negligence

- Failure to take care of a reasonably prudent person in similar circumstances
  - *Negligence Act* and Common Law

- Wanton or reckless disregard for the lives or safety of others
  - *Criminal Code* amendments (Bill C-45)

Policy versus Operational Decisions

**Anns v. London Borough of Merton (1977)**

- Drew a distinction between “policy" and "operational" decisions
- Limited scope of liability for "policy" decisions
  - If a policy decision, "the decision is one for the authority or body to make, and not for the Courts"
What are "Policy" Decisions?

• Since _Anns_, decisions from the Supreme Court of Canada have given conflicting guidance on the scope of "policy" decisions.

  • _Just v. British Columbia_
  • _Brown v. British Columbia_
  • _Swinamer v. Nova Scotia_

What are "Policy" Decisions?

• Policy decisions are typically based on financial, economic, social or political factors or constraints

• Policy decisions involve pre-planning regarding the boundaries of the municipality's undertakings
Scope of Protection for Policy Decisions

- Even if a policy decision, can be liable if decision:
  - is made in bad faith
  - for an improper purpose
  - is are so irrational or unreasonable that is cannot be said to be bona fide

- Indecision not protected

- Policy decisions may be made at any level

What is an "Operational" Decision?

- Day-to-day implementation of policies

- Judged on standard of reasonableness
  - What are other municipalities doing?
What Services does the FPPA Require?

• Section 2 of the FPPA:
  2. (1) Every municipality shall,
      (a) establish a program in the municipality which must include public education with respect to fire safety and certain components of fire prevention; and
      (b) provide such other fire protection services as it determines may be necessary in accordance with its needs and circumstances.

Who is Responsible for Service Delivery?

• Section 6 (3) of the FPPA:
  • A fire chief is the person who is ultimately responsible to Council for the delivery of fire protection services.
Who is Responsible for Service Delivery?

- Section 74 of the FPPA:
  - No legal proceedings shall be instituted against a firefighter acting in good faith
  - "Firefighter" includes fire chief

Who is Responsible for Service Delivery?

- Section 75 of the FPPA:
  - Firefighters shall be indemnified by municipality for legal costs incurred:
    - (a) defending a civil action, if not liable;
    - (b) defending a criminal prosecution, if not guilty;
    - (c) defending other proceedings in which the execution of duties is in issue, if in good faith.
Who is Responsible for Service Delivery?

- Council is responsible for determining services to be provided, and for setting standards and levels of service, according to the needs and circumstances of the municipality

- Fire Chief responsible to Council

"Fire protection decisions are made at the municipal level. So governments at that level make decisions about how much fire protection they can afford and that's how much fire protection the community gets."
Who is Responsible for Service Delivery?

- Arbitrator Teplitsky in *City of Ottawa* (1993):
  "Although firefighters as professionals might prefer a larger complement of firefighters which may provide additional options in the manner in which fires are fought, their personal interests must bow to the overriding decision of Council which represents the public and decides on their behalf the lever of service which the community can afford and is will to pay for."

Tips for Managing Service Delivery

- Distinction between "policy" and "operational" decisions can be unclear
  - Manage your Fire Chief
    - Ensure all decisions are *bona fide*
    - Ensure all decisions are reasonable given resources, generally accepted practices
    - Ensure decisions accord with needs and circumstances;
  - Deference where appropriate
  - Ensure legislative requirements satisfied
  - Ensure decision-making is well documented
Service Delivery

Scenario #1: Public Education and Prevention

- Over the past few years, the municipality of Flagdale has seen a dramatic increase in the number of carbon monoxide calls occurring at local nursing homes. In each case, the carbon monoxide detectors were not operational at the time of incident.
- The Fire Chief has requested a one-time increase in the fire department budget to create a public education campaign aimed at teaching elementary-aged children about fire safety.

Are the municipality’s fire prevention and education efforts adequate?
Service Delivery

Scenario #2: Costs adding up ...

- Recently, the Municipality of Flagdale has run into severe budgetary constraints, and the fire budget is well above provincial average. In response, a group of councillors has pushed for the Fire Chief to layoff all full-time firefighters, and instead create a volunteer department.

- Is this a viable option?
- What are the potential repercussions?


Service Delivery

- Consider:

  ✔ Collective Agreement restrictions
  ✔ Likelihood of success at interest arbitration
  ✔ Needs and circumstances of municipality
  ✔ Public Relations Issues


The Town of Deep River

The Corporation of the Town of Deep River and The Deep River Professional Fire Fighters Association (Kaplan, December 2014)

- A problem existed regarding delivery of fire protection services in Deep River:
  - Population of approximately 4200
  - Full-time fire department – Fire Chief, Captain and 8 full-time firefighters (9 bargaining unit members total)
  - Cost per household - $641.52 annually
  - Average cost per household of comparable municipalities – approximately $193.45

The Town of Deep River cont’d…

The Corporation of the Town of Deep River and The Deep River Professional Fire Fighters Association (Kaplan, December 2014)

- Kaplan did not award the elimination of the contracting out language but did allow for the creation of a composite fire department
  - "Maintain the current no contracting out clause, but subject to the right of the employer to establish a composite force, conditional on maintaining the existing complement of nine (9) firefighters that may, by attrition, be reduced to eight (8) firefighters"
**OFM Reviews**

- The FPPA grants the OFM the authority to monitor and review the services provided by municipalities.
- Where the OFM is of the view that a serious threat to public safety exists, he may make recommendations to Council to reduce risk.

**OFM Reviews**

- The FPPA provides that, if the Municipality fails to adhere to the OFM's recommendations, the Minister may pass regulations requiring the Municipality to comply.
To Do List

- Does your Master Fire Plan reflect an appropriate response to community risk?
- Was the Master Fire Plan approved by Council within an Establishing and Regulating By-Law?
- Other considerations:
  - Does your Master Fire Plan require review?
  - Ignore recommendations at your own peril!
  - Document, document, document!

Service Delivery

**Scenario #3: Reaching out to a neighbour…**

- Due to the large size and small population of Flagdale, Council recently decided to enter into a mutual aid agreement with Strawberry Grove, a much larger neighbouring Municipality. Council felt that this would allow for better service in the case of emergency for their citizens living on the side of Town near Strawberry Gove.

- Will the citizens receive better coverage in the case of an emergency? What liabilities exist in this type of arrangement?
Consider Alternate Service Delivery Models

L'Isle Verte (2014)

Are mutual aid agreements satisfactory?

Consider establishing automatic aid agreements


Inspections

7.1 (4) of the FPPA:

A municipality may appoint an officer to enter upon land and into structures at any reasonable time to inspect the land and structures to determine whether by-laws enacted in accordance with this section are being complied with.
Inspections

Scenario #4: *I’ll do it tomorrow …*

- In Flagdale there are a number of local business whose properties have been inspected by the Fire Department for Fire and Building Code compliance. Several business owners have advised the Inspector(s) that they cannot comply with the requirements in the timeframes provided. They have asked that the inspector issue a verbal warning, in lieu of issuing a Notice of Violation.

- What should the inspector do? What can Council do?

Inspections

- Numerous inquests in recent decades regarding vulnerable occupancies
  - Extendicare (1980)
  - Meadowcroft (1995)
  - Sunnybrook Hospital (1997)
  - Muskoka Heights (2009)

- Changing Regulation and Practice
  - Vulnerable occupancy registry (OFM)
  - Mandatory sprinklers (2019), Inspections and Fire Drills
Inspections

- Need for greater enforcement efforts
  - Elliot Lake (2012)
- Need for enhanced training for fire and building inspectors
  - OFM adoption of NFPA standards
  - Invest in your staff!

Occupational Health and Safety

- Three principle issues:
  1. Incident Command and Accountability Systems:
     a) Internal
     b) Inter-Agency
  2. Training and Competency of Supervisors
  3. Workplace Harassment and Violence

Occupational Health and Safety

Scenario #5: Who’s In Charge?

- There have been a number of interpersonal disputes between volunteer and career firefighters in the Flagdale Fire Department. Both the volunteer and career firefighters believe they are in charge at an emergency scene, and refuse to take direction from the other.

- What risks face the Corporation?
- What can the Corporation do to resolve these risks?

- Need for a clear command structure amongst first responders.
- Without a clearly identified decision maker the public and first responders safety is at risk.
  - Who’s in charge?
    - Volunteers? Career Firefighters?
    - Police? Fire?
Occupational Health and Safety

**R v. Meaford (2012)**

- Two firefighters were injured while fighting a restaurant fire.
- Defendant charged with *failing to activate an accountability system* to track firefighters entering a burning structure.
- The defendant was *acquitted* - Main cause of injuries were *equipment failure* and *wrong turn* taken by injured firefighters.
- However, decision sets out that a Municipality can be liable under the OHSA for failing to comply with the guidelines set by the Section 21 Advisory Committee.


**Elliot Lake (2012)**

- Inquiry heard that there was confusion at times over who was making decisions during the rescue
- Inefficient information transfer between police and fire services
- Lead to delays in rescue efforts and some strategic missteps
Occupational Health and Safety

- Must ensure you have competent supervisors
  - Generally accepted standards of practice relevant
  - What others are doing is relevant
- Adoption of NFPA Standards
- Eliminate seniority-driven promotional processes

Emerging Issues

Scenario #6: Not my problem …

- Sam has mentioned to colleagues a number of times that she is being sexually harassed by a member of the Flagdale Fire Department. Council has repeatedly said that she must go through the grievance process or file a formal complaint, failing which they are not in a position to assist.

- Is that response acceptable?
Occupational Health and Safety

Jian Ghomeshi

- Private investigator's report released April 2015
- Nearly 100 witnesses canvassed
- "The majority of witnesses who worked with him over the course of his career at the CBC described a pattern of behaviour and conduct that fell well below the Behavioural Standard"

Bill 132

- Came into force September 8, 2016
- Code of Practice released August 12, 2016
Three OHSA Changes

1. Expansion of "workplace harassment" definition, which now clearly includes "sexual harassment"

2. Creates two new substantive duties – investigation and "investigation closure"

3. Sets five new minimum program requirements

Expansion of Workplace Harassment Definition

**Workplace harassment continues to mean...**

engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome

And, now, if it is "because of" sex, sexual orientation, gender identity or gender expression it is also "workplace sexual harassment"
Expansion of Workplace Harassment Definition

But now workplace harassment also includes…

making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

Expansion of Workplace Harassment Definition

• Policy implications

  • The scope of any policy to address workplace harassment must embody the expanded definition

  • BUT nothing in the OHSA or the MOL consultation documents suggests workplace sexual harassment needs to be addressed in a fundamentally different manner than workplace harassment
Two New Duties

New Substantive Duty #1 – The Duty to Investigate

• an employer shall ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances

Two New Duties

New Substantive Duty #2 – The Duty to Formally Close an Investigation

• an employer shall ensure that the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation
Five New Program Requirements

1. In writing, developed and maintained in consultation with JHSC
2. Measures and procedures to report to someone other than supervisor
3. Set out how incidents and complaints will be investigated and dealt with
4. Set out how information obtained will not be disclosed unless necessary
5. Set out how new substantive duty to close an investigation will be met
The Code of Practice

- The MOL consulted on a "code of practice" that will serve as a voluntary "safe harbour"
- Provides guidance with respect to workplace harassment and obligations under Bill 132
- Compliance with the Code of Practice is one way employers can meet the new legal requirements surrounding workplace harassment
- Goes beyond the minimum statutory requirements and is split into 4 parts – can choose to comply with one, some or all parts.

The Code of Practice

- Workplace Harassment Policy:
  - Prepared in writing by the employer
  - Posted in a conspicuous place in the workplace
  - Reviewed by the employer as often as necessary, but at least annually
  - Dated and signed by the highest level of management
The Code of Practice

• Workplace Harassment Policy:
  - Commitment to addressing workplace harassment
  - Statutory definition of harassment
  - Statement that policy applies to all workers and addresses harassment from all sources
  - Encouragement for workers to report workplace harassment to the appropriate person
  - Commitment to investigate and deal with all complaints or incidents of in a fair, timely and confidential manner
  - “No reprisal” provision
  - Other resources available to employees

The Code of Practice

• Workplace Harassment Program:
  - ✔ Reporting
  - ✔ Investigation and handling of complaint
  - ✔ Record keeping
The Code of Practice

- Workplace Sexual Harassment Program:
  - Reporting:
    - Measures for worker to report incident, including situations where employer or supervisor is the alleged harasser
    - Include details of what happened including the date(s), frequency, and location(s) of alleged incident(s)

The Code of Practice

- Workplace Sexual Harassment Program:
  - Investigation and handling of complaint:
    - Detailed overview of the complaint resolution process for allegations of harassment and workplace sexual harassment:
      a) to whom employees should report allegations of harassment
      b) how the investigation process works
      c) how confidentiality will be addressed
      d) how and to whom conclusions will be reported
The Code of Practice

• Workplace Sexual Harassment Program:
  • Record Keeping:
    • All participants in an investigation shall retain documents for an appropriate amount of time
    • Documents must be disclosed unless necessary to investigate incident
    • For OHSA purposes, records kept for at least one year from conclusion of the investigation

The Code of Practice

• Employer’s Duties:
  • Investigation appropriate in the circumstances
    • who conducts the investigation
    • how it is done
    • how it is reported
  • Communication of results of investigation
    • results, not report
    • details on corrective action
  • Regular review of the program
The Code of Practice

• Information and Instruction:
  • Workers
    • how to report and how investigations will be conducted
  • Supervisors and managers
    • how to recognize harassment and handle complaints
  • Investigators
  • JHSC

MOL Inspectors

• MOL Inspectors will be empowered to enforce the new obligations
• Their authority will not be limited to enforcing the requirement to have written policies/programs