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DATE 22 November 1999

TO/DEST. The Chair and Members of Regional Council

FROM/EXP. A/Regional Solicitor

SUBJECT/OBJET **MUNICIPAL LIABILITY: "POLICY AND OPERATION"**

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It has been well established in law for some time that in an action against a municipality Courts will not review "policy" decisions made by Council. Municipal Councillors are answerable to the electorate on "policy" matters, which might be described as legislative decisions made on the basis of financial and staffing considerations, and whether or not Council believes it appropriate to involve itself in a particular project. In contrast, "operational" decisions are normally made at the staff level, as it implements Council's "policy" decisions.

The legal principle is that while Courts will not intervene at the policy level, they will at the operational level, because once a policy decision has been made it must be implemented at the operational level in a proper manner.

This principle was recently codified by inclusion in the *Municipal Act* of Section 331.3, which provides that,

"No proceeding based on negligence shall be commenced against a municipality, a member of a municipal council or an officer or employee of a municipality in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision made in a good faith exercise of the discretion."

Two things about this Section should be noted. First, the immunity from judicial intervention applies only where the function is discretionary. Secondly, the immunity is lost in the event it is shown that Council, or the person making the policy decision, acted in bad faith.

There has been some uncertainty whether or not the Corporation could claim the “policy” immunity in actions against it arising from road disrepair, the argument being that because Council decides as a matter of “policy” how its roads will be maintained, the condition of those roads should not be subject to judicial review.

The Court of Appeal, in two recent cases, has responded to that uncertainty by ruling that the “policy” defence cannot be relied upon by a Municipality where the function arises from a statutory obligation. In other words, and for example, Council cannot by policy avoid its obligation to keep its roads in a reasonable state of repair. Section 284 of the *Municipal Act* requires that roads be kept in a “state of repair that is reasonable in light of all the circumstances, including the character and location of the highway or bridge”. Failure to do so will see the municipality liable in damages arising from the disrepair.

In an action against a school board the Court of Appeal decided, “it was not open to the Board for financial or other reasons, to make a “policy decision” to absolve itself from or reduce its statutory obligation. The bottom line is that the Court will decide whether or not a municipality has met the statutory obligation to maintain properly its roads.

Having said that “policy” cannot be used as a means of defeating a road related claim, it should be noted that it will be used to assist the municipality in establishing that as a matter of fact it did keep its roads in a proper state of repair “in light of all the circumstances”. Accordingly, if at trial it can be shown that Council had established well considered policies for the maintenance of its roads, then the municipality is well on its way to convincing the court that its maintenance was reasonable “in light of all the circumstances”. Certainly, without those policies, the municipality will face an uphill battle in convincing the Court that it maintained its roads adequately, when faced with an accident and allegations that it did not.

Finally, in the words again of the Court of Appeal, “although it may be appropriate for the Court to consider the financial resources of the township in determining whether it failed to keep the highway in repair as required by Section 284, the township could not make a policy decision which could allow it to avoid compliance with its statutory obligation”.

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cc: Department Heads