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**THE RELATIONSHIP BETWEEN THE PUBLIC LIBRARIES ACT  
AND MUNICIPAL ACT AND ITS IMPACT ON PUBLIC LIBRARY  
BOARDS**

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## OVERVIEW

- Introduction
- Regulation of Public Libraries in Ontario
- Public Library Boards and Municipalities
- Possible Areas of Tension Between Municipalities and Public Library Boards
- Other Regulatory Provisions of Note
- Conclusion

## A. INTRODUCTION

- Public libraries occupy a unique position within the legal framework of publicly funded services in Ontario
- Although public libraries are generally established by municipalities, their regulation and reporting is conducted through the Ministry of Tourism, Culture, and Sport under the *Public Libraries Act* (Ontario) (the “PLA”) as well as the municipality through the *Municipal Act, 2001* (Ontario) (the “MA”)
- This presentation and accompanying discussion paper builds upon the earlier presentation made on January 31, 2015, on the topic of *The Duties And Liabilities Of Directors And Officers Of Public Library Boards*

## B. REGULATION OF PUBLIC LIBRARIES IN ONTARIO

- The Ministry of Tourism, Culture, and Sport (the “Ministry”) currently lists approximately 321 “public libraries” in the Province of Ontario
- When a public library is established, that public library board is considered to be a corporation
- As such, in addition to the PLA, public library boards are also subject to various corporate, tax, employment, privacy, and other general legislation which informs the relationship between the PLA and the MA



# 1. Overview of Legislative Framework of Libraries in Ontario

- Applicable legislation can also include more general legislation, such as the current *Corporations Act* (Ontario), (to be replaced by the *Not-for-profit Corporations Act, 2010* (Ontario))
- May also include the *Charities Accounting Act* (“CAA”)
  - Many public library boards are registered charities for purposes of the *Income Tax Act* (Canada) (i.e., approx. 78)
  - In addition, many public library boards would be deemed to be charities at common law (CAA s. 1(2)) because of their purpose to advance education and to benefit the public

- Even where not a registered charity, CAA may have application
  - s. 9(1) provides specific authority to “local boards” of municipalities to “receive, hold and enjoy real or personal property devised, bequeathed or granted to it for a charitable purpose, upon the terms expressed in the devise, bequest or grant”
  - s. 8 requires a “person” who holds an interest in real or personal property for a charitable purpose shall use the property for the charitable purpose
- However, application of charitable law is not a focus of discussion for this topic

## 2. What Is A Public Library Board?

- For purpose of *Public Libraries Act* (PLA), a “board” includes a public library board, a union board, a county library board or a county library co-operative board (PLA s. 1)



- This presentation focuses on the “public library boards”, though general statutory and common law liabilities will also apply to directors of other library boards, e.g., county library boards, etc.
- The council of a municipality **may by by-law** establish a public library (PLA s.3)
- A public library shall be **under the management and control of a board, which is a corporation...**(PLA s. 3(3))

- What are the composition requirements of a public library board ?(PLA s. 9 and s. 10)
  - Board shall be composed of at least five members appointed by municipal council
  - Council may only appoint up to one less than a majority of its own members, unless it is a county or co-operative library board, in which case a bare majority would apply

Q. Can my municipal council appoint an equal or greater number of its own members to the board of my public library?

A. No, see PLA ss. 10(2), maximum of one less than a majority of the board



- What are the qualification requirements for members of a public library board?
  - PLA sets out qualification requirements and composition requirements for board members
  - Qualifications (PLA, s. 10(1)) - is a member of the appointing council **or**:
    - 18 years of age
    - Canadian citizen
    - Complies with residency requirements (see PLA para 10(1)(c)) which generally require residency in the applicable municipality
    - Is not employed by the board or by the municipality or county as applicable



- A person will no longer be a member of a public library board when he or she (PLA s. 13):
  - is convicted of an indictable offence;
  - becomes incapacitated;
  - is absent from the meetings of the board for three consecutive months without being authorized by a board resolution;
  - ceases to be qualified for membership under s. 10(1)(c) (i.e., residency requirements); or
  - otherwise forfeits his or her seat
    - Unclear what effect “otherwise forfeits” was intended to mean

Q. Can my municipality remove a public library board member?

A, Does not appear to be provided under PLA

- What are the obligations and powers of a public library board?
  - Public library boards under PLA are required to appoint certain officers:
    - Public library board **shall appoint** a chief executive officer (PLA s. 15(2))
    - Public library board shall appoint a secretary; (15(3))
    - Public library board shall appoint a treasurer; (15(4))
    - The same person may be both the secretary and treasurer, and the CEO may be both (s. 15(5))



Q. Can my public library board appoint a committee to supervise the public library and not a CEO?

- the holding of regular meetings once a month for a least 10 months each year and at such other times as it considers necessary
- Ensuring that all meetings are open to the public

Q. Can my public library board meet by email or conference call?

- Section 16.1(2) of the PLA mandates that meetings of the board be open to the public as noted above.
- This would appear to preclude a public library board from meeting by teleconference (which is permitted under the *Corporations Act*), save and except where a closed meeting is permitted where the subject matter enumerated in subsection 16.1(4)

- What are the powers and duties of a public library board?
- Under the PLA, the public library board has the following powers and duties (PLA s. 20)
  - **shall** seek to provide, in co-operation with other boards, a comprehensive and efficient public library service that reflects the community's unique needs;
  - **shall** seek to provide library services in the French language, where appropriate;
  - **shall** operate one or more libraries and ensure that they are conducted in accordance with PLA and the regulations;
  - **may** operate special services in connection with a library as it considers necessary;



- **shall** fix the times and places for board meetings and the mode of calling and conducting them, and ensure that full and correct minutes are kept;
- **shall** make an annual report to the Ministry of Tourism, Culture and Sport and make any other reports or provide any other information required by PLA and the regulations or requested by the Ministry from time to time;
- **shall** make provision for insuring the board's real and personal property;
- **shall** take proper security for the treasurer; and
- **may** appoint such committees as it considers expedient (PLA s. 20)

- What reporting obligations does a library board have?
  - Public library board “shall make an annual report to the Minister and make any other reports or provide any other information required by this Act and the regulations or requested by the Minister from time to time” (PLA s. 20)
  - Regulations under the PLA state that all boards which receive grants must provide certain information, which information includes, “financial, statistical, and any other information or documents as requested...”



- In addition to the requirement to provide a report to the Minister as required under the PLA, public library boards must also submit to their municipality estimates of “all sums required during the year for the purposes of the board.” (PLA s. 24)
- A “local board” **is not** required to have its own auditor “despite any Act” (MA s. 296(12))
- The municipality is responsible for appointing an auditor who is responsible for annually auditing the accounts and transactions of the municipality and **its local boards**
- Under s. 296(11) of the *Municipal Act, 2001*, if financial statements of a municipality and local board are consolidated, the municipality may require the local board to be audited as if it were part of the municipality



## C. PUBLIC LIBRARY BOARDS AND MUNICIPALITIES

- Municipality has broad discretion over the appointment of a certain number of library board members, together with discretion over certain actions taken by the public library board
- MA also provides certain legislated obligations for public library boards
- We will review the interrelationship between PLA and the MA, as they collectively make up a combined regulatory scheme for public libraries



- What is the relationship of a public library board with the municipality under in the PLA?
  - Public library is established by by-law of municipality
  - Municipal councils appoint board members (PLA s. 9 and 10)
  - Municipality may authorize the CEO appointed under the PLA by by-law to call the first meeting of the board in each new term (PLA s.14(2))
  - The board must obtain consent of the municipality to do the following (PLA s.19(1)):
    - Acquire land for its purposes;
    - Erect, add to, or alter buildings;
    - Acquire or erect a building larger than is required for library purpose, and lease any surplus of the building; and
    - Sell, lease, or otherwise dispose of land

- Municipality may approve, or amend and approve, annual budget estimates submitted by public library board, or approve variations of prior approved estimates (PLA s.24)
- Municipality may issue debentures for library purposes (PLA s.25)
- Municipality may makes grants of money, lands, or buildings to a library board (PLA s.27)



- Under section 24 of the PLA, a municipality is to consider and deal with estimates submitted to it by a public library board, and approve, or amend and approve, annual budget estimates
  - Board must apply the monies paid to it in accordance with the estimates approved, subject to council authorizing a variation (PLA s. 24(3))
- **Case Study:** *Case Study: Stinton v. Waterloo City* [1984] O.J. No. 2380
  - “...it is clear that the statutory foundation for the existence of a public library board and its power to operate the library are derived from the *Public Libraries Act*. **It is not simply a committee operating under the aegis of a municipal corporation.**”

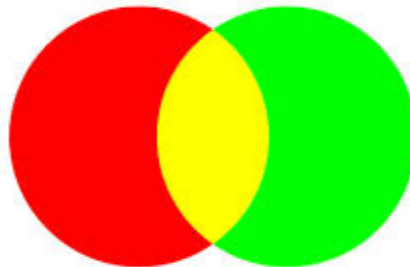
- What authority does a municipality have over a public library board under the MA?
  - “local board” means:
    - a municipal service board
    - transportation commission,
    - **public library board,**
    - board of health,
    - police services board,
    - planning board,
    - or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority



- However, public library boards are distinguished from other “local boards” throughout the MA
  - A municipality may pass by-laws respecting the governance structure, accountability and transparency, financial management, or other matters concerning local boards
    - A municipalities, though, may not do so for a public library board
  - A municipality may establish codes of conduct for members of local boards
    - A municipalities, though, may not do so for a public library board
  - A municipality may dissolve local boards
    - A municipalities, though, may not dissolve a public library board

## D. POSSIBLE AREAS OF TENSION BETWEEN MUNICIPALITIES AND PUBLIC LIBRARY BOARDS

- Public library boards are regulated by overlapping spheres of provincial legislation
- Possible tension between public library boards understanding whether they are meant to follow the PLA or the MA with regard to their general governance and operations
- Both PLA and MA provide for the regulation and funding of public libraries by municipal and provincial bodies.



## 1. Judicial Commentary on PLA and Library Boards

- *Stinton v. Waterloo City* [1984] O.J. No. 2380
  - “...it is clear that the statutory foundation for the existence of a public library board and its power to operate the library are derived from the *Public Libraries Act*. **It is not simply a committee operating under the aegis of a municipal corporation.**”





- *Aurora Public Library Board and Town of Aurora (Re)*  
111 D.L.R. (3d) 757
  - Aurora Public Library Board brought an application for injunctive relief after the municipal council rescinded a resolution approving funding for the public library board after the public library board had diverged from the estimate
  - Current provisions in the PLA dealing with the approval of estimates by municipal council have changed since the decision

- “Furthermore, it seems to us that the scheme of the Act requires that money received by a board pursuant to an approved expenditure and submitted by way of estimate, should be used for the purpose set out in the estimate, and not for any other purpose. If a board does otherwise, it is acting outside what we perceive to be the intent of a legislation. **Such a restriction does not in any way derogate from the exclusive responsibility of a board to fix the remuneration of its staff.** In doing so, a board will have to be guided, as is every other employer, by the financial resources available to it.” (emphasis added)



- *Etobicoke Public Library Board*, [1989] OLRB Rep. September 935.
  - Ontario Labour Relations Board decision concerning an application by a union to have the municipality deemed a “common employer”
  - Applicants had argued that because of the financial involvement of the municipality in approving funding under the PLA, it was an employer



- “On balance and after a review of all the evidence we are satisfied that in the circumstances of this case the **City did no more than what it was statutorily obliged to do under the *Public Libraries Act* namely, provide the funds, "consent" to the acquisition of land and the erection of the library (section 19(1)) and "approve" the issuance of debentures (section 25).** In carrying out its statutory duties and responsibilities the City did not so involve itself in the construction of the Elmbrook Park Library, as to warrant the making of a common employer declaration.” (**emphasis added**)

- *Welland (City) v. Welland Public Library Staff Assn.*  
1994 CarswellOnt 7268, 5 P.E.R. 60.
  - Ontario Pay Equity Hearings Tribunal **held that a municipality was an employer of the library staff for pay equity purposes**
  - The decision of the tribunal turned largely on the financial support provided to the library board by the municipality



- **“In conclusion, based on all of the evidence, we find that the Board’s autonomy from the City is more perceived than real. In particular, the Board lacks financial self-determination, and that is crucial to our determination.** The reality is that the City provides 87% of the Library’s funding requirements; five-sixth of that funding is required to meet payroll commitments; the annual percentage increase in City funding for the Board and the annual percentage salary increase for Library Workers match the funding increases for City departments and City Workers. So long as the Board’s decisions do not deviated from this pattern, the City will not interfere.” **(emphasis added)**

## 2. Role of CEO and other Employees under *Public Libraries Act*

Q – Can the public library board appoint a municipal employee to the position of CEO under the PLA?

- Public library board has discretion to appoint anyone as CEO, though, there may be issues concerning fiduciary duty loyalty to two employers, together with potential for cross-over liability
- Clear that appointment, removal, determination of the terms of employment and of the staff is within the prerogative of the public library board, not the municipality (PLA s. 15(1))

### 3. Dual Loyalties of Board Members

- Members of a municipal council must consider their role as council members under the MA, members of public library boards arguably owe a fiduciary duty to the public library board as any director of a not-for-profit corporation would
- In making decisions, public library board members are required to do so in the best interests of the public library
- Councillors who sit on the board of a public library board may find themselves facing conflicting loyalties in their role as a municipal councillor and as a member of a public library board



## 4. What if a Public Library Board Does Not Comply with the PLA?

- Minister may withhold funds where the board of a public library does not comply with the PLA or regulations made under it
- PLA does not specify what non-compliance is, but may include:
  - Requiring a fee for items which the PLA mandates be circulated for free;
  - Not permitting the public to attend meetings of the public library board
  - Having more members of council appointed to the public library board than permitted; or
  - Not providing an annual report as required to the Minister.

- Minister may dissolve a public library board, but only where it has not maintained and operated a library for a period of two years
- On dissolution, assets of the public library board are vested in their municipality



## E. Other Regulatory Provisions of Note

- Numerous other laws are applicable to public library boards
- Important to review other potentially relevant statutes
- A comprehensive review of all applicable statutes is beyond the scope of this presentation



# 1. Common Law

- Liability for Breach of Fiduciary Duty
  - Directors and officers have a fiduciary duty to put the best interests of the corporation ahead of their own
  - Examples of breach of fiduciary duty can include mismanagement of corporate funds and property, or the misappropriation of corporate opportunity
  - Directors and officers can found liable for any loss that the corporation suffers as a result of a breach of fiduciary duty



- Liability for Breach of Corporate Authority
  - When directors permit the corporation to act beyond the scope of the authority set out in the corporation's objects, the directors may be found personally liable for *ultra vires* actions
    - Public library boards should be familiar with their powers and duties under the PLA in this regard
  - *Ultra vires* will not be a concern under the ONCA, if the ONCA were to apply to public library boards
  - However, every director is still under a duty of obedience to comply with the PLA, the by-law establishing it, or its by-laws
    - i.e., public library boards have a duty of obedience to comply with the PLA in relation to the composition of the board

- Liability Risk for Negligent Mismanagement (Tort)
  - Tort is civil wrong for which injured party can seek damages from the court
  - If their carelessness in the oversight of the corporation's operations leads to injury, directors of charities can be found liable in tort for negligent mismanagement, for instance:
    - Failing to adequately supervise hiring of staff and employees
    - Failing to implement a child protection policy



- Failing to monitor the on-going conduct of staff and employees, especially in regard to sexual harassment of employees
- Wrongful dismissal - where directors acted with malice or otherwise improperly dismissed the employee
- Permitting unsafe conditions on corporation's property leading to an accident
  - **Case study:** *Nickell v. Windsor (City)* [1926] O.J. No. 76
    - Windsor Public Library Board found liable as a corporation for an accident occurring on its steps due to ice
- Knowingly drawing cheques against insufficient funds



- Liability Risk in Contract
  - Directors generally are not personally responsible for contracts signed for the corporation unless they are found to have intended to assume personal liability
  - However, they need to have proper corporate authority to sign contracts and ensure contractual terms are complied with
  - To reduce liability exposure, directors need to ensure contracts are duly authorized by the board before entering into them





- Common problems in relation to breach of contract for directors:
  - The directors do not properly identify the corporation in any contract or to the contracting party
  - The other party believes the director is signing in his or her own name
  - The directors are found to have induced a breach of contract with other parties prior to the signing of the contract
  - The directors do not follow through to ensure that the corporation complies with a contract

- Liability for Special Purpose Charitable Trusts
  - Case law has confirmed that a charitable corporation owns its general assets beneficially and not as trustee for those assets, a corporation can still receive charitable property under express or implied terms in trust and thereby be trustee of such funds
  - To the extent that a gift constitutes a special purpose charitable trust the charity can only use the gift to accomplish the specific charitable purpose established by the donor and for no other purpose

- Commingling of special purpose charitable trusts
  - Gifts subject to restrictions or limitations by the donor
  - Commingling of donor restricted gifts possible under *Charities Accounting Act* (Ontario) regulations
  - But cannot commingle special purpose charitable trusts with general funds
  - See Charity Law Bulletin #4 for details at <http://www.carters.ca/pub/bulletin/charity/2001/chylb04-01.pdf>



- Liability for Imprudent Investments
  - Section 10.1 of the CAA confirms that sections 27 to 30 of the *Trustee Act* apply to all charities that deal with charitable property unless the constating documents of the charity or the gift agreement state otherwise
  - The *Trustee Act* establishes a prudent investment standard governing investment decision-making of trustees of charitable property
  - The board needs to have a investment policy in order to obtain protection under the *Trustee Act* where there is delegation of investment decision making, save and except where the funds are a “reserve fund” under the *Municipal Act, 2001*

## 2. Other Relevant Statutes

- *Municipal Conflict of Interests Act*
  - The definition of “local board” under *Municipal Conflict of Interests Act* also applies to “public library board”
  - *Municipal Conflict of Interests Act* includes additional procedures in relation to conflict of interest, of which public library board members should be aware
  - These would be in addition to the conflict of interest provisions adopted by the public library board, or as applicable under general corporate legislation

- Corporate Legislation
  - A general corporate statute, like the *Corporations Act* (Ontario), applies to a special act corporation (including those incorporated under a general act of legislature like the *Public Libraries Act*) unless the special act contains a provision to expressly exempt the application of the general corporate statute
  - Generally, any provisions in the corporate statute that conflict with the special act do not apply
  - Some provisions are meant to fill in the “gaps” where the special act is silent, i.e., the ability to indemnify directors, or the authority to pass by-laws

- Examples of possibly non-applicable general corporate provisions include:
  - Provisions that relate to membership issues, such as admission of members, holding membership meetings, proxy votes at members meetings, keeping a register of members.
  - Provisions in relation to board issues, such as having three directors, election of directors, removal of directors, employees not being able to be directors, conflict of interest of directors, holding board meetings, declaring conflicts at board meetings, keeping a register of directors.
- The issue of when a general corporate statute applies, and when the special act trumps the general corporate statute needs careful review by legal counsel



- Ontario *Corporations Act* (“OCA”)
  - Directors are jointly and severally liable to the employees, apprentices and other wage earners for all debts due for services performed for the corporation, not exceeding six months wages and twelve months vacation pay (OCA s. 81)
  - Failure to keep proper books, records and registers at the head office of the corporation and failure to make such books, records and registers available for inspection by entitled persons may result in personal liability for the directors (OCA s. 304, 305)



- Ontario *Not-for-Profit Corporations Act* (“ONCA”)
  - Application of ONCA to public library boards is unclear
    - Bill 85, *Companies Statute Law Amendment Act, 2014* would have amended *Municipal Act, 2001* to exclude application of ONCA to “local boards”, including public library boards, unless prescribed by regulation
    - Bill 85 died as a result of the last provincial election
    - Unclear if Bill 85 will be reintroduced in the provincial legislature and whether the same proposed amendments to the *Municipal Act, 2001* excluding the ONCA for local boards will return



- If the ONCA were to apply, some benefits will apply to public library boards which are not currently available under the OCA:
  - Capacity of a natural person (ONCA s.15(1))
  - Elimination of the *ultra vires* doctrine (ONCA s. 16(3))
  - Objective standard of care for directors and officers (ONCA s.43(1)) (as discussed below)
  - Due diligence defence for directors (ONCA s.44)
  - Protection of “indoor management rule” (section 19 of the ONCA)
- If it applies, directors can be held jointly and severally liable for the following debts in certain circumstances for 6 month’s wages for employees and vacation pay (up to 12 months)



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- Members of public library boards that are registered as registered charities under the *Income Tax Act* (“the Act”) need to also be aware of its general application to registered charities
- Compliance matters under the Act directors should be aware of include:
  - Issuing official tax receipts in accordance with the Act and regulations
  - Filing a complete and accurate T3010 annual return
  - Compliance with CRA fundraising guidance
  - Compliance with the Act and CRA administrative policies concerning political activities



- Directors, officers, trustees and managers of charities can become “ineligible individuals” and be prohibited from being a director, officer, trustee, manager or a person in control of another registered charity for a period of five years, if:
  - The person was convicted of a criminal offence under Canadian law or an offence elsewhere that would be a criminal offence if it were committed in Canada
  - It relates to financial dishonesty or other matters relevant to the operation of the charity,
    - Unless a pardon has been granted or issued and has not been revoked or ceased to have effect



- The person has been convicted of an offence (other than the above) under Canadian or provincial law or an offence elsewhere that would be such an offence if it took place in Canada, within the last five years, involving financial dishonesty or other matters relevant to the operation of the charity; or
- The person was a director, trustee, officer, manager or was in control of a charity during a period of a serious non-compliance that resulted in the loss of charitable status within the last five years

## F. CONCLUSION

- Public libraries have unique rules and regulations which set them apart from other not-for-profit corporations in Ontario
- The PLA and MA provide a distinctive regulatory regime for the provision of these services which permits both the provinces and municipalities to have oversight for the funding of such services
- The PLA and MA are not competing statutory regimes, but rather complementary statutory regimes for the provision of library services

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