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Primer on Municipal Ward Boundary Reviews

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Free and fair elections are the cornerstone of democracy. In Ontario, municipalities play a vital role in the electoral process by establishing the size and composition of municipal council, determining the method of selecting members of municipal council (i.e. at large elections versus the ward system), and by establishing the wards from which municipal councilors are elected.

Section 222(1) of Ontario's *Municipal Act, 2001* ("Municipal Act") authorizes municipalities to pass by-laws to create, redivide, or abolish wards.¹ Generally, the legislative parameters include the following:

1. municipal council must pass a by-law to divide or redivide the municipality into wards;
2. the municipality must provide notice of the passing of said by-law to the public within 15 days of passage by municipal council;²
3. any person may appeal the by-law to the Ontario Municipal Board (the "Board") within 45 days of the passage of the by-law,³ and
4. the Board has the power to make an order affirming, amending or repealing the by-law.⁴

Ward boundary changes may also be initiated by electors within the municipality. Electors of the municipality may present a petition to municipal council to alter its ward structure.⁵ The *Municipal Act* requires that the petition either have the signatures of one percent of the electors in the municipality or 500 of the electors in the municipality, whichever is less; however a minimum of 50 signatures of electors is required.⁶ If a municipal council does not pass a by-law in accordance with the petition within 90 days after receiving the petition, any of the petitioners may apply to the Board for an order dividing or redividing

¹ *Municipal Act, 2001*, SO 2001, c 25, s 222.

² *Ibid*, s 222(3).

³ *Ibid*, s 222(4).

⁴ *Ibid*, s 222(7).

⁵ *Ibid*, s 223(1).

⁶ *Ibid*, s 223(2).



the municipality into wards or to have the existing wards dissolved.⁷

Despite the importance of the ward boundary review process, section 222 of the *Municipal Act* contains no direction to municipalities respecting the process for a ward boundary review. In fact, no criteria has been provided to guide the division of wards, the alteration of ward boundaries, or the process for a ward boundary review even though subsection 222(10) specifically provides that the Minister may prescribe such criteria. While the legislature has not provided guidance to municipalities, the courts and the Board have.

The common law has established a number of guiding principles concerning ward boundary reviews. In *Reference re Provincial Electoral Boundaries*, the Supreme Court of Canada held that “effective representation”, not representation by population on its own, is the standard for determining electoral boundaries in Canada.⁸ Effective representation must be based on the relative parity of voting power and the focus must be on effective representation and not mathematical parity.⁹ The Supreme Court went on to state, “representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one’s grievances and concerns to the attention of one’s government representative”.¹⁰ The Supreme Court further noted that effective representation cannot be achieved without taking into account countervailing factors like geography, community history, communities of interest and minority representation.¹¹

The Board has interpreted and applied this principle of effective representation in subsequent cases. What emerges from those cases is that effective representation is the overriding principle that must be applied in considering the propriety of a ward boundary by-law. When considering whether a ward boundary by-law will result in effective representation, the Board will consider the following criteria (the “Carter Criteria”):

1. Does it equitably distribute the population and the electors?
2. Does it respect identifiable communities of interest?
3. Does it utilize natural, physical boundaries that are locally recognized?
4. Does it serve the larger public interest of all electors of the municipality in contrast to the interest of a small group?¹²

⁷ *Ibid*, s 223(4).

⁸ *Reference re Provincial Electoral Boundaries*, [1991] 2 SCR 158, 1991 CarswellSask 188.

⁹ *Ibid* at para 39.

¹⁰ *Ibid* at para 26.

¹¹ *Ibid* at para 31.

¹² *Teno v Lakeshore (Town)*, 51 OMBR 473, 2005 CarswellOnt 6386, at para 26.

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“... a deviation in population of 25% - 33% among municipal wards is tolerable so long as the deviation is justified on the basis of one element of the Carter Criteria”

Respecting the equitable distribution of the population and the electors, the Board noted in the same case that there are various views on the tolerance factor for a deviation in the principle of equality of vote (meaning electoral boundaries which divide the population evenly) and that a factor of 25% to 33% has been suggested as tolerable, if supportive of more effective representation.¹³ In other words, while voter parity among municipal wards should be the goal of ward boundary reviews, a deviation in population of 25% - 33% among municipal wards is tolerable so long as the deviation is justified on the basis of one of the Carter Criteria.

When creating population forecasts for the purpose of ward boundary reviews it is imperative that municipalities take approved developments into consideration when developing its population forecasts. In *Re: Milani*, the Board amended the City of Vaughan’s ward boundary by-law after finding that Vaughan did not consider approved developments when calculating population forecasts and that Vaughan distributed its forecasted population increase evenly throughout the City, instead of disaggregating the forecasted population increase to specific geographic areas where the growth was actually expected.¹⁴ In order to effectively utilize population forecasts, it has become common for municipalities to disaggregate population forecasts to municipal traffic zones which can be recombined into specific geographic areas, such as the possible ward alternatives.

Respecting communities of interest, the Board in *Ottawa (City) v Osgoode Rural Community Assn.*, repealed the municipality’s ward boundary by-law because it held that it did not properly take into consideration importance of communities of interest within rural wards and put too much emphasis on representation by population, rather than effective representation.¹⁵ The Board also took issue with the terms of reference established at the outset of the ward boundary review process. It held that said terms of reference were flawed because they precluded the opportunity to increase the number of wards, even though this was a legally viable option and because too much emphasis was placed on the principle of representation by population over the principle of effective representation.¹⁶

Beyond the question of whether the by-law will result in effective representation, the Board will also consider the process followed by the municipality and grounds raised by the appellant. In the 2009 case of *Re: Hambly*, the Board reiterated that it should only amend or repeal a decision of municipality on ward boundary matters if there is a compelling reason to do so. In determining whether such a compelling reason is present the Board held it would consider the process, criteria, and result of the proposed ward boundary changes and

¹³ *Ibid* at para 28.

¹⁴ *Milani, Re*, 63 OMBR 257, 2009 CarswellOnt 7420.

¹⁵ *Ottawa (City) v Osgoode Rural Community Assn*, 39 MPLR (3d), 2003 CarswellOnt 1887, at para 68.

¹⁶ *Ibid* at para 61.



whether effective representation would be achieved.¹⁷

The Board described the test as follows:

1. the criteria used by the municipality, the studies undertaken to inform the application of those criteria, and the appropriateness of the proposed implementation of those criteria;
2. the process followed by the municipality, particularly in terms of the extent to which steps were taken to inform the public and provide an opportunity for public comment; and
3. the grounds of the appeal against the municipality's decision and any additional grounds advanced at the hearing of the merits.¹⁸

“The Board will only amend or repeal a decision of a municipality on ward boundary matters if there is a compelling reason to do so”

It is important to note that in *Re: Hambly* the Board expressed its expectation that the public be involved in the ward boundary review process.¹⁹ This is interesting as under the former *Municipal Act* there was a requirement that before a municipality passed a ward boundary by-law it had to give notice of its intention to pass the by-law and hold at least one public meeting to consider the matter (section 13(4)). However, this public consultation requirement was removed from the former *Municipality Act*. Despite this fact, the Board made its intentions clear in *Re: Hambly* that it expects municipalities to engage the public in the ward boundary review process before a by-law is passed.²⁰

Respecting the jurisdiction of the Board on an appeal of a ward boundary by-law, it has been held in numerous Board cases that its jurisdiction pursuant to section 222 of the *Municipal Act* is restricted to the propriety of the ward boundaries as established in the impugned by-law. In the 2005 case of *Gatward v Brant (County)*, the Board noted at paragraphs 55-56:

The Board's jurisdiction as cited earlier is found at Section 222(7) of the *Municipal Act* and is restricted to the matter of propriety of the ward boundaries... The issue before the Board is whether the By-law provides for effective representation within the context of Brant County as prescribed in Reference re Provincial Electoral Boundaries, [1991] 2 S.C.R. 158 (S.C.C.)”²¹

Similarly, in *Lauer v Oshawa (City)*, the Board held that the subject matter of a hearing pursuant to an appeal under section 222 is the appropriateness of the municipality's plan for ward redistribution.²²

¹⁷ *Hambly, Re*, 64 OMBR 36, 2009 CarswellOnt 7748, at para 8.

¹⁸ *Ibid.*

¹⁹ *Ibid* at para 13.

²⁰ *Ibid.*

²¹ *Gatward v. Brant (County)*, 2005 CarswellOnt 7502, at paras 55-56.

²² *Lauer v Oshawa (City)*, 53 OMBR 362, 2005 CarswellOnt 7501, at para 6.



In *Gatward v Brant (County)*, the Board noted that its jurisdiction pursuant to section 222 of the *Municipal Act* is restricted to the propriety of the ward boundaries, which involves an analysis of whether the ward boundaries would achieve effective representation.²³

An analysis of the case law and experiences of municipalities in Ontario reveal a number of important guiding principles city councils must consider in conducting a ward boundary review, such as:

- a strong and effective public consultation process must take place;²⁴
- develop appropriate objectives and guiding principles for the terms of reference for the ward review;²⁵
- the principle of “effective representation” must be respected;²⁶
- in determining ward boundaries factors such as geography, community history, community interests and minority representation should be taken into account by municipalities in order to ensure effective representation of the diverse social mosaic;²⁷
- absolute voter parity is impossible, and relative voter parity may be deviated from in order to achieve more effective representation;²⁸
- beyond achieving more effective representation, the dilution of one citizen’s vote as compared with another’s should not be countenanced;²⁹
- reasonable population projections for each ward based in fact that reflect where growth is actually expected;³⁰
- in determining if there is a compelling reason to amend or repeal a decision of a municipality on ward boundary matters the Board may consider the process followed by the municipality, the criteria used by the municipality and the grounds of the appeal.³¹

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²³ *Ibid.*

²⁴ *Supra* note 17 at para 13.

²⁵ *Supra* note 15.

²⁶ *Supra* note 8.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Supra* note 14.

³¹ *Supra* note 17.