

THE OBLIGATION FOR
MUNICIPALITIES TO
ASSUME THE DEFENCE
OF ELECTED COUNCIL
MEMBERS

As part of the 2018
convention of the Fédération
Québécoise des
Municipalités

by

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Both the *Municipal Code of Québec* and the *Cities and Towns Act* provide that municipalities must defend their elected officials in certain circumstances in order to protect them against financial losses that may be caused to them in the course of legal proceedings related to the performance of their duties.

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INTRODUCTION

Municipal Code of Québec (RLRQ, C-27.1)

711.19.1. A municipality shall

(1) assume the defence of a person whose election as member of the council of a municipality is contested or who is the defendant or respondent in judicial proceedings brought before a court by reason of the person's alleged disqualification for office as a member of the council or as an officer or employee of the municipality or a mandatory body of the municipality;

(2) assume the defence or the representation, as the case may be, of a person who is the defendant, respondent or accused, or the person impleaded in judicial proceedings brought before a court by reason of the person's alleged act or omission in the performance of his duties as a member of the council or as an officer or employee of the municipality or a mandatory body of the municipality;

(3) assume the defence of a member of the council against whom an application has been brought under section 312.1 of the Act respecting elections and referendums in municipalities ([chapter E-2.2](#)). [...]

Cities and Towns Act (RLRQ, C-19)

604.6. A municipality shall

(1) assume the defence of a person whose election as member of the council of a municipality is contested or who is the defendant or respondent in judicial proceedings brought before a court by reason of the person's alleged disqualification for office as a member of the council or as an officer or employee of the municipality or a mandatory body of the municipality;

(2) assume the defence or the representation, as the case may be, of a person who is the defendant, respondent or accused, or the person impleaded in judicial proceedings brought before a court by reason of the person's alleged act or omission in the performance of his duties as a member of the council or as an officer or employee of the municipality or a mandatory body of the municipality;

(3) assume the defence of a member of the council against whom an application has been brought under section 312.1 of the Act respecting elections and referendums in municipalities ([chapter E-2.2](#)). [...]

A. APPLICATION

1. Contesting the election of a council member or an application based on an allegation that the person is ineligible to serve as a council member, officer or employee of the municipality;
2. The request referred to at section 312.1 of the Act respecting elections and referendums in municipalities, RLRQ, c. E-2.2 (AREM);
3. A request based on an allegation of an act or omission in the performance of the duties of a person as a member of the council, officer or employee of the municipality.

A. APPLICATION

The conditions of application :

- The protected person must be the defendant, the respondent or the accused, or the person impleaded in judicial proceedings;
- Protection must take place in proceedings before a Court;
- The procedure must be based on an allegation of an act or omission in the performance of the duties of the council member, officer or employee of the municipality.

1) The elected representative must be the defendant, the respondent or the accused, or the person impleaded in judicial proceedings

The protection does not cover judicial and extrajudicial costs that may result from a proceeding for which he is the plaintiff.

2) Protection must take place in proceedings before a court

A “court” includes a tribunal, a coroner, a fire investigation commissioner’s inquiry, a commission of inquiry or a person or body performing quasi-judicial functions.

This excludes simple warnings or threats to prosecute.

3) **The proceedings must be based on the allegation of an act or omission in the performance of his duties**

The notion of “member”

Both current and past elected officials are covered by the notion of “Council member”. However, a simple candidate in an election is not included.

The notion of an "act or omission in the performance of his duties"

Two elements must be analyzed to determine whether the elected municipal official is or was in the "exercise of his or her functions", i.e:

1. The purpose of the action taken;
2. The pertinence of the act to municipal affairs.

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A. APPLICATION

Examples of acts or omissions committed in the performance of duties *

- Write an information bulletin to explain the decision of the municipal councillors;
- Defame or damage a person's reputation during a council meeting;
- The fact that an advisor gave an interview to a journalist to express his point of view on the way the mayor behaved, particularly towards council members.

Examples of acts or omissions that were not committed in the performance of duties *

- Accepting amounts of money to influence a decision and the corruption of public officials;
- Commit an act of fraud, corruption and breach of trust;
- Maneuvers made during a candidate's election campaign.

** However, each case is a specific case.*

B. THE EXTENT OF THE OBLIGATION

1. The obligation to defend involves the obligation to take up the cause of the person who benefits from protection;
2. There may be a renunciation by the protected person to exercise his or her right;
3. The protection is applicable until a final judgment is rendered. This includes situations where the person enjoying protection takes the judgment in which he or she is defending on appeal or for judicial review;
4. The person who benefits from protection has the choice of his or her lawyer;
5. Defence costs must be reasonable.

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B. THE EXTENT OF THE OBLIGATION

The notion of "reasonable costs"

It is the lawyer's responsibility to establish his fees in a reasonable manner, in accordance with his ethical obligations (ss. 101 and 102 of the *Code of Professional Conduct of Lawyers*, RLRQ, c. B-1, r. 3.1).

Fees are fair and reasonable if they are justified by the circumstances and proportionate to the professional services rendered, taking into account, for example:

- the time and effort required and devoted to the case;
- the difficulty of the case;
- the result obtained;
- the fees provided for by law or regulation;
- the disbursements, fees, commissions, rebates, fees or other benefits that are or will be paid by a third party in connection with the mandate given to it by the client.

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B. THE EXTENT OF THE OBLIGATION

The notion of "reasonable costs" (continued)

The person benefiting from the protection also assumes the obligation to ensure that the services provided to him/her are reasonably charged for. It also has an interest in doing so, considering that it could be required to reimburse them to the municipality.

Reasonable costs may include preparation costs prior to the filing of the proceeding for which the person is being prosecuted, provided that they were foreseeable and the prosecution was actually filed.

Travel and living expenses may also be included in reasonable expenses when the lawyer is from outside the region.

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B. THE EXTENT OF THE OBLIGATION

The notion of "reasonable costs" (continued)

The municipality can not make the decision to set a maximum hourly rate itself.

However, it may use the lawyers' conciliation and arbitration procedure under the *Regulation respecting the conciliation and arbitration procedure for the accounts of advocates* (RLRQ, c. B-1, r. 17), if it wishes to question the reasonableness of the costs claimed from it.

It can, and even must, stop paying defence costs when they are no longer reasonable; a difficult notion to apply.

C. REMEDIES IN THE EVENT OF REFUSAL TO DEFEND

If a person benefiting from protection is refused payment or reimbursement of his defence costs by the municipality, he has legal remedies to force the municipality to comply with its obligation, including, in particular, the following:

- the injunction;
- the appeal for judicial review;
- the request for a declaratory judgment;
- the request to initiate proceedings in warranty.

If the person was entitled to protection and was improperly refused protection by the municipality, the municipality could be required to reimburse the person for reasonable costs and fees incurred in enforcing his or her right.

D. THE REQUEST FOR REIMBURSEMENT

The person benefiting from the protection must, upon request by the municipality, reimburse it for all or part of its expenses as indicated in the request, in one of the following cases:

1. the act or omission of the person, whose allegation founded the procedure, is gross negligence, intentional or separable from the performance of the person's duties;
2. the court has been seized of the proceedings by the municipality or by a third party at the latter's request;
3. the person, defendant or accused in the criminal or criminal proceedings, was found guilty and had no reasonable grounds to believe that his or her conduct was in accordance with the law.

D. THE REQUEST FOR REIMBURSEMENT

The choice to claim reimbursement is made by the municipality that incurred them.

In exercising its discretion, the municipal council must take into consideration two objectives

1. The person must be reasonably protected from financial loss;
2. Public funds must not be used to protect a person who has committed misconduct that is disproportionate to the mistakes that a reasonable person can make.

D. THE REQUEST FOR REIMBURSEMENT

In carrying out this exercise, the Council may consider the following factors:

- the person's good or bad faith;
- diligence or negligence in learning the rules and practices relevant to the performance of their duties;
- the existence or absence of previous misconduct on his part related to the performance of his duties;
- the simplicity or complexity of the situation in which she committed a fault;
- the good or bad quality of the advice it has received;
- any other relevant factors.

In the event that the municipality's right to obtain reimbursement is contested, it will be obligated to assume the costs of representation of the person contesting the said request, but which can also be subject of reimbursement.

E. THE OBLIGATION TO INDEMNIZE THE THIRD PARTY

Additional financial protection is provided by law to board members in the event of a personal award of damages. The municipality is thus required to pay the damages for which the council member was convicted. However, conditions must be met:

1. the conviction is the result of the fault of the council member in the performance of his or her duties within the municipality or a mandatory body of the municipality;
2. it is not gross negligence, intentional or separable from the performance of his duties;
3. the council member must not, without the authorization of the municipality, have admitted his fault;
4. the member of the board must not have assumed his or her defence or representation, during the proceedings where his or her fault is demonstrated, either himself or herself or by the attorney of his or her choice.

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QUESTION PERIOD

DUNTON RAINVILLE

AVOCATS et NOTAIRES

LA **FORCE** D'UNE **PASSION**

MONTRÉAL 514 866-6743

LAVAL 450 686-8683

LONGUEUIL 450 670-8225

JOLIETTE 450 759-8800



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