

Resolution No. 1
Annual General Meeting of the APEGM of October 23, 2015

Once you get through all of the "whereases" and "wherefors" in this resolution, the fundamental point of the resolution is to seek to revise the Council's Code of Conduct to eliminate the council's authority to remove a councillor.

The resolution itself seems to be based upon the premise that the Council does not, or should not, have the authority to remove a councillor because it is inconsistent with the Act and the by-laws and that such power is somehow inconsistent with the principles of natural justice.

Dealing firstly with the premise that the Council should not have the authority to remove a councillor (and here I am referring to the 4th to 7th recitals of the resolution); the authority of the Council flows from the Act and the common law. It has been a fundamental principle of common law going back literally hundreds of years that an organization such as the APEGM and its Council have the inherent right to make and enforce their own policies and procedures in connection with their internal governance.

Separate and apart from the common law right, s.12 (3) of the Act expressly allows the Council to establish its own operating policies and procedures. The wording of s.12 (3) is broad, permissive and empowering. Subsection (a) empowers the Council to create "specific requirements for any aspect of the process of governing, regulating or advancing the practices of engineering and geoscience". The section is clearly designed to give the Council the authority to

create its own operating policies and procedures subject only to the requirement that the policies and procedures are not inconsistent with the Act or the by-laws. Again, the wording is broad and enabling. It is not restrictive.

There is a suggestion in the "whereas" in this resolution that because the Act contains an express provision in s.8(4) stating that a councillor who fails to attend three consecutive meetings automatically ceases to be a councillor unless the absence is excused by resolution of the Council, that the provisions for removal of a councillor that are set out in the Code of Conduct are inconsistent with the Act. Firstly, s.8 (4) deals with automatic removal, not removal after due process and allowing for a full hearing of the allegations and an opportunity for the accused person to respond; which is what the Code of Conduct provides for. Secondly, if one is going to provide for automatic removal of a councillor without due process, as s.8 (4) does, then that power must be set out in the Act because the only way to override the requirement for due process or the application of the rules of natural justice is to expressly set out the power in the Act. The Council itself cannot excuse itself from the application of the rules of natural justice. Only the legislature can and that is why s.8 (4) is in the Act. Not because the section is intended to limit the Council's authority.

With all due respect to the drafter of the resolution, it is a considerable leap of logic to say that because one provision of the Act allows for automatic removal of a councillor for missing three meetings that the Council cannot provide for removal for any other reason; particularly after a full hearing and an opportunity for the accused person to be heard as is the case with the Code of Conduct.

Based upon my review of the Act, the by-laws and the Code of Conduct, it is abundantly clear to me that the Council has the authority to adopt policies and procedures for the removal of councillors and that the exercise of the authority is not contrary to the Act or the by-laws. I should add that there are a number of cases where the authority of a governing council to remove one of its members has been recognized. Just last year, the Council of the British Columbia Medical Association voted to eject one of its councillors. The case was based on the Carver Code of Conduct which is the same code as the Association uses (the case is Wang v. British Columbia Medical Assn. 2014 BCCA 162, 2014 Carswell BC 1137). The facts related to a failure or refusal of the councillor to observe the confidentiality of board meetings. The case actually dealt with other issues but the British Columbia Court of Appeal did not question the authority of the Council of the British Columbia Medical Association to expel one of its councillors based upon the application of its Code of Conduct. In another case involving the Calgary Roman Catholic Separate School District No. 1, (the case is Calgary Roman Catholic Separate School District No. 1 v. O'Malley 2007 ABQB 575, 2007 Carswell Alta 1261) the Alberta Court of Appeal recognized the right of the school board to expel one of its board members, provided that the rules of natural justice were followed. The right to remove a councillor is a typical right of bodies like the Council of the APEGM, and is recognized by law.

I also want to point out that the Association's Code of Conduct has been adopted under the by-laws of the Association. And you will be interested to know that the provision states that the council member who is alleged to have violated the Code of Conduct must be informed in writing of the complaint and allowed to present his own views on the alleged breach to the

Council. After both parties have had an opportunity to speak and be heard by Council, the two parties must absent themselves from the meeting and the remaining councillors vote on whether the allegation has been proved and any resulting censure including removal from the council.

I also want to refer to Robert's Rules of Order, which are expressly adopted by by-law of the APEGM, which I have here with me today. Robert's Rules state and I am quoting from the 10th edition at pages 624 to 625 as follows:

“Although ordinary societies seldom have occasion to discipline members (i.e. councillors), an organization or assembly has the ultimate right to make and enforce its own rules, and to require that its members refrain from conduct injurious to the organization or its purposes. No one should be allowed to remain a member if his retention will do this kind of harm.”

When Robert uses the word “member” in this context, he is referring to a member of a deliberative board such as the Council. Robert carries on further below to say:

“Punishments that a society can impose generally fall under the headings of reprimand, fine (if authorized in the bylaws), suspension, or expulsion. The extreme penalty that an organization or society can impose on a member is expulsion.”

Again, Robert reiterates the right of an organization like the council to make its own rules of procedure and to expel a councillor who fails to abide by them.

The second premise for this resolution and here I am referring to the second last recital on the first page, is that the Council's governance policies are not consistent with the principles of natural justice. To be blunt, that is simply incorrect. Natural justice is a principle of common law.

Essentially, it consists of 2 principles; the first principle is the rule against bias and the second is the right to a fair hearing. The rule against bias means that the same person cannot act as accuser and judge. The right to a fair hearing means that the accused has the right to know the charges against him and the opportunity to respond to those charges in front of the decision making panel. The applicable provisions of the Code of Conduct expressly provide that the person making the allegations cannot participate in the deliberation and that the accused councillor has the opportunity to know the allegations against him and to respond. In other words, the Code of Conduct not only complies with the rules of natural justice, it embraces the rules of natural justice.

Presented by E. Wells Peever, QC, to the assembly at the annual general meeting of Engineers Geoscientists Manitoba, Friday, October 23, 2015