

Sherbrooke, June 29, 2018

**Via E-mail**

**Mr. Daniel Décary**

Director-General and Secretary-Treasurer  
MUNICIPALITY OF THE VILLAGE OF NORTH HATLEY  
3125, chemin Capelton, C.P. 30  
Village of North Hatley (Québec) J0B 2C0

Ref #: 38.324-1 (NHATLE)

**Object: Legal Opinion – Liability exposure relative to the management of the public beach located on the territory of the Village of North Hatley**

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Dear Sir,

You requested that we provide a legal opinion regarding liability exposure arising from the management of the public beach located on the territory of the Municipality of the Village of North Hatley (hereafter 'the Municipality'), applicable to the Municipality, to Council members as well as to administrative staff members.

According to the information provided, the Municipality is the owner of a public beach. Previously, the beach was operated by the North Hatley Recreation Society (hereafter 'the Society'). Due to a disagreement with the Society, notably regarding access to the beach outside opening hours, the Municipality took over management of the beach. Citizens have voiced their disapproval as they can no longer have access to the beach beyond regular opening hours. It is within this context that you have requested that we draft the present legal opinion.

## THE NOTION OF LIABILITY

In the case of *Laurentide Motels Ltd. c. Beauport (Ville)*<sup>1</sup>, the Supreme Court of Canada held that once the decision is made to provide a service, the adequacy of the service falls within the operational sphere and when the Municipality is within the operational sphere of its discretionary powers, it is as such subject to rules of conduct under private law.

In Quebec, the rules of conduct under private law are outlined in the *Civil Code of Québec*<sup>2</sup>, specifically under articles 1457 and following:

*1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.*

*Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.*

*He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.*

As provided under article 1457 of the *Civil Code of Québec*, extra-contractual liability applies to a person if the following three components are present with a preponderance of the evidence: fault, prejudice and a causal link between the fault and the prejudice.

As such, the notion of 'fault' is of primary importance. There is 'fault' when, voluntarily or involuntarily, a person causes harm to another. The person is at fault because she or he behaves in a manner that is contrary to what is expected **of a reasonably prudent and diligent person placed under the same circumstances**. The fault can result from action (wrongful act) or inaction (failure to act). The fault can be intentional (the act is deliberate with the intention to do harm) or unintentional (the act is the result of imprudence or negligence). Depending on the level of the violation, the fault can sometimes qualify as gross negligence. Gross negligence is defined as the author of the act demonstrating recklessness, imprudence, gross negligence or a total disregard for the well-being of others.

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<sup>1</sup> [1989] 1 RCS 705.

<sup>2</sup> *Municipal Code of Québec*, R.L.R.Q., chapitre C-27.1.

## **OBLIGATIONS OF THE MUNICIPALITY**

The Municipality must, as the owner of a beach operated for general public swimming, meet various requirements. These requirements are set out under the *Regulation respecting safety in public baths*<sup>3</sup>, which states, among others, that the owner of a beach operated for public swimming in general must indicate the area of the beach under surveillance as well as the hours under surveillance, have a number of safety supervisors in place on the beach, and evacuate bathers and prohibit access to the beach under certain circumstances.

Consequently, we are of the opinion that the Municipality must, in order to meet the requirements under the *Regulation respecting safety in public baths*, place signs at each end of the beach indicating the supervised hours and the area of the beach under supervision.

Although the Municipality is not required to do so, we are of the view that it should add signs with a notice to the public that bathing is prohibited outside operating hours.

It should be noted, however, that the legal value of the said signs is regulated under article 1476 of the *Civil Code of Québec*, which states that a person may not by way of a notice exclude or limit his obligation to make reparation with respect to third persons; such notice only constitutes the disclosure of a danger. As such, the posting of 'swimming prohibited' signs will not exempt the Municipality from its obligation to remedy harm inflicted through its fault, the sign being equal to a simple notice of danger that allows the courts to take the said notice into consideration and possibly conclude that there is a shared responsibility between the Municipality for the fault committed and the victim for her or his reckless behaviour.

Finally, it should be noted that the Municipality is not obligated to fence off the beach area that it operates. The decision to do so falls within its operational sphere.

## **RESPONSIBILITY OF THE MUNICIPALITY**

As extensively explained above, once the Municipality has made the decision to operate a beach, it becomes subject to the rules of conduct under private law.

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<sup>3</sup> *Regulation respecting safety in public baths*, R.R.Q., c. B-1.1, r. 11.

As stated above, extra-contractual civil liability by the Municipality will arise if the following three components are present with a preponderance of the evidence: fault, prejudice and a causal link between the fault and the prejudice.

The fact the Municipality fails to meet the requirements under the *Regulation respecting safety in public baths* or permits or tolerates public swimming outside regular operating hours could certainly constitute a fault and make the Municipality subject to liability.

That being said, the following are questions you specifically submitted to us relative to the responsibility of the Municipality.

**Could the Municipality be held liable if someone is injured or drowns after having accessed the beach when the access gate was locked?**

We are of the opinion that the Municipality would not be liable if someone is injured or drowns after having accessed the beach when the access gate was locked. However, an answer to this question could be different if it was shown that the Municipality knew that the public had found a way to access the beach outside operating hours, even though the access gate was locked and that it did nothing to prevent this from happening.

**Would the answer be the same if the Municipality installed a lockable gate latch?**

Although the Municipality is not obligated to fence off a beach area, we are of the opinion that once the fence is installed, it must be used for the purpose for which it was intended and that the public expects, that is to prevent the public from accessing the beach area outside operating hours. Moreover, as stated above, the Municipality cannot tolerate or allow that the public have access to the beach outside operating hours at the risk of being liable as a result. Consequently, we are of the view that installing a simple latching system to lock the gate could constitute the grounds for liability on the part of the Municipality. The risk is all-the-more present if, as in this case in point, the padlock is replaced by a latch in order to allow the public to have access to the beach outside opening hours.

**Could responsibility by the Municipality arise if someone is injured or drowns after accessing the beach when the access gate was not locked?**

The comments on the preceding question apply here. Consequently, we are of the view that the fact of not locking the gate constitutes the grounds for liability on the part of the Municipality. The risk is all-the-more present, as in this case in point, if the gate is not locked in order to allow the public to have access to the beach outside opening hours.

**Could the Municipality be held liable if someone is injured or drowns after accessing the beach and there is no fence?**

At the risk of repeating ourselves, the Municipality is not obligated to fence off a beach area. The Municipality can as such remove the gate. Removing the fence is not susceptible, in of itself, of establishing the grounds for liability on the part of the Municipality. However, removing the fence for the purpose of allowing the public to have access to the beach outside operating hours can be the grounds for liability on the part of the Municipality. In fact and as previously mentioned, the Municipality cannot tolerate or allow that the public have access to the beach outside operating hours at the risk of liability.

It is also important to ensure that a decision such as this (removing the lock or fence) will not have an impact on the Municipality in terms of insurance.

**RESPONSIBILITY OF COUNCIL MEMBERS AND ADMINISTRATIVE STAFF MEMBERS**

Council members and administrative staff members are not immune in any way, to the extent that their actions could certainly result in judicial proceedings.

In the event of judicial proceedings regarding a Council member or administrative staff member, the Municipality, by virtue of article 711.19.1 of the *Municipal Code of Québec*, is obligated to ensure their defense, cover or reimburse the costs incurred for their defense or pay third-party damages incurred through their fault.

However, article 711.19.2 of the *Municipal Code of Québec* stipulates that a Council member or administrative staff member will be required to reimburse the Municipality if the alleged act or omission is a gross or intentional fault or a fault separable from the performance of his duties.

It can therefore be said that Council members or administrative staff members are not held personally responsible for an error committed within the framework of their duties unless it is a gross or intentional fault or a fault separable from the performance of her or his duties.

As previously explained in detail, a fault is intentional if it is deliberate and intended to cause harm, it is gross when it includes recklessness, imprudence or gross negligence or a total disregard for the interests of others.

That being said, the following are questions you specifically submitted to us relative to the responsibility of the above-mentioned persons.

**Could Council members or administrative staff members be personally subject to judicial proceedings?**

As mentioned above, Council members and administrative staff members are not immune in any way and could be subject to judicial proceedings.

**Could Council members or administrative staff members be at risk for civil or criminal responsibility?**

We do not see how civil liability for Council members and for administrative staff members could become an issue. We all-the-more do not see how they could become criminally liable. What is more and as mentioned above, should judicial proceedings be launched against any one of them personally, the Municipality, in accordance with article 711.19.1 of the *Municipal Code of Québec*, would be required to ensure her or his defense, reimburse the costs incurred for their defense or pay third-party damages incurred through their fault.

**If Council members were to vote not in favour or administrative staff members were in disagreement would this absolve them of all responsibility?**

In our view Council members who do not vote in favour or administrative staff members who are in disagreement would not be held liable.

We trust that the present legal opinion answers all of your questions. We remain available to provide all additional information that you may deem useful.

***The present is a legal opinion and as such is confidential. In order to preserve the confidential nature of this said document, you must not present it at any public council meeting and you must not discuss it publicly during a said meeting, whether it be in the course of discussions***

***relative to an item listed on the agenda or during the question period. Furthermore, the legal opinion must not be filed among regular files of the Municipality to which the public in principle has access; it must instead be filed with other confidential documents of the Municipality and as such, we recommend that a specific location be designated for documents and files that the Municipality deems confidential. Moreover, any person who becomes acquainted with the content of the present legal opinion may not divulge its content to a third party or discuss it, without prior approval by Council.***

Yours truly,

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