

Ombudsman Act Investigation Report
Cases 2019-0283 and 2019-0284:
Rural Municipality of Lac du Bonnet

March 2021

Manitoba  Ombudsman

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REPORT UNDER THE OMBUDSMAN ACT CASES 2019-0283 and 2019-0284 Rural Municipality of Lac du Bonnet

THE COMPLAINT

The complainant owns property adjacent to public reserve land in the Rural Municipality of Lac du Bonnet (the RM or the municipality) that is being used by snowmobilers to access the Lee River from the road. The complainant began to occupy the property in 2001 and reports that the public reserve land has been in continual use by snowmobilers since at least that time.

The complainant states that he has raised concerns regarding snowmobile activity – both on the public reserve and his private property – with the RM and alleges that the RM has not treated his concerns fairly. The complainant believes that the RM has acted contrary to provincial law. In particular, the complainant states that the noise and lights from the machines disturbs his quiet enjoyment of his property, particularly when snowmobiles pass his home during the night.

With regards to the public reserve land, the complainant is of the view that the RM's decision to allow this activity on public reserve land brings with it increased liability. The complainant has concerns that, should an accident occur on his property, which adjoins the public reserve, he could be found personally liable. The complainant is also concerned that an action against the RM as a result of an accident may result in a cost to taxpayers to defend and/or settle the action.

OMBUDSMAN JURISDICTION AND ROLE

Under the Ombudsman Act, Manitoba Ombudsman investigates complaints about administrative actions and decisions made by any department or agency of the Manitoba government or a municipal government. We will either support a complaint and identify the appropriate corrective or restorative action, or provide a reasonable explanation for the conclusion that a complaint cannot be supported. If a complaint is supported, the ombudsman may make recommendations to the public body pursuant to section 36 of the Ombudsman Act.

A matter of administration includes any practice, procedure, action or decision that government makes as it implements or administers its laws and policies. We examine the administrative processes and procedures followed when government applies legislation, regulation and/or existing policies.

In addition to reviewing municipal actions and decisions for compliance to legislation and bylaws, we assess the fairness of those decisions. We look at three dimensions of fairness when assessing an action or decision, namely:

1. Fair process
2. Fair decision
3. Fair service

Public bodies and their employees receive their authority and direction from legislation. To support and guide elected officials and staff in exercising this authority, public bodies develop policies, procedures, guidelines, bylaws, and other guidance documents. These documents are the primary framework for administering public programs and services. Bylaws and other guidance documents have the power to affect the legal rights, and private interests and privileges of individuals. It is important that such bylaws are applied in a fair and reasonable manner.

We reviewed applicable provincial legislation and municipal bylaws relevant to this case, and considered the reasonableness and fairness of the actions of the RM.

THE SCOPE OF OUR INVESTIGATION

Our investigation of this complaint included the following:

- Review of the submissions (oral and documentary) of the complainant
- Interview of the representative for the Rural Municipality of Lac du Bonnet
- Review of agendas and minutes of public meetings of the Rural Municipality of Lac du Bonnet
- Review of relevant sections of the Municipal Act
- Review of the Off- Road Vehicles Act
- Review of relevant sections of the Planning Act
- Review of Rural Municipality of Lac du Bonnet By-law No. 30-13 “Municipal Road Allowances, Public Reserves, Open Spaces”
- Review of Rural Municipality of Lac du Bonnet By-law No. 7-16 “Noise”

ANALYSIS

1. Is the use of the public reserve land by snowmobilers contrary to legislation or bylaw?

Public reserve land is defined by the Real Property Act as follows:

"public reserve" means land which vests in a municipality and which is dedicated to the public;

The Planning Act provides for the following uses of public reserve land:

- 138(1) Public reserve land may be used only for
- (a) a public park;
 - (b) a public recreation area;
 - (c) a natural area;
 - (d) a planted buffer strip separating incompatible land uses; or
 - (e) public works.

In order to govern the use of public reserve land in its control, the Municipal Act makes provision for municipalities to pass bylaws regarding its use:

Guide to interpreting power to pass by-laws

231 The power given to a council under this Division to pass by-laws is stated in general terms

- (a) to give broad authority to the council and to respect its right to govern the municipality in whatever way the council considers appropriate, within the jurisdiction given to it under this and other Acts; and
- (b) to enhance the ability of the council to respond to present and future issues in the municipality.

Spheres of jurisdiction

232(1) A council may pass by-laws for municipal purposes respecting the following matters:

...

- (b) people, activities and things in, on or near a public place or a place open to the public, including parks, municipal roads, recreation centres, restaurants, facilities, retail stores, malls, and private clubs and facilities that are exempt from municipal taxation;

...

- (g) the operation of off-road vehicles on public or private property;

...

The municipality has created a bylaw to govern the use of public reserve land. By-law No. 30-13 "Municipal Road Allowances, Public Reserves, Open Spaces" specifies activities which are prohibited on public reserve land:

3.0 The following activities, in any manner or fashion, are not permitted on Undeveloped Road Allowances, Public Reserve lands and Open Space, Recreational and Institutional lands, unless prior permission is granted by the Municipality as prescribed in Section 3.3:

- i) archery
- ii) fire arms and other types of weapons (also see Fire Arms Bylaw)
- iii) any other activity which in the opinion of the Designated Officer of the Municipality is unsafe to the general public or adjoining property
- iv) cutting or clearing of trees or brush
- v) burning
- vi) dumping of any waste or waste materials

By-law 30-13, section 1.1 defines “Designated Officer” as:

A building inspector or other official appointed by council, from time to time, to enforce this by-law, or, in the absence of such an appointment, the Chief Administrative Officer.

The municipality has limited discretion as to how public reserve land will be used. Its use must fall into one of the five permitted uses enumerated by the Planning Act. A snowmobile trail falls into one of the permitted uses, namely a public recreation area. Concurrently, the public reserve in question also serves as a drain, which is a second use permitted by the Planning Act.

Apart from the specific, limiting language of the Planning Act, a municipality is given “broad authority” by provincial legislation in order to “respect its right to govern the municipality in whatever way the council considers appropriate.” Legislation supports the autonomy of democratically elected leaders of municipalities. They are deemed to be the most likely to comprehend and respond to the unique interests of their jurisdiction.

A municipality has the discretion to pass bylaws respecting the use of public and recreation space. A municipality may choose to regulate the use of off-road vehicles in bylaws.

The RM has passed a bylaw with regards to the use of public reserve land, and has decided to list six prohibited uses of the public reserve land. The use of snowmobiles on public reserve land is not a prohibited use.

Our office notes that the bylaw provides that other activities may be prohibited “which in the opinion of the Designated Officer of the Municipality is unsafe to the general public or adjoining property” (emphasis added). This language allows the designated officer, and by extension council, broad discretion to determine what is safe to the general public in the context of the community in which they have been elected.

It is our view that snowmobile use on public reserve land is not contrary to law or the bylaws of the RM, and that decisions with regards to their use by council are discretionary.

2. Is the manner in which the public reserve land is used by snowmobilers contrary to legislation or bylaw?

The Off-Road Vehicles Act governs the manner in which snowmobiles may be operated in the province.

Following are the relevant sections of the act:

"off-road vehicle" means any wheeled or tracked motorized vehicle designed or adapted for cross-country travel on land, water, ice, snow, marsh, swamp land or other natural terrain and includes, but is not limited to,

(a) a snowmobile,

...

"peace officer" means

(a) any member of the Royal Canadian Mounted Police Force and any other police officer, special constable, or other person employed for the preservation and maintenance of the public peace,

(b) any person lawfully authorized to direct or regulate traffic, or to enforce this Act or traffic by-laws or regulations, and

...

Certain operations prohibited

32(1) No person shall operate an off-road vehicle

(a) on privately owned land without the express or implied consent of the owner or lawful occupier of the property;

(b) on Crown land allocated by lease or permit, without the express or implied consent of the lawful occupier of the property, unless the operator is otherwise lawfully authorized to enter such land;

(c) within 30 m of a dwelling between the hours of twelve midnight and seven o'clock in the morning, unless the dwelling is located on the operator's own property or property under the operator's control or as an invited guest; or

(d) within 30 m of a playground, or area set aside for other recreational use, unless the area is enclosed or fenced or unless the off-road vehicle is required for the maintenance or operation thereof.

By-laws respecting the operation of off-road vehicles in other areas

46(1) Rules supplementary to, or in addition to, but not contrary to any other provision of this Act or the regulations made under this Act

(a) prescribing the periods of the day, or of the year, during which designated off-road vehicles shall not be operated;

(a.1) prescribing the maximum speed above which off-road vehicles shall not be operated;

(b) prescribing areas in which the operation of designated off-road vehicles shall be permitted or prohibited; and

(c) fixing penalties for violation of by-laws passed under this section;
may be made

(d) in respect of a municipality, by the council thereof;

...

The complainant has presented photographic and video evidence that snowmobiles cross his privately-owned land without his consent, that such operation occurs at times prohibited by the Off-Road Vehicles Act, and that the operation occurs closer than 30 metres from his dwelling. It is our view that the evidence indicates that snowmobiles are being operated in a manner contrary to the Off-Road Vehicles Act.

Generally, the Off-Road Vehicles act is enforced by police. In the RM of Lac du Bonnet, the Royal Canadian Mounted Police (RCMP) is the police force. The complainant has contacted the RCMP, and they have assessed the situation. The ombudsman does not have jurisdiction to make recommendations to a federal police force.

A municipality does not have a role to play in enforcing the Off-Road Vehicles Act. A municipality has the discretion to make rules, in the form of bylaws, that regulate the movement of snowmobiles in their area, provided those bylaws do not contradict the act. The municipality then gains jurisdiction to enforce the bylaw. In this case, the RM has not passed a bylaw regarding snowmobile activity. Therefore, there is no bylaw to enforce.

3. Is the RM in breach of its legislative obligation to maintain the drain located on the public reserve land?

The complainant is concerned that snowmobiles damage the drain that exists on the public reserve land.

Fundamental principles regarding a municipality's obligations for drain maintenance and licensing are found in the Municipal Act. Following are the relevant sections of that act:

Definition

294.1(1) In this section, "**drain**" means a culvert, drain, drainage ditch, dyke or floodway, constructed or maintained by a municipality but does not include a provincial waterway as defined by *The Water Resources Administration Act*.

Jurisdiction over drains

294.1(2) Subject to the rights vested in any other party under *The Water Resources Administration Act* or *The Water Rights Act*, a municipality has jurisdiction over every drain within its boundaries.

Duties re drains

294.1(3) A municipality must maintain every drain within its boundaries to a standard that is appropriate for the use to which the municipality expects the drain to be put.

The Municipal Act places a duty on municipalities to maintain drains. The standard of maintenance is at the discretion of the municipality with the only restriction being that the drain must serve the purpose given it by the municipality.

It is our view that the RM has the authority to designate the appropriate conditions in which drains must be kept, and maintain them to the standard appropriate to their use. These are both discretionary decisions made by council.

4. Is snowmobiling activity in breach of the noise bylaw of the Rural Municipality of Lac du Bonnet?

Following are the relevant sections of the municipality's By-law 7-16 "Noise":

"Nuisance Noise" means any loud, unnecessary or unusual sound or any sound whatsoever which annoys, disturbs, injures, endangers or distracts from the comfort, repose, health, peace and/or safety of any reasonable person as determined by an Officer.

"Officer" means any member of the Royal Canadian Mounted Police Force and any other police officer, police constable, constable, designated officer or other person appointed and employed by the Rural Municipality of Lac du Bonnet for preservation and maintenance of the public peace.

2. PROHIBITED NOISES No person shall make, continue to cause, or allow any Nuisance Noise except where otherwise permitted by this By-Law.

The following shall be deemed likely to be Nuisance Noise and restricted between the hours of 11:00 p.m. and 7:00 a.m. but not limited to:

- (a) The sound caused by the lighting and/or setting off of any explosive noise making device, including a firecracker or other fireworks.
- (b) No person owning, possessing or harboring any animal or bird shall allow it to create a Nuisance Noise.
- (c) The sound from excavation or construction work of any nature.
- (d) The sound resulting from the use and/or operation of any power tool, motorized law mower, snow clearing device, chain saw, leaf blower, motorized garden tiller, weed/grass trimmer, motorized toy, or similar device used outdoors.

...

Nuisance noise is determined on a subjective standard by an officer. This allows the municipality to maintain the discretionary ability to determine what is, or is not, a nuisance noise. The noise bylaw does not identify snowmobiles or similar recreational vehicles as creating noise that must be restricted.

The complainant suggests that the phrase “similar device” in s. 2(d) of the bylaw could include snowmobiles. The regulation attached to the bylaw, which itemizes penalties associated with each offence, makes it clear that s. 2(d) is limited to power tools.

It is our view that, while noise from snowmobiles may in fact be a nuisance, the noise bylaw gives the RM the authority to determine whether it is a nuisance noise within the meaning of the bylaw that can be regulated.

5. Has the RM made a fair decision regarding the use of the public reserve land?

An analysis of a fair decision examines whether the process followed has been fair, and whether, once action has been taken, the substantive decision falls within a range of reasonable outcomes.¹

Our office reviewed the process that allowed the complainant to voice his concerns to the RM. We note that the complainant has had an opportunity to be heard by delegation before council on at least two occasions. Minutes of council document the appearance and the decisions taken, including opposing delegations. Communication between the RM and the complainant is on-going and appears timely. The RM further responded to the concerns of citizens by seeking a legal opinion on the matter. Our office appreciates that there is continuing debate by the community with regards to the legal opinion. It is not the place of our office to offer its opinion on legal advice obtained by various parties.

Our office considered the matter of integrity and impartiality in the decisions made by the RM. We did so as the complainant argued that council is not impartial and is biased in their decision making because they are snowmobilers themselves and they make decision in favour of the snowmobiling community. We note that there is no pecuniary interest involved in this matter. Further, we note that the RM markets itself as a “four-season playground” on their website and its promotional literature² which means that decisions that favour a group using the area for recreational purposes falls within the vision and mandate of the RM and, consequently, within a reasonable range of outcomes based on the culture of the community.

It is our view that the RM’s decisions have not been arbitrary, as they link directly back to the vision and mandate of the RM. It is not *improperly* discriminatory in that, while their decision discriminates in favour of snowmobilers, their decisions link directly to the overall vision and mandate of the RM.

The RM’s decisions have been lawful to the extent that they have complied with existing legislation which are within their power of enforcement.

¹ References in this section are to the publication “Fairness by Design: An Administrative Fairness and Self-Assessment Guide,” created by a coalition of provincial and territorial Ombuds offices in Canada, and currently publicly available [HERE](#).

² For example, see [HERE](#) and [HERE](#).

Lastly, we acknowledge that the RM has provided fair administrative service to the community in that its bylaws, council meeting minutes, and marketing information are all publicly available on their website. They have provided various citizen groups the right to bring the matter before council for reconsideration. Participation in the democratic process of public presentations, attendance and contributing to council meetings, and voting is the method to deal with concerns about decisions being made by local governments. These avenues of persuasion remain available to the complainant and the citizens of the community.

FINDINGS

Our office does not find that the RM has acted contrary to existing legislation or bylaws, or has acted in a procedurally unfair manner.

Nevertheless, this finding does not diminish the fact that the complainant is experiencing a real problem and, despite their best efforts, has met with little success in solving the situation. We are further of the view that the RM has the responsibility to play a greater role in protecting the safety and property rights of their citizens, snowmobilers and non-snowmobilers alike.

The Municipal Act of Manitoba states the following:

Municipal purposes

- 3 The purposes of a municipality are
- (a) to provide good government;
 - (b) to provide services, facilities or other things that, in the opinion of the council of the municipality, are necessary or desirable for all or a part of the municipality; and
 - (c) to develop and maintain safe and viable communities.

Elected officials have the responsibility to continuously monitor emerging concerns in their communities, receive and evaluate complete and relevant information, reflect an appropriate exercise of discretion, and reasonably consider the specific case and citizen's individual circumstances.

Snowmobilers who trespass the complainant's private land do so illegally and in violation of the Off-Road Vehicles Act.

On May 3, 2018, a corporal with the RCMP wrote to the reeve and council of the RM. The corporal had investigated the complainant's report, reviewed the evidence, and attended at the public reserve and private property. While declining to become involved in the dispute between the complainant and the RM, the RCMP offered to assist the RM and make recommendations on the matter. RCMP acknowledged they could "see the concerns" of the complainant, in particular "where someone could hit a tree or culvert which could be fatal or at the very least cause serious injuries." RCMP concluded that they were "not opposed to seeing an alternate

route so that travel can be made in a matter (sic) that involves winter travel on and off the river in a safe manner.”

While acknowledging that the RM does not have the jurisdiction to enforce the Off-Road Vehicles Act, it is our view that they have fettered their discretion by taking no action. It is our view that the RM has an inherent responsibility as a government to uphold the laws of the province, and to act, such as the passing of bylaws and/or the communication of community restrictions, that would allow them to fulfill their purpose in developing and maintaining safe and viable communities.

CONCLUSION

Our office acknowledges the discretion of municipal governments generally to govern independently. That discretion must be used to balance competing interests in the community. Governments are responsible to serve the needs of all citizens, and to build safe and inclusive communities.

While there may not be a legal obligation placed on the RM by the Off-Road Vehicles Act, it is our view that the RM has precluded itself from intervening in a situation which calls out for its intervention.

Manitoba Ombudsman is of the opinion that the RM’s lack of intervention in this matter has been an unreasonable omission, as contemplated by the Ombudsman Act, section 36(1)(a)(ii).

In our investigation, we reviewed the regulation and practices of similar situated rural RMs. Many rural RMs in Manitoba have undertaken the following:

- created snowmobile specific bylaws
- included snowmobile activity in noise bylaws, and
- designated snowmobile routes

It is our view that such clear direction provides guidance to their communities that is consistent with legislation and assists those who snowmobile to make safe travel choices. It further assists those who do not snowmobile to have realistic expectations of how machines will operate in the community, and allows them to make safer, informed choices to avoid accidental encounters with machines. Communication on the matter is especially important to visitors to the community, who may not otherwise be aware of local practices.

Accordingly, we make the following recommendations:

Recommendation 1 - The RM will work with the local RCMP detachment and consider their advice and recommendations with the goal of creating an environment in which citizens may enjoy the activity of snowmobiling in a manner that is safer and in compliance with legislation, and citizens not snowmobiling may use private and community resources without disturbance.

Recommendation 2 - The RM will review the plans and bylaws of other similarly situated rural RMs in Manitoba with a view to considering provincial best practices as it pertains to the regulation of snowmobile usage, reflecting on how such best practices could apply in their community.

By letter dated February 18, 2021, the RM council after reviewing our report provided our office with the following response to our recommendations:

Recommendation 1 - The Rural Municipality of Lac du Bonnet has contacted the local RCMP Detachment on multiple occasions regarding this file. During the last contact on February 8, 2021 the local detachment Commander advised the CAO and Council that the RCMP was satisfied that the municipality has adopted any and all advice and recommendations with the goal of creating an environment in which citizens may enjoy all activities in a manner that is safe and in compliance with legislation.

Recommendation 2 - The Rural Municipality of Lac du Bonnet has initiated a comprehensive by-law review for all by-laws to modernize and ensure currency of by-laws. Legislative Service staff and the CAO have engaged similar situation past practices as it pertains to the regulation of snowmobiles usage and have advised council for their consideration. This situation occurred before this council was elected and the current CAO was hired and has been ongoing for many years.

Further, Council is committed to continue to work closely with the local RCMP detachment on issues relating to this file.

Our office is pleased the Rural Municipality of Lac du Bonnet is adopting our recommendations. We encourage the RM to continue to work with citizens to create a safer and enjoyable environment for those in the community that snowmobile, while respecting the rights and safety of all.

This report concludes our involvement regarding this complaint.

MANITOBA OMBUDSMAN