

Municipal Law Potpourri

Things You Need to Know But Haven't Had Time To Think About

AMCTO Zone 6 Spring Meeting

Tony Fleming

Topics

- By-laws vs Resolutions
- Proposed Changes Under Bill 68
- Municipal Conflict of Interest Act Overview and Proposed Changes
- Constitutional Considerations When Passing By-laws
 - *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767
- Judicial Review of an Integrity Commissioner Report
 - *Di Biase v Vaughan (City)*, 2016 ONSC 5620
- Solicitor-Client Privilege in the Context of Privacy Legislation
 - *Alberta (Information Privacy Commissioner) v Board of Governors of the University of Calgary*, 2016 SCC 53

Topics

- Relief from Deemed Forfeiture in a Tax Sale
 - *Poplar Point First Nation Development Corporation v the Corporation of the City of Thunder Bay*, 2016 ONCA 934
- Disclosure of IT Service Contracts
 - *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904
- Trespass at Council Meetings
 - Bracken Cases
- Refusal to Sell Road Allowances
 - *Marciniak v Greater Madawaska (Township)*, 2016 CarswellOnt 12582

1. By-laws vs Resolutions

- By-laws
 - The law of a particular district made by the inhabitants thereof, or their authorized representatives
 - The equivalent of “legislative action”; a regulation by a municipal council for governing its affairs
 - Binds all persons within the boundaries of a municipality, whether residents or not. Equally binding on the enacting municipality
 - FORM: Section 249 of the *Municipal Act, 2001* requires:
 - That the By-law be written
 - That the by-law be signed by the head of council or other presiding officer and the Clerk

1. By-laws vs Resolutions

- The requirements for a by-law:
 1. There must be a valid municipal corporation
 2. It must be passed by a duly convened meeting of the council at which the majority of a quorum concur
 3. IT must be authenticated in the manner required by law
 4. It must be within the express or implied powers of the local authority
 5. It must not be repugnant to the law of the province or the Dominion
 6. It must be made bona fide in the interest of the inhabitants, and not to serve a private interest
 7. It must have certainty of meaning
 8. All conditions precedent to its enactment must be observed; and
 9. It must be duly promulgated and published, if required by law

1. By-laws vs Resolutions

- Resolutions
 - As compared with a by-law, which is more of a continuing regulation, a resolution is usually declarative of a council's intention with respect to a particular matter of a temporary character; it does not necessarily prescribe a permanent rule of local government
 - Expresses the will of the governing body on a special occasion which is not likely to recur, and its subject matter is not, usually, as important as that dealt with in a by-law
 - Resolution passed by council agreeing to do something does not, by itself, give rise to a contractual obligation

1. By-laws vs Resolutions

- Resolutions
 - Formalities are not as strict
 - Need not be under the corporate seal or be signed by the head of council. Such resolutions do not have the force and effect of by-laws.
- Resolutions may be attacked on the same grounds as those employed to defeat by-laws

1. By-laws vs Resolutions

- Municipal Act, 2001

5(3) Powers Exercised by By-law – A municipal power, including a municipality's capacity, rights, powers and privileges under section 9, shall be exercised by by-law unless the municipality is specifically authorized to do otherwise

- Legislative Intent: to ensure due deliberation by councils of all important policy matters through the more formal procedure described for the enactment of a by-law
- There are approximately 30 instances in the Municipal Act, 2001 where a municipality is authorized to proceed other than by by-law



1. By-laws vs Resolutions

- Municipal Act, 2001
 - COMMON LAW EXCEPTIONS: there are also a number of long-standing common law exceptions:
 - By-law not needed for “insignificant matters of every-day occurrence or matters of convenience amounting almost to necessity” ie routine or minor matters do not require a by-law
 - Some administrative decisions, such as instructing staff in the performance of their duties and receiving legal advice, do not require a by-law
 - Therefore, the subject matter of the item of business transacted and whether it is being transacted under the Municipal Act, 2001 determine the need for an authorizing by-law
- NOTE: Whenever there is doubt about the mode that should be adopted, it is the wiser course to proceed by by-law



2. Proposed Changes By Bill 68

- Key changes that would grant municipalities a higher degree of autonomy through amendments to:
 - The Municipal Act
 - The Municipal Conflict of Interest Act
 - The Municipal Elections Act
 - Various other pieces of legislation

2. Proposed Changes by Bill 68 – Municipal Act, 2001

- Codes of Conduct
 - Will now be mandatory
- Closed, Open, and Electronic Meetings
 - Clearer definition of “meeting”
 - Expanded number of discretionary exemptions where councils can meet in closed session
 - Requirements for municipalities to report back on how they intend to address a closed meeting investigation
 - Councillors can now participate in public meetings electronically, as long as there is an in-person quorum of councillors
 - Councillors will not be able to participate electronically in meetings that are closed to the public



2. Proposed Changes by Bill 68 – Municipal Act, 2001

- Integrity Commissioners
 - All municipalities will need to provide access to an integrity commissioner by appointing their own, keeping one on retainer, or working with another municipality through a shared services agreement
 - Role will be changed and expanded in a number of ways
 - Expanding authority to include investigations under the Municipal Conflict of Interest Act
 - Power to provide advice to councils about their codes of conduct and Municipal Conflict of Interest Act obligations
 - Explicit power to refer investigations to the courts
 - Explicit power to initiate investigations into Municipal Conflict of Interest Act or code of conduct violations
 - Broader responsibility for public education
 - Municipalities required to indemnify integrity commissioner



2. Proposed Changes by Bill 68 – Municipal Act, 2001

- Fiscal Sustainability
 - **No new access to revenue tools
 - Prudent Investment standard will be expanded to provide more investment options
 - New section 418.1 would permit a municipality that meets certain prescribed requirements to invest money that it does not immediately require in any security, in accordance with the section and regulations
 - Changes to allow tax sales to start faster (the time period would be shortened to two years), and be easier to complete.
 - Technical changes to taxation provisions under Part VIII, Part IX, Part X



2. Proposed Changes by Bill 68 – Municipal Act, 2001

- Staff Council Relations
 - Requirement for formal policy on staff-council relations
- Administrative Monetary Penalties
 - Municipalities given authority to use AMPs for a broader range of offences, beyond simply parking
- Parental Leave
 - Changes to ensure that councillors are entitled to take time off for pregnancy or parental leave without fear of being removed from elected office
 - Proposed changes would require all municipalities to have a policy on pregnancy and parental leave for council members

2. Proposed Changes by Bill 68 – Municipal Act, 2001

- Climate Change
 - Explicit authority to pass by-laws dealing with climate change and engage in long-term planning for energy use to address the impacts of climate change
 - Changes to encourage passing of by-laws relating to green construction
- Community Councils
 - New section concerning the establishment of community councils
- Small Business
 - Municipalities will now be required to meet certain prescribed conditions before establishing small business programs
- Advertising Devices
 - Municipalities given the ability to regulate all signs within their jurisdiction
- Other notable changes, including
 - New section 239.2(12) requires a municipality or a local board to pass a resolution stating how it intends to address a report from a person reporting his or her opinion that a meeting or part of a meeting that was the subject of an investigation by that person appears to have been improperly closed to the public



2. Proposed Changes by Bill 68 – Municipal Elections Act, 2006

- Section 6(1) amended to change the beginning of terms of all offices from December 1st to November 15th in the year of the regular election
- Change of individual contribution limit from \$750 to \$1200
- New formula-based limits on self-finance campaigns, with a maximum limit of \$25,000
- Under provisions of section 33 that are not in force, the nomination must be endorsed by at least 25 persons. Amendments are made to provide that the requirement, once in force, would not apply in a municipality if the number of electors is less than the number prescribed by regulation.

3. Municipal Conflict of Interest – Proposed Changes by Bill 68

- Expansion of Penalties
 - Changes permit an elector or a **person demonstrably acting in the public interest** to make an application to a judge (integrity commissioner?)
 - Range of penalties expanded, and requirement to declare seat vacant removed
- Conflict of Interest Registration
 - Individual required to file a written statement after they disclose a pecuniary interest.
 - Municipalities required to create a registry that tracks all registered conflict of interest
 - Registry keeps copy of written statements as well as the declarations recorded under section 6 of the Act.



4. Constitutional Considerations When Passing By-laws – *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767

- FACTS

- To adapt to decline in revenues, Canada Post announced that it would restructure delivery services away from door to door delivery and towards community mailbox delivery
- Decision made pursuant to *Canada Post Corporation Act*, 1985, c C-10 and its associated *Mail Receptacles Regulation*, SOR/83-743
 - Canada post “may install...in any public place...a receptacle...to be used for the collection, delivery or storage of mail”
 - “no person may relocate or remove a mail receptacle without Canada Post’s prior written authorization”



4. Constitutional Considerations When Passing By-laws – *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767

- FACTS

- City of Hamilton passed by-law establishing regulatory regime that gave control over the installation of equipment, including CMBs, on municipal roads. Specifically, by-law included
 - Permit System
 - Moratorium
- Canada Post brought an application challenging the by-law, which was granted. City appealed, and the ONCA dismissed the appeal

4. Constitutional Considerations When Passing By-laws – *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767

- Paramountcy
 - Double Aspect Doctrine: Some subjects will fall equally under two distinct heads of power, one federal and one provincial
 - Double aspect raises the possibility of conflict between valid provincial and federal laws.
 - The doctrine of paramountcy stipulates that such conflict is to be resolved in favour of the federal legislation
 - Conflict will occur “If the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating parliament’s purpose”

4. Constitutional Considerations When Passing By-laws – *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767

- APPLICATION IN THIS CASE

- Good indicator of purpose was effect of the by-law
- PERMIT PROCESS: The criteria in the Manual used in process did not address the efficiency or modality of mail delivery, but rather accessibility, safety, etc indicating that subject matter of by-law was general regulation of municipal rights of way for the protection of physical safety of person and property
- MORATORIUM:
 - Fact that by-law specifically addressed CMBs through moratorium did not alter character as a law of general application
 - Moratorium provision was needed to enable the City to work up the necessary infrastructure and standards to regulate the location of CMBs in the interests of the protection of physical safety of persons and property
- OVERALL PITH AND SUBSTANCE: The protection of person and property from harm occasioned by equipment installed on municipal road allowances



4. Constitutional Considerations When Passing By-laws – *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767

- APPLICATION IN THIS CASE
 - HEADS OF POWER:
 - The by-law fell respectively within the provincial powers over local works and undertakings and property and civil rights in the province.
 - PARAMOUNTCY
 - “A harmonious reading of the By-law and the Regulation was not possible. The By-law asserted a supervisory jurisdiction over the decision making of Canada Post. It was not co-operative, but competitive, replacing one discretionary authority with another.
 - CONCLUSION: Court of Appeal concluded that there was a conflict between the By-law on one hand, and the CPCA and the Regulation on the other, and that the By-law was inoperative to the extent of the conflict, including both permitting and moratorium provisions as they applied to Canada Post



5. Judicial Review of an Integrity Commissioner Report – *Di Biase v Vaughan (City)*, 2016 ONSC 5620

- An Integrity Commissioner's Investigation must be reviewed through the lens of the "statutory scheme" which includes not only part V.1 of the *Municipal Act, 2001* and the code of conduct established by a municipality, but also the complaint protocol or rules and any other guidelines or documents that set out the process for receiving, investigating, and reporting the findings of a complaint to the municipal council.
- Role of the Integrity Commissioner: provides both an advisory service to help councillors and staff who seek advice before they act, and an investigative or enforcement service to examine conduct alleged to be an ethical breach.
- Statutory scheme often does not create any legitimate expectation that the person who is subject to a code of conduct complaint will receive full disclosure of all documentation obtained by an Integrity Commissioner
- Integrity Commissioner has a broad power to decide whether or not to commence an investigation.



5. Judicial Review of an Integrity Commissioner Report – *Di Biase v Vaughan (City)*, 2016 ONSC 5620

- An Integrity Commissioner's decisions made pursuant to subordinate legislation are to be given deference and are therefore to be reviewed by the courts on a standard of reasonableness.
- The applicant submitted that the Integrity Commissioner had denied him natural justice and breached procedural fairness by relying on a non-transparent investigation process.
 - The Divisional Court rejected this submission, holding that the Integrity Commissioner's report carefully set out the conduct he or she found to be of concern and described the various stages of her investigation as well as the documents that were reviewed and considered.
 - Divisional Court was satisfied that throughout the investigation, the Integrity Commissioner exercised her discretion with respect to the participation of the applicant in a manner that properly balanced the applicant's right to meaningfully respond to allegations in the complaint and the need to protect City staff who had cooperated in the investigation.



5. Judicial Review of an Integrity Commissioner Report – *Di Biase v Vaughan (City)*, 2016 ONSC 5620

- Other more narrow issues also considered. An Integrity Commissioner:
 - Is entitled to continue to investigate any non-criminal complaints after determining that an allegation in a complaints form is on its face criminal in nature
 - Has no obligation to determine whether the interception of private communications provided or referenced by a complainant was in fact lawful
 - There is nothing procedurally unfair or illegal about an integrity commissioner's targeted search of an individual's email address hosted on a municipality's computer system

6. Solicitor-Client Privilege in the Context of Privacy Legislation –
*Alberta (Information Privacy Commissioner) v Board of
Governors of the University of Calgary, 2016 SCC 53*

- **FACTS**

- Constructive dismissal claim where a delegate of the Information and Privacy Commissioner of Alberta ordered the production of records over which the University of Calgary had claimed solicitor-client privilege.
- University of Calgary refused to comply
- Under section 56(3) of the Alberta Act, a public body must produce required records to the Commissioner “despite...any privilege of the law of evidence.”



6. Solicitor-Client Privilege in the Context of Privacy Legislation –
*Alberta (Information Privacy Commissioner) v Board of Governors of
the University of Calgary, 2016 SCC 53*

- The Court determined that the expression "any privilege of the law of evidence" does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed.
 - Court recognized that solicitor-client privilege is no longer merely a privilege of the law of evidence, but a substantive right that is fundamental to the proper functioning of our legal system.
 - The Court held that to give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so. Section 56(3) did not meet this standard.



6. Solicitor-Client Privilege in the Context of Privacy Legislation –
*Alberta (Information Privacy Commissioner) v Board of Governors of
the University of Calgary*, 2016 SCC 53

- The decision will likely be relevant to the interpretation of the *Municipal Freedom of Information and Protection of Privacy Act*
 - section 41(4) of that Act states that the commissioner can inspect any record in the custody or control of an institution, despite other parts of the Act or despite “any other Act or privilege.”
 - Whether this provision is sufficiently “clear and unambiguous” to set aside solicitor-client privilege is one that remains to be decided in light of this decision



7. Relief from Deemed Forfeiture in a Tax Sale – *Poplar Point First Nation Development Corporation v the Corporation of the City of Thunder Bay*, 2016 ONCA 934

- FACTS

- appellant was the registered owner of a property that was sold by the City of Thunder Bay in a municipal tax sale.
- As required by the Act, after deducting the cancellation price, the City paid the surplus into the Superior Court.
- Pursuant to subsection 380(4), the former property owner had one year from the date of payment of the surplus into court to bring an application for payment out of court.
- However, while the property owner was aware of the one-year deadline, it did not receive the required notice of payment into court, which had been sent to the assessed (and sold) property.
- The former owner therefore brought an application three weeks after the one-year deadline.



7. Relief from Deemed Forfeiture in a Tax Sale – *Poplar Point First Nation Development Corporation v the Corporation of the City of Thunder Bay*, 2016 ONCA 934

- Pursuant to section 380(6), one year after the payment is made, the monies were deemed forfeited to the City. As such, the City brought a counter-application seeking payment out of court of the monies pursuant to section 380(7) of the Act.
- the former property owner argued that it was entitled to relief from the deemed forfeiture under section 380(6) by operation of section 98 of the *Courts of Justice Act*.



7. Relief from Deemed Forfeiture in a Tax Sale – *Poplar Point First Nation Development Corporation v the Corporation of the City of Thunder Bay*, 2016 ONCA 934

- The Court of Appeal:
 - concluded that since the *Municipal Act* does not expressly, or by implication, exclude the court's general power to grant relief from forfeiture in civil proceedings, and the automatic forfeiture under 380(6) is not imposed as a penalty for breach of any requirement of the statute, the court has jurisdiction to grant such relief.
 - The court also noted that to grant relief would not undermine the purposes of the *Municipal Act*, or interfere with the finality and certainty of the municipal tax sale scheme.
- Court proceeded to apply relief from forfeiture provisions:
 - Concluded that relief should be granted under the circumstances.

8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- FACTS
 - The application for judicial review arose from access to information requests made under MFIPPA for records relating to the Town of Arnprior's IT management after a newspaper article detailed numerous problems with the Town's IT system which had been assessed
 - FIRST REQUEST: Access to Records Relating to the assessment of the Town's IT System Which Had Been Performed by a Named Company
 - Town granted partial access to these records and denied access to portions of them under section 7(advice and recommendations), section 8(1)(e) (endanger life or safety), section 8(1)(i) (security), section 10(1) (mandatory - third party information), section 11(a) (valuable governmental information)
 - SECOND REQUEST: Access to (1) Records relating to the Town's electronic records storage initiative and (2) service contracts with existing suppliers for services including internet services, maintenance of existing hardware, and firewall services.
 - The Town did not find records in relation to the first part of the request. It identified three records responsive to the second part of the request and denied access to portions of them under the same provisions outlined above.



8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Appeals were made on the Town's responses to both requests
 - FIRST REQUEST:
 - Only the discretionary exemption in section 7(1) applied to exempt some portions of the records from disclosure. All other exemptions did not apply.
 - Town was ordered to re-exercise its discretion with respect to the severances made to portions of the records pursuant to section 7(1)
 - SECOND REQUEST:
 - The Town's search for records pursuant to the first part of the request was reasonable.
 - With regards to the second part of the request, no exemptions applied. The Town was ordered to release the records.

8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Section 10(1)
 - For section 10(1) to apply, the institution must satisfy a three part test (ie the burden of proof is on the institution):
 - 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
 - 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly, and
 - 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in section 10 will occur.
 - FINDING: The adjudicator's conclusion was reasonable. While parts 1 and 2 of the test were clearly established, part 3 was not. There was nothing in the evidence or submissions presented by the town to the adjudicator that would lead to a reasonable expectation that one of the harms would occur.

8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Section 7(1) (Advice and Recommendations)
 - Section 7(1) states that : "A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution."
 - The Court concluded that the adjudicator in this case went through each document and ordered the release of information (including entire documents and parts of documents) that did not fall within the exemption. Her reasoning was thorough, logical, and fair.
 - The Town argued that factual material, which can be disclosed without revealing any advice or recommendations, is exempt from disclosure when it appears in a document that may also contain advice or recommendations.
 - COURT DISAGREED



8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Section 8(1)(e) and 8(1)(i) (Security)
 - Section 8(1)(e) states
 - A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - e) endanger the life or physical safety of a law enforcement officer or any other person
 - Section 8(1)(i) states:
 - A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required

8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Section 8(1)(e) and 8(1)(i)
 - The court found that the adjudicator's decision that the submission that "given the world we live in...protection of confidential information is crucial" and "given constant reports of security breaches on government security systems...cyber attacks are a reality for municipalities" did not satisfy the onus.

8. Disclosure of IT Service Contracts – *Arnprior (Town) v Ontario (Information and Privacy Commissioner)*, 2016 ONSC 2904

- Section 11(a) (Valuable Governmental Information)
 - The Adjudicator properly set out the three part test that the Town had the burden of proving under 11(a)
 - 1) is the information a trade secret, or financial, commercial, scientific or technical information;
 - 2) does the information belong to an institution;
 - 3) does the information have monetary value or potential monetary value
 - Second Part of Test Not Met – Town had provided no evidence that it had a proprietary interest in the information from an intellectual property sense
- OVERALL: Orders of adjudicator not unreasonable and application dismissed by the court.



9. Trespass at Council Meetings – *Bracken v Niagara (Regional Municipality)*, 2015 ONSC 6934

- **FACTS**

- CAO issued a no trespass notice to the applicant under the *Trespass to Property Act* prohibiting him from entering the regional headquarters for a period of one year.
- Region's position that the no trespass notice was warranted because of the conduct of Mr. Bracken at two separate meetings, which indicated that his presence at council meetings posed a threat to the safety of the public at the meeting, municipal staff, and members of council

9. Trespass at Council Meetings – *Bracken v Niagara (Regional Municipality)*, 2015 ONSC 6934

- Mr. Bracken commenced an application that the no trespass notice was unconstitutional for violating his freedom of expression and assembly under section 2(b) of the Charter and his right to life, liberty and security of the person under section 7.
- Court granted the application and found that the trespass notice contravened the appellants section 2(b) rights under the Charter



9. Trespass at Council Meetings – *Bracken v Niagara (Regional Municipality)*, 2015 ONSC 6934

- The applicant's section 2(b) right was to attend and participate in open public council meetings as long as he was not violent or threatened violence and abided by the applicable rules
- The Court was not satisfied on the balance of probabilities that Mr. Bracken was violent or made threats of violence that reasonably caused councillors or staff or members of the public to fear for their own safety
- The expression portrayed by Mr. Bracken at the public meetings was protected by section 2(b). The effect of the municipality's notice prohibited him from attending council meetings altogether for a period of one year and accordingly, violated his right to freedom of expression.



9. Trespass at Council Meetings – *Bracken v Niagara (Regional Municipality)*, 2015 ONSC 6934

- SECTION 1 ANALYSIS

- The region failed to explain why a significantly less intrusive but equally effective measure was not chosen and did not establish that its restrictions of a complete ban for one year fell within a range of reasonable alternatives tailored objectively to the infringement so as to constitute a minimal impairment of Mr. Bracken's section 2(b) freedoms;
- The municipality did not establish that its total ban met the test of proportionality between the effects of the limiting measure and its objective.

9. Trespass at Council Meetings – *Bracken v Fort Erie (Town)*, 2016 ONSC 1122 [Part Two]

- **FACTS - 2016**
 - the CAO issued a no trespass notice under the Trespass to Property Act prohibiting Mr. Bracken from entering the Town Hall for a period of one year.
 - Issuance was in relation to an incident that occurred at the town Hall when Mr. Bracken was engaged in "erratic behaviour" and shouting into a megaphone, and staff members "were afraid for their safety and that of the public."
 - Police were eventually called and gave Mr. Bracken several opportunities to leave the premises. However, Mr. Bracken refused to do so. He was therefore placed under arrest for trespassing, removed, issued a ticket, and provided with the trespass notice issued by the Town.

9. Trespass at Council Meetings – *Bracken v Fort Erie (Town)*, 2016 ONSC 1122

- The court concluded that Bracken's section 2(b) rights were not engaged and it was not necessary to proceed to an analysis under section 1 or section 7 of the Charter.
 - The court found, based on the overwhelming evidence, that Mr. Bracken was not protesting peacefully. Rather, his language was shouting, incomprehensible, and his behaviour was erratic and intimidating.
 - Section 2(b) of the Charter protects lawful means of expression including peaceful assembly and association. the evidence in the case disclosed that Bracken crossed the line of peaceful assembly and protest so that the expression could not be protected under section 2(b).

10. Refusal to Sell Road Allowances – *Marciniak v Greater Madawaska (Township)*, 2016

CarswellOnt 12582

- In May 2013, Applicants applied to purchase a road allowance adjacent to their property.
- November 2013: Applicants arrived at their cottage and discovered neighbours had cleared vegetation and placed gravel on the road allowance. Township sent a letter.
- April 2014: Applicants sent another application to Township to close road allowance and allow them to purchase.
- May 2014: Further clearance by neighbours. Township provides warning
- June 2014: Township provides letter to Applicants advising that their application will not be processed as it was contrary to Official Plan policies
- October 2014: Township accepts and processes application from neighbours
- November 2014: Second letter denying to process Applicants second application
- Applicants commenced an application for judicial review
- In the end, the Township decided to deny both applications and keep the road allowance closed and deny all parties the right to purchase it.

10. Refusal to Sell Road Allowances – *Marciniak v Greater Madawaska (Township)*, 2016 CarswellOnt 12582

- COURT HELD: The decision by the Township not to process the Applicants application was reasonable and supported by the evidence
 - Official Plan called for the preservation of unopened road allowances leading to water when the road allowance is used for public waterfront use or access.
 - The Applicants application clearly violated this policy on its face. The application of the neighbours did not compromise access of anyone's private property to the waterfront, and therefore it was accepted for consideration

10. Refusal to Sell Road Allowances – *Marciniak v Greater Madawaska (Township)*, 2016 CarswellOnt 12582

- • THE COURT ALSO HELD that the decision of the Township to keep the road allowance closed and not to sell it was reasonable.
 - A precondition to selling an unopened road allowance was that the road allowance be declared "surplus."
The Township decided that the allowance could not be so declared
- Court found that Township did not act in bad faith
- CONCLUSION: The Township had the right to refuse to sell the road allowance and there were reasonable grounds for doing so.

Questions?



PROFILE

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Our municipal clients consult Tony on all aspects of municipal governance and complex land use planning matters. Tony appears frequently before the Ontario Municipal Board to defend decisions of municipal Councils and Committees of Adjustment. Tony also appears regularly before the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including defending challenges to municipal by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer.

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