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LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Draft Integrated Accessibility Regulation

This is a summary of a more detailed article by Alan Whyte that is available on our website at www.cswan.com.

The Accessibility for Ontarians with Disabilities Act (AODA) was introduced in 2005 but will not take full effect until 2025. The AODA contains a series of accessibility standards designed to break down the barriers that prevent or limit persons with disabilities from participating in a range of activities. The objective of the legislation is to promote proactive measures to address a range of accessibility issues.

The first regulation passed under the AODA, the Customer Service Accessibility Standard, is presently in effect for organizations in the broader public sector. The government has recently issued a draft Integrated Accessibility Regulation ("the draft Regulation") which is currently in a consultation phase. The stated goal is to integrate the draft Regulation with the Customer Service Standard by 2013.

The draft Regulation deals with the areas of employment, information and communications, and transportation. Certain aspects of the three accessibility standards dealt with in the draft Regulation are common, including:

- The requirement to establish, maintain and implement policies that describe how the organization will meet the requirements of the various accessibility standards.
- The development of accessibility plans that set out how the organization will achieve the accessibility requirements within the projected timelines.
- The requirement to provide training on the requirements of the accessibility standards to all employees, volunteers, persons who provide services on behalf of the organization and persons who participate in developing the policies, practices and procedures of the organization.
- The implementation of an accessible feedback process.
- The provision of prepared emergency and public safety information in an accessible format (upon request) where this information is available publicly.

The draft Regulation applies only to paid employment and generally requires a formalized approach to accommodation, as well as a proactive approach to accommodation throughout the entire employment relationship. The full article available on-line highlights the requirements, some of which include:

- notifying applicants that accommodations will be provided in the recruitment process.
- developing documented Individual Accommodation Plans upon request.
- Developing a Return to Work procedure that would apply where there is no statutory procedure in place.

The draft Regulation requires the provision of accessible information and communications pertaining to the provision of goods and services by the organization. If information is not available on an accessible website, the information needs to be made available (upon request) in an accessible format with appropriate communications supports. Where documents are required to be provided, organizations will have a

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What to do when the M.O.E. Calls

Part II, Investigation vs. Inspection

In our earlier edition of Legal Matters, we discussed spills and issues related to response. In this edition we consider what to do when the Ministry calls after an incident. There will be typically little time to consider your response. Understanding the "rules" in advance is important to determine how to respond.

The Ministry of the Environment has two classes of officers: inspectors who inspect for compliance, and investigators whose sole purpose is to gather evidence for prosecution.

The purpose of an inspection is to enquire about compliance, not to collect evidence of wrongdoing. Inspectors have broad powers to enter any regulated workplace without a warrant, obtain documents, take samples, order testing and interview employees to determine if the law is being followed. Obstructing an inspector is in itself an offence.

An investigation is the collection of evidence in circumstances where the investigator has reasonable and probable grounds to believe an offence has been, or is about to be, committed. An investigator fulfils the same function as the police: to investigate suspected violations, collect evidence and prosecute the offender.

An investigator with the Ministry of Environment cannot enter onto municipal property or seize evidence without a warrant or the municipality's consent. An investigator cannot compel anyone to answer their questions. It is therefore important for staff to determine at the outset the status of an

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Paying for Construction, Twice

Ten years ago, Tim Horton's took the Region of Niagara to court arguing that the municipality must provide a cross-cut in a proposed median that formed part of a road widening in St. Catherines. The Court of Appeal found that the municipality did not have to make the change, provided the works did not deprive the landowner of their only means of access to the highway.

Unfortunately, the Court explicitly left open the possibility that a landowner in similar circumstances might have a claim for compensation for injurious affection under the Expropriations Act.

Antrim Truck Centre Ltd., answers the question left open by the Court of Appeal. Municipalities now need to consider whether a construction project may have them paying for roads twice; once for the project and then for injurious affection claims.

One definition of Injurious affection, where no land is taken, is the reduction in the market value of the owner's land and personal and business damages resulting from building the project, minus damages that result from use of the project.

When Ottawa constructed the 417 Highway one result was closing Highway 17 east of the Antrim Truck Centre. The change resulted in eastbound and westbound traffic on the 417 bypassing the truck stop. The court found that this effectively put the truck stop out of business and the owners had to relocate.

Antrim claimed damages for injurious affection of approximately $8 million, which included costs of relocation and construction of the new premises. The OMB awarded just less than $400,000 in damages, which the Divisional Court upheld after an appeal. Even though the municipality did not take any land, the owner still had a claim for losses resulting from construction of the public work, not its use.

The court found that since the construction of the 417 eliminated or reduced access, it amounted to a substantial interference with the landowner's right to reasonable use and enjoyment of its property, which in law means a claim in nuisance.

What does this mean for municipalities in the business of constructing public works? At the very least, this decision implies that as part of highway planning and construction budget process, injurious affection should be carefully considered. Any time the construction of a new road, median, or alternate access causes serious or substantial interference with a property owner's access, even where access is not totally eliminated, the roads authority may potentially be liable for damages for injurious affection. ■

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general obligation to notify the public that the document is available upon request. With respect to websites, the organization will be required to make those websites conform to an international standard. The obligation to make websites accessible will initially apply to new websites and new web content, but will subsequently apply to existing websites and web content – online materials published prior to 2012 will need to be made available in an accessible format upon request.

The proposed transportation standards contain detailed requirements applicable to conventional transportation, specialized transportation, public school transportation, other transportation services, ferry services and taxi services.

The proposed timelines for compliance with the draft Regulation are quite detailed and are best summarized on the chart produced by the government found at http://www.ontariocanada.com/registry/showAttachment.do?postingId=4142&attachmentId=5359.

Parts of the draft Regulation, especially the employment and information/communication requirements, will significantly affect how municipalities and other organizations which provide services to the public conduct their affairs. The deadlines to come into compliance with the draft Regulation are not that far away and we recommend that our municipal clients start taking steps to educate themselves as to what specifically will be required of them, and by when.

Alan Whyte is a partner in the Labour and Employment Group and a former Vice-Chair of the Human Rights Tribunal of Ontario. ■

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officer and the capacity in which they are operating (inspection versus investigation).

Key points to remember about inspections and investigations:

- An investigator cannot use a Provincial Officer's powers of inspection when collecting evidence of an offence.
- An inspector may lose the ability to use their inspection powers if there are reasonable and probable grounds to believe that an offence has occurred and the "predominant purpose" for collecting the information is to prosecute.
- The municipality may insist that investigators obtain a warrant to compel the production of documents.
- When questioned, individual employees who might be charged have the right to remain silent.
- An investigator cannot compel an employee to answer his or her questions.

Understanding these differences is critical to manage an investigation properly and ensure that you do not inadvertently waive the municipality's legal rights. It is important to work with the Ministry to protect the environment, but equally important to protect your employee's rights and the rights of the corporation. ■

In the next edition:
Part III, Managing an Investigation

Municipal Elections Act Amendments

In the wake of the recent election, candidates will soon be submitting financial statements. The Good Government Act made some significant amendments to the Municipal Elections Act, 1996 that municipalities must be aware of.

The definition of "Fund-raising function" now reads:

"Fund-raising function means an event or activity held by or on behalf of a candidate for the purpose of raising funds for his or her election campaign."

This is not in our opinion a change in the law, but a clarification that a function must have the primary purpose of fund-raising to qualify. The importance of the definition is of course fund-raising functions are not subject to campaign spending limits.

In addition, section 67 is amended to clarify that in determining which costs are properly attributed to fund-raising functions, the following are excluded:

a) events or activities that are organized for such purposes as promoting public awareness of a candidate and at which the soliciting of contributions is incidental; or

b) promotional materials in which the soliciting of contributions is incidental.

Candidates cannot merely mention "fund-raiser" in promotional materials and argue the costs attributed to the promotional materials or events are exempt from spending limits.

A new section 12.1 requires the Clerk to "have regard to the needs of electors and candidates with disabilities". Within 90 days after voting day the Clerk shall submit a report to Council about the identification, removal and prevention of barriers that affect electors and candidates with disabilities.

The list of expenses in section 67(2) that must be reported now includes expenses related to a compliance audit and expenses incurred by a candidate with a disability that are directly related to the disability and which would not have been incurred but for the election.

The contribution limits have changed so that no contributor can make contributions exceeding a total of $5,000 to two or more candidates for the same office on the same Council or local board. The individual limit of $750 maximum per candidate still applies.

Sections 79, 80 and 81 have been repealed and replaced. The formula for calculating a surplus is essentially unchanged. Now a candidate with any amount of surplus must pay it to the Clerk (previously the trigger was any amount over $500). The Clerk continues to hold the surplus in trust and must repay the surplus if the campaign recommences. Now, when the campaign is finally over and no recount or controverted election proceedings are possible, the surplus becomes the property of the municipality; the surplus is no longer available to the candidate in a subsequent election. ■

Non-conforming uses in Cottage Country

Feather v. Bradford is a very recent Court of Appeal decision that has some fairly unique facts, (underwater cottages being a somewhat uncommon phenomenon). The decision of the Court of Appeal makes interesting findings related to legal non-conforming uses and also has implications for legal non-complying structures.

The Court explicitly adopts the following statement describing the general intention of planning legislation:

The general intention of planning legislation is eventually to eliminate non-conforming uses and replace them with permitted uses; thus the council may be said to zone out such uses. This is based on the premise that such a use is undesirable because it is incompatible with the existing permitted uses but is to be tolerated because it was a lawful use prior to its prohibition by by-law. It has been said that gradual elevation of a district is an end towards which progress should always be made.

This is an important recognition of what has always been a key underlying principle of land use planning.

More importantly, this decision helps to reduce some of the uncertainty that surrounded legal non-complying structures after the decision in City of Ottawa v. TDL Group Corporation.

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WHO'S WHO ...

Tim Wilkin
PARTNER

Tim Wilkin is a Partner in our Municipal and Land Use Planning and Development Groups. Tim has 30 years experience in municipal, planning, development and environmental law.

Municipalities and private clients throughout Eastern Ontario regularly consult Tim on a wide range of issues concerning municipal government, planning, development and environmental law matters. Tim also appears frequently on behalf of the firm's clients before the Ontario Municipal Board and other administrative boards and tribunals. He has also acted as a special prosecutor for several municipalities in respect of municipal election finance irregularities.

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In the TDL decision, the Divisional Court upheld an OMB decision that the section of Ottawa's zoning by-law concerning non-conforming and non-complying rights was outside the jurisdiction of municipalities. In our view, the Divisional Court in TDL took too broad a view and incorrectly struck out that portion of the Ottawa by-law that dealt with non-complying structures.

Feather v. Bradford confirms that municipalities have the jurisdiction to regulate erecting or rebuilding a structure separately from regulating or recognizing a legal non-conforming use.

The Court in Feather v. Bradford ruled that given the general intent of planning legislation to eventually eliminate non-conforming uses, it was fair and equitable to require the owner to act within a reasonable time to resume the use of the cottage. Merely considering how to raise a submerged cottage for 10 years was not sufficient to maintain a legal non-conforming use.

We encourage municipalities to revisit the often standard language dealing with non-complying and non-conforming rights in their zoning by-laws to ensure that the by-law can withstand challenges and maintain the municipality's intent. ■

Tony Fleming
PARTNER

Tony Fleming is a partner in the Municipal and Land Use Planning and Development Groups. The law Society of Upper Canada has recognized Tony as a Certified Specialist in Municipal Law. Tony provides advice to municipalities and private sector clients on all aspects of land use planning and development as well as environmental law.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston and practised with private law firms in Toronto. Tony appears regularly before the Ontario Municipal Board, the Assessment Review Board and the Environmental Review Tribunal. He has also defended large and small corporations and municipalities against Ministry of the Environment and other regulatory orders, investigations and prosecutions.

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Alan Whyte
PARTNER

Cunningham Swan is pleased to welcome Alan Whyte to the firm.

Alan is a partner in our Labour and Employment group. Alan has extensive experience working for municipal sector employers. Alan provides opinions and advice on all aspects of the employment relationship.

Prior to joining our firm, Alan served as a Vice-chair of the Human Rights Tribunal of Ontario. Before joining the Tribunal, Alan represented employers throughout Eastern Ontario for 26 years in all areas of labour and employment law.

Alan appears before all levels of courts in Ontario and numerous administrative tribunals.

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