SUMMER 2011

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Ministry of Labour Requires Reports of all Critical Injuries – Including Non-Employees

The Ontario Court of Appeal recently upheld a Ministry of Labour (MoL) order requiring Blue Mountain Ski Resort to report to the MoL the death of a guest who drowned in a pool at the resort.

The Occupational Health and Safety Act requires all critical injuries be reported to the MoL, of any person, whether they are an employee or not, so long as the critical injury or death occurred in a "workplace".

For Blue Mountain, the critical issue was what area within its 750 acre resort was a "workplace"? The Court of Appeal and the MoL defined the criteria for "workplace" as any area where a worker may work and where the hazard that caused the injury to the non-employee may also present a risk to a worker. Essentially "workplace" could be anywhere within Blue Mountain's 750 acres, but it will be dependent on the facts – making the determination of when to report even more difficult for the employer.

The implications for municipalities are significant. Critical injury is defined in the Occupational Health and Safety Act as any incident where an arm or leg is broken, among other injuries, or death. Taken literally, any significant slip and fall or accident on municipal property by a member of the public should be reported to the MoL. The only factor that may be considered in determining whether a report is not required is whether the hazard involved might have posed a risk to a worker of the municipality. Getting this determination wrong can result in a prosecution. ■

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

Part III, Managing an Investigation

When an incident happens, municipal staff have many conflicting priorities. In the confusion, it is easy to forget that what happens today could result in MOE charges against the municipality and individuals two years later.

Parts I and II in this series examined the need for proper reporting procedures and the difference between inspections and investigations. This final installment contains suggestions for managing an MOE investigation (or any other type of regulatory investigation) under the protection of lawyer-client privilege.

Properly managed, an investigation protected by lawyer-client confidentiality can fulfill the obligation to cooperate with the Ministry, but in a way that puts the municipality's best foot forward.

Typical stages in a protected pre-investigation include:

- Pre-interviewing staff and key management personnel:
  - To document their recollection for future use. If you go to trial 2 years later, these notes will be valuable for refreshing memories.
  - To assist staff to organize their thoughts and refresh their recollection of due diligence procedures previously followed, such as training, risk assessment etc.
- Gathering information that demonstrates proper due diligence. The Ministry will gather evidence of wrong doing; you want to give them evidence that demonstrates due diligence, whether they ask for it or not.
- Conducting a "root cause analysis" or reconstructing the incident. This will help determine whether the accident was foreseeable and if there is a defense;
- Putting together a list of people to interview that the Ministry may not be aware of, but who could give good evidence of due diligence.

The goal of managing the investigation is to make sure the Ministry receives not just the information it asks for, but also the information you want it to have. Hopefully, a more balanced understanding of all the information will convince the Ministry that the municipality has a solid "due diligence" defence and reduce the chances of the Ministry proceeding with charges.

It is possible to prevent charges being commenced through proactive management during an investigation. ■

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Added Liability for Building Departments

The municipality of Chatham-Kent owned a former dump site (acquired through amalgamation) that it sold, with disclosure to the purchaser of a phase I Environmental Site Assessment (ESA). The ESA identified past dumping as an issue but did not preclude future use for residential (but did not assess what measures might be necessary to allow residential use).

The purchaser sold the property but did not disclose the ESA to the new purchaser. The municipality issued a building permit with no conditions imposed related to the contamination known by Chatham-Kent to be present on the property. At no point did the municipality advise the purchaser that the property was a former dump site or provide them with the ESA.

The owners sued the vendor, real estate agent and the municipality. The Court found the municipality had a duty to issue a conditional building permit, with conditions designed to address issues raised by the contamination. The municipality's duty did NOT end when it sold the property. The municipality had a continuing duty to future purchasers because of its knowledge of contamination and its role as the administrator of the Ontario Building Code.

The Court stated, "One of the purposes of the Building Code has to be to protect purchasers of property…. The … City has a duty to notify that person of a known defect of the property. This is especially so when the city itself either created the problem or at the very least was complicit in its creation."

The court also made the comment that the minimal cost of registering some type of caution against the property or a notation to the building department to disclose the environmental reports to potential builders was far outweighed by the damages suffered by the owner. The Court awarded the owner nearly $400,000 in damages.

At best, this case will be interpreted as a negligent failure to disclose a report in the possession of the municipality and will be limited to its facts.

However, the broad language in the decision raises concerns that in the future municipal building departments may be held to a higher standard where the municipality has information about a particular property that affects the costs to develop. In this case, it was a defect in the property that increased costs to develop (which might be interpreted to include geotechnical issues etc, and not be restricted to contamination).

It would be prudent to assess existing policies and determine if additional policies are necessary to deal with whether the municipality has the resources to identify constraints to development and "flag" properties so that conditional building permits can be issued. Additionally, municipalities should consider policies dealing with "institutional knowledge". What knowledge will be imputed to the building department (is information known by the planning department or engineering "deemed" to be knowledge of the municipality for purposes of conditional building permits)? ■

Inspection Powers – is a Backyard a Dwelling?

A neighbour complained about standing water in a neighbour's pool posing a health hazard. The City of Guelph posted a notice advising the owner that she was in violation of the City's Standing Water By-law. Subsequently, while the owner was out of the country, an enforcement officer removed the pool cover and drained the pool, causing the vinyl liner to peel away and the surrounding earth to begin collapsing into the pool. A further City inspection revealed that earth was collapsing into the pool, which prompted the City to issue a property standards order to repair the problem. The owner appealed.

The court found that observations of the pool made by city officials from an adjacent property were inadmissible in evidence. The court further found that the by-law enforcement officer did not have consent to enter the property and did not explain that his entry, if not consented to, would require a judicial order or warrant.

The Court, in interpreting the City's by-law, held that the swimming pool in Ms. Davis' back yard was part of "a place actually used as a dwelling," within the meaning of the Municipal Act. The Court of Appeal had earlier ruled that backyards were not a place "actually used as a dwelling" and no warrant was required to enter. The Court in this case disagreed and found that landscaping around the yard was intended to create privacy and therefore the backyard was a place "actually used as a dwelling".

This decision is being appealed by Guelph. If upheld on appeal, this will create problems for enforcing property standards by-laws. In our opinion, the language of the Municipal Act makes it clear that a dwelling is a structure and it must be "actually being used" as a dwelling in order to require a warrant for entry. The Guelph decision does not override the previous Court of Appeal decision that backyards are not part of the dwelling, but it may create confusion about how to interpret inspection powers – stay tuned to hear how this turns out. ■

Class Environmental Assessment and Planning Act Approvals

A careful reading of the text and the Schedules of the Municipal Class Environmental Assessment demonstrates that there are two categories of projects that can be approved without undergoing a full assessment.

The first category is limited in that only specified projects are eligible, including: local roads; establishing, extending or enlarging a sewage collection system or water distribution system; and constructing stormwater management facilities.

For these projects, no environmental assessment is required, provided the project is required as a condition of approval under the Planning Act. Approvals include site plan approvals, consent approvals and plans of subdivision and Condominium. No specific reporting or public notice is required and there is no requirement that any specified environmental assessment-type of planning process be followed in order to obtain the pre-approval.

For all other projects for which the Class EA applies, no environmental assessment is required (and the project will be deemed pre-approved) provided that:

- the project undergoes a process to demonstrate that the intent of the Class EA has been complied with; and
- the project comes into effect or is approved under the Planning Act (Official Plan, Official Plan Amendment, Plan of subdivision or condominium, Community Improvement Plan, but NOT site plans or conditions of consent).

This second category permits a municipality (or a developer on behalf of the municipality) to conduct a limited form of environmental assessment, with a limited amount of public notice (which may be satisfied by the Planning Act public notices/meetings depending on the project).

For example, an arterial or collector road or bridge could be included in the land use planning process for a Secondary Plan area, or Community Improvement Plan area or as part of an Official Plan Amendment process.

The benefits of proceeding under this section of the Class EA are that there is no bump up opportunity (the only appeal is to the OMB) and the approval will not lapse.

The Association of Municipal Engineers recently submitted for approval an amendment to the Class EA. The goal of the amendments (not yet approved) is to clarify the existing process for combining approvals under the Planning Act and the Class EA. The proposed amendments will modify the project schedules, increasing the types of projects that are now pre-approved. The full text of the proposed amendments can be found on our website www.cswan.com. ■

Update – Injurious Affection

The Winter 2010 edition of Legal Matters included an article titled "Paying for Construction, Twice". The case summarized was appealed and the Court of Appeal has just dismissed the claim for injurious affection entirely.

When Ottawa constructed the 417 Highway, one of the results was the closing of Highway 17 east of the Antrim Truck Centre. The change resulted in eastbound and westbound traffic on the 417 bypassing the truck stop. The Divisional Court upheld an OMB decision that the construction effectively put the truck stop out of business and the owners had to relocate. Antrim was awarded damages for injurious affection of just less than $400,000. Even though the municipality did not take any land, the court held that the owner still had a claim for losses resulting from construction of the public work as it unreasonably interfered with Antrim's use of its land.

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The Court of Appeal found that the OMB failed to properly assess whether the interference caused by the construction of the highway was unreasonable. The Court of Appeal found that where an essential public service is involved, the utility of the public authority's work must be given substantial weight. Any interference must be balanced against the public benefit of the construction to determine if the interference is unreasonable and deserves compensation. Antrim's use of its property was interfered with, but on balance, the interference was not unreasonable.

The Court of Appeal has injected some practicality into the equation, in particular by focusing on the public benefit of the construction and the need to convincingly show that the interference is unreasonable. This does not mean that the construction of a new road, median, or alternate access will never be found to cause substantial interference with a property owner's access. The issue still exists and the potential liability for damages has not gone away with this ruling.

Our original recommendation therefore stands. As part of highway planning and construction budget process, injurious affection should always be considered. ■

Learn How to Manage MOE Investigations

If you are interested in learning how to manage MOE Investigations, Tony Fleming will be presenting this topic on:

September 14th, 2011

at the

Annual Ontario East Municipal Conference

in Kingston.

Visit **www.oemc.ca** to register.

WHO'S WHO ...

Tony Fleming
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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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Tim Wilkin
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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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