SUMMER 2014

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Lame Duck Council

Section 275 of the Municipal Act is commonly known as the "lame duck" provision. There are 3 scenarios where a council can become a "lame duck" council:

1. Where the new council will have the same number of members as the outgoing council, when it becomes a mathematical certainty that less than three quarters of the outgoing council can be/are re-elected;
2. Where the new council will have more members than the outgoing council, when it becomes a mathematical certainty that less than three quarters of the outgoing council can be/are re-elected OR if three quarters of the outgoing council are re-elected, those re-elected members will not constitute a majority of the members of the new council; or
3. Where the new council will have fewer members than the outgoing council, when it becomes a mathematical certainty that less than three quarters of the outgoing council can be/are re-elected OR if three quarters of the outgoing council are re-elected, those re-elected members will not constitute a majority of the members of the outgoing council

On the earliest day after nomination day, and before the new council is sworn in, the lame duck rules may apply. A council deemed to be "lame duck" is prohibited from:

- appointing or removing any officer of the municipality;

LAME DUCK continued on page 3 >

The Opening of the Floodgates?

Mental Stress Claims at the WSIB

In a recent decision with potentially far-reaching implications for all Ontario employers, the Workplace Safety and Insurance Appeals Tribunal ("the Tribunal") struck down the statutory limitations on workplace mental stress claims. The basis for the decision was that such limitations breach the equality rights under Section 15(1) of the *Charter of Rights and Freedoms* ("the *Charter*").

Although the *Workplace Safety and Insurance Act* generally provides benefits to all workers who suffer injury or disease arising out of their employment (irrespective of the kind of ailment), certain provisions regarding mental stress which were enacted in 1998 restricted entitlement in particular circumstances ("the mental health exception"):

Section 13…

Exception, mental stress

(4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

Same

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

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Is There a Role for the Provincial Ombudsman?

With the recent provincial election call Bill 179 died. Now that the Liberal party has a majority, it is likely this Bill will be revived. The Bill dealt primarily with accountability and transparency for members of Provincial Parliament, but also amended the Ombudsman Act, making it apply to municipalities. Given the recent election results, municipalities need to understand the type of enhanced role that may be given to the Ombudsman.

The rationale for introducing oversight by the Provincial Ombudsman was stated by the Liberal government as providing oversight for those people who, "feel that the system is working against them and would benefit from a fresh pair of eyes". Essentially, for those people who do not trust the municipality or anyone associated with the municipality, they would have recourse to the Provincial Ombudsman. Additionally, the Liberal government believed that the Provincial Ombudsman might be able to uncover systemic problems in multiple municipalities that individual municipal ombudsmen might miss.

In our view, there is little to no benefit having additional provincial oversight. Bill 179 would have created tremendous duplication and the potential for conflicting decisions from two levels of government through their respective ombudsmen. Notwithstanding an investigation and report from a municipal ombudsman, Bill 179 allowed the Provincial Ombudsman to investigate the same matter and possibly make recommendations contradictory to those of the municipal ombudsman.

Under the proposed amendments, the Provincial Ombudsman was also empowered to investigate closed meetings of Council, even when an investigator appointed by the municipality had conducted an investigation. If passed, the new legislation would raise serious questions about whether paying for a municipal investigator or ombudsman was a wise use of municipal resources.

Notwithstanding the potential duplication of effort, there is still in our view value in having a municipal investigator and/or ombudsman. Presumably these individuals will have a better understanding of municipal administration and governance than the Provincial Ombudsman; and one would hope that the Provincial Ombudsman would be reluctant to open investigations were the municipality had already conducted an investigation into the same incident.

We will watch for a re-introduction of this legislation. ■

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The Tribunal conducted an extensive analysis of the history of workers' compensation in Ontario, the purposes of the mental health exception, and the historical prejudice against mental illness, arriving at the conclusion that the mental health exception is an example of the historical injustice visited upon persons with mental health conditions. Ultimately, the Tribunal found that the statutory provisions created a distinction between different types of disability, in particular a distinction based on mental disability. The Tribunal also found that the mental health exception was not saved under s. 1 of the Charter based on their alleged purpose (limiting the costs imposed on the Accident Fund).

The implications of, and potential financial exposure created by, the decision are significant. Older mental stress claims that were denied on the basis of the mental health exception may now be the subject of a reconsideration request by past unsuccessful claimants. New mental stress claims will likely be adjudicated by the Board (and the Tribunal) in the same fashion as any other claim; there would be no legal basis for the Board or Tribunal to deny such claims on the basis of the mental health exception.

The Government of Ontario is very likely to judicially review this decision, we will follow this closely and report back if it is appealed. ■

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- hiring or dismissing any employee;
- disposing of any real property with a value exceeding $50,000;
- making any expenditure or incurring any liability that exceeds $50,000.

The only exceptions to these rules are where the expenditure was already contained within the municipal budget adopted prior to nomination day or where action is necessary in the event of an emergency. In addition, a municipality may delegate any of the above authority in accordance with the Act prior to nomination day to enable the municipality to continue to deal with those matters. ■

In-Camera Leaks

Section 6(1)(b) of MFIPPA allows a municipality to refuse to disclose matters arising in-camera. Notwithstanding, a recent case confirms that there is no privilege that attaches to in-camera discussions and courts may order disclosure of any material discussed in-camera. In addition, there is nothing in MFIPPA or the *Municipal Act* that prohibits a councillor from disclosing in-camera matters.

Two municipal councillors argued that they were not obligated to answer questions referencing a closed or in camera meeting of Council, pursuant to s. 239 of the *Municipal Act* when they were examined under oath as part of a legal action. Their refusal to answer questions became the subject of a separate court proceeding.

The court found that as a general rule, the public has a right to be informed of the decisions and agreements which transpire when dealing with a municipal council. Matters discussed in-camera are confidential only, not privileged (unless the advice is from your solicitor). The councillors were ordered to answer the questions put to them by the opposite party.

It is important to remember that even though public access may be restricted at a closed session, there is no general restriction placed upon publication of the matters discussed. Every municipal procedural by-law should contain prohibitions on discussing matters discussed in-camera and making discussions or materials presented in-camera public. Because there are no general legal prohibitions to prevent a councillor from leaking confidential information, the procedural by-law is the only protection the municipality can rely on. ■

Whitfield v. Steckley, 2014 ONSC 1742

MFIPPA Protects Advice from Staff

The Corporations Tax Act was recently amended by the Ministry of Finance (MoF), which gave rise to an access to information request by John Doe. Under the *Freedom of Information and Protection of Privacy Act (FIPPA),* where the advice or recommendations of a public servant may be revealed, the responsible authority is entitled to refuse disclosure based on an exemption under FIPPA. It was upon these grounds that the MoF denied John Doe access to the requested records. This decision to deny access was upheld by the Supreme Court of Canada (SCC).

The SCC noted that access to information legislation such as *FIPPA* (and MFIPPA) serves a number of important purposes, including supporting an open and democratic society and allowing the public to be involved with the conduct of its government.

The SCC also held that privacy legislation must balance the protection of other interests; more specifically, it is intended to ensure the preservation of effective and neutral advice from public servants. Exemption from disclosure under *FIPPA* in certain circumstances permits the advice that is sought by the government to remain full, free and frank.

The SCC helpfully distinguished the terms "advice" and "recommendations" as exempted under *FIPPA*. The Court determined that the protection granted includes not only suggested courses of action, but policy options as well. In order to give effect to the intent behind the protection, prior drafts which inform the final communication must also be protected in order to provide full exemption from disclosure when necessary.

This case is important for municipalities because the language in FIPPA is identical in all material respects to MFIPPA. Municipalities may rely on this exemption to refuse to disclose internal reports containing advice or recommendations of an officer, employee or consultant. Municipalities need to be aware of this exemption when retaining consultants and instructing staff. This gives some measure of comfort that difficult issues can be fully considered internally without fear of disclosure. As with all MFIPPA exemptions this is not a blanket exemption and the facts of each situation will be determinative. ■

John Doe v. Ontario 2014 SCC 36

WHO'S WHO ...

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.

Tony may be contacted by email at tfleming@cswan.com or call 613.546.8096 direct.

SAVE THE DATE

Our 3rd Annual South East Municipal Law Seminar is coming.

November 11 in Kingston
November 13 in Eganville

Plan to spend the morning learning about the latest developments in municipal law and then stay for a networking lunch.

Please contact us at:

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Tim Wilkin
Counsel

Tim Wilkin is counsel with our Municipal and Land Use Planning and Development Groups. Tim has over 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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David Munday

David Munday is an associate in our Municipal and Planning and Development Groups.

David joined Cunningham Swan in 2009 as an articling student and, following his Call to the Bar, returned to the Firm as an Associate lawyer in July 2010.

David assists municipalities and private clients with planning and development issues and handles real estate transactions and tax sales for our municipal clients. David also provides advice and opinions on all aspects of the Municipal Act and other legislation that impacts municipalities.

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