WINTER 2014

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Municipalities Prescribed a Low-sodium DIET

A recent case makes meeting the duty to maintain roads in the winter more challenging. In Lambton, a local farmer sued the municipality for damage to their farm caused by road salt applied to a nearby road. The farmer alleged damage to crops, diminution of property value and stigma due to salt contamination. The County argued that salting serves a "social utility" and that it is required by legislation to maintain roads for the benefit of all, including the farmer. The court agreed with the farmer.

These types of claims started in 1987 when the Ontario Court of Appeal found that where the application of salt on a road impacts a farmer's property that constitutes a nuisance. In Lambton, the Court followed the 1987 decision and found that elevated concentrations of sodium and chloride in the soil were a direct result of the application of salt on the adjacent road by the County which caused damage to the farm and diminished its value.

The farmer's injury was found to be a cost of highway maintenance that the farmer should not be required to bear in the circumstances, at least without compensation. Neither the social utility of salt application nor the lack of negligence on the County's part excused liability; the damage

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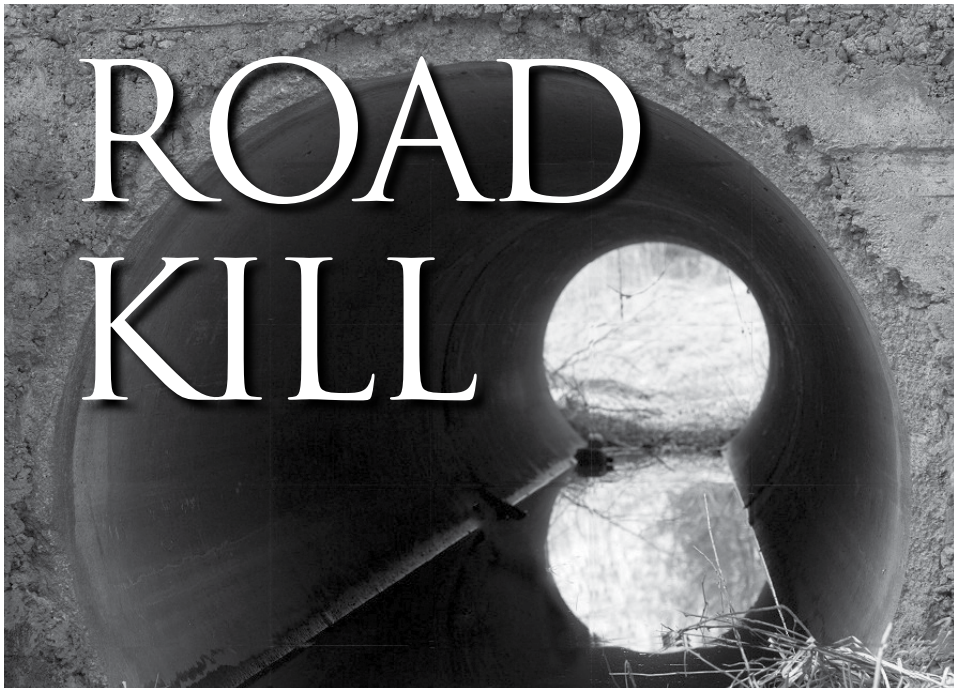

A blocked culvert underneath a road owned and maintained by the Ministry of Transportation (MTO) caused a road to washout. The washout caused a heavy volume of flood water and road material to flow into a small watercourse and downstream to nearby rivers & lakes, resulting in damage to fish habitat and water that was rendered harmful to fish. The MTO was charged by the federal Department of Fisheries and Oceans (DFO) under the Fisheries Act. The MTO was convicted on one charge of causing serious harm to fish and one charge of permitting the deposit of a deleterious substance in water frequented by fish. Mitigation efforts by the MTO did not amount to due diligence.

The MTO argued that once constructed, the road and culvert infrastructure could not be considered 'carrying on a work or undertaking' for the purpose of the Fisheries Act. The court disagreed and found that the road was a 'work or undertaking' for which the MTO remained liable even after the construction was complete.

The case was upheld on appeal, confirming that the road authority has a responsibility to maintain the road infrastructure once it is constructed. Part of maintenance is to maintain the road so that it does not fail and, in failing, harm or destroy fish habitat.

This is a decision with potentially serious consequences for municipalities. Road authorities have a continuing obligation to ensure that their roads do not inadvertently breach the Fisheries Act in the future, post-construction, regardless of the passage of time. It further underscores the need for a comprehensive program of road system inspection and maintenance in order to avoid damage altogether as well as to ensure you've done enough to cross the due diligence threshold. ■

CUNNINGHAM, SWAN, CARTY, LITTLE & BONHAM LLP
SMITH ROBINSON BUILDING · SUITE 300 - 27 PRINCESS ST. · KINGSTON, ON K7L 1A3
TEL: 613.544.0211 · WEBSITE: WWW.CSWAN.COM

Cunningham Swan LAWYERS

< DIET previous page

caused to the farmer's land was a significant harm which amounted to an unreasonable interference. Lambton could not rely on a defence of statutory authority (inevitable harm) based on the Minimum Maintenance Standards because the Court found that it could have used alternatives to salt. The Court awarded $45,000.00 in damages for 15 years of crop loss from 1998 to 2013 and $56,000.00 for the diminution of land value.

The award for decreased property value is concerning. Loss of property value was found despite the fact that the farmer did not mitigate his damages and the land was not irreparably damaged – meaning that it might still be remediated.

A case decided approximately 1 month later in Napanee highlights the extremely difficult position municipalities are in. In Napanee the court found the municipality negligent for a car accident on a snowy road because the municipality's use of a 3:1 sand/salt mixture was insufficient and the road ought to have been salted. A robust and routinely reviewed risk management program is key to balancing the risks of accidents compared to the potential for property damage. ■

Enforcement of a Subdivision Agreement is Discretionary

Municipalities do not have a duty to litigate for someone else's benefit where a subdivision agreement is breached.

Dawson claimed his neighbours dumped soil on his and their property in 2004, contrary to the subdivision agreement governing the properties. Dawson attended a Laurentian Valley council meeting in 2006 where he complained about the dumping, and was advised the matter was being reviewed. In January 2007, Dawson received internal documents from the Township, including letters to the neighbours confirming that they had breached the subdivision agreement. In 2009, the municipality decided not to take action against the neighbours given the costs of litigation and the evidence available.

The Court held that Dawson had in his possession in January 2007 all of the information on which he relied in his statement of claim against the Township. The action against the Township was dismissed for being outside of the limitation period.

More importantly, the Court held that even if the claim had been brought in time, the municipality did not owe a duty to Dawson to pursue proceedings against his neighbours; it had considered the matter and "behaved reasonably" in deciding not to commence a proceeding. The lesson here is that enforcement of a Subdivision Agreement is a matter of contract between the Municipality and the Developer/ successor landowners. One successor landowner cannot compel the municipality to enforce its own Subdivision Agreement against another successor landowner; the decision to enforce is entirely at the discretion of the municipality. ■

Expropriation is not a Bonus

Oxford County expropriated land and subsequently sold it to Toyota in order to facilitate the development of an auto plant. The expropriated landowner challenged the expropriation for a number of reasons, including that the expropriation and later sale to Toyota conferred a "bonus" on Toyota, contrary to section 106 of the Municipal Act. The owner argued that but for the expropriation he could have negotiated a higher price because his continued refusal to sell to Toyota would have increased the purchase price. The expropriation and subsequent sale "robbed" him of the ability to obtain the higher price.

The Court of Appeal confirmed that the expropriation and the subsequent sale were two separate transactions. Even if the sale were a bonus, that could not invalidate the expropriation. In fact, the sale was not a bonus as the municipality sold for the same value as it paid under the expropriation. Arguments that the pending Toyota plant increased land values were not applicable in the circumstances of an expropriation as the Act requires that value be calculated without reference to the purpose for which the land will be used after expropriation.

Equally important, the Court of Appeal confirmed that the expropriation was initiated for a proper municipal purpose. This ruling confirms that expropriating land to facilitate economic development is a valid municipal purpose, even where the lands are not ultimately retained by the municipality. ■

Leaking Landfills

Strand Theatre (ST) sued the City of Prince Albert Saskatchewan, alleging that leachate from a nearby landfill had contaminated its property.

The basis for the claim was a Phase II Environmental Site Assessment (Phase II) carried out in connection with a potential sale of ST's property. The Phase II concluded the property had been impacted by leachate migration, the purchase fell through and ST sued the City.

The City retained its own experts, one to review the ST report (who completely discredited the report) and one to complete a Phase II of its own, which concluded that although the former landfill had an influence on the groundwater quality the results (compared to Ontario MOE non-potable groundwater criteria) were well below the standards for Commercial/Industrial development.

The Court of Appeal confirmed the trial decision that in order to establish nuisance, ST had to prove that the City was interfering, in a substantial and unreasonable manner with the use and enjoyment of its property. A number of findings of fact were fatal to the plaintiff's claim: (i) there was no evidence that leachate was migrating from the landfill site to ST's property, thus there could be no interference, (ii) if leachate was migrating, the concentrations were "miniscule" and did not substantially or unreasonably affect the plaintiff's property, and (iii) if leachate was migrating, it did not affect the plaintiff's use and enjoyment of the property, since the trial judge heard evidence that the prospective purchaser withdrew its offer to purchase for reasons unrelated to the Phase II report.

Don't assume that just because your landfill is leaking (they all do) that you have to foot the bill of every neighbour. ■

Frustration and the Green Energy Act

Municipal by-laws are not applicable to provincially approved renewable energy projects where the by-law frustrates the purpose of the provincial approval. East Durham Wind Inc. (EDW) took a municipality to court over two by-laws it alleged prevented it from proceeding with construction of a wind energy project. EDW had obtained a Renewable Energy Approval ("REA")—but needed municipal "entrance permits" and "oversize/overweight haulage permits" to convey large/heavy project materials by truck along public highways.

EDW applied for entrance permits on two separate occasions, both of which were rejected. EDW submitted 8 applications for oversize/overweight haulage permits, which were also rejected. The municipality took the position that it required a security for potential damage to the roads, which the parties had been unsuccessfully negotiating, before the applications could be considered.

At trial EDW argued the municipality's policy/by-law regulating each permit conflicted with the REA such that the REA's purpose was frustrated. A by-law can be struck down for: (1) operational conflict with a provincial permit, or (2) frustration of the purpose of a provincial legislative instrument. Since the REA did not impose standards for entrances or the size/weight of trucks/loads, there could be no operational conflict preventing compliance with both the by-law and the REA. The Court's analysis focused on the second-prong: frustration.

The purpose of the Green Energy Act is to encourage and facilitate the development of renewable energy projects in Ontario. Further, the purpose of the REA was to authorize the construction and operation of EDW's project. The Court found that EDW's project had been duly authorized by the province and the municipality's by-laws effectively prevented construction, such that the purpose of the REA was frustrated. The by-laws were held inoperable to the extent that they conflicted with the REA.

The key lesson for municipalities is that you cannot do indirectly what you are prohibited from doing directly. Where the Green Energy Act shuts municipalities out of the decision-making process, artificial means of re-asserting regulatory control of the project won't be upheld. ■

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

The South East Ontario Municipal Seminar is back!

Cunningham Swan will be holding two seminars early-mid October, dates to be announced.

The seminars will be held in Eganville and Kingston.

We hope that two alternative venues will allow even more municipalities to send someone for this informative free event.

Invitations will be sent out in early September. If you want to reserve space, please send an email to **kjames@cswan.com**.

Similarly, if you have any preferred topics for discussion, please send an email to **kjames@cswan.com** with the subject line "seminar topics"

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.

Tim may be contacted by email at twilkin@cswan.com, or call 613.546.8074 direct.

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.

To contact David, please email dmunday@cswan.com, or call 613.546.8091.

Cunningham, Swan, Carty, Little & Bonham LLP
Smith Robinson Building · Suite 300 - 27 Princess St. · Kingston, ON K7L 1A3
Tel: 613.544.0211 · Website: www.cswan.com

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