FALL 2014

LEGAL MATTERS

POINTS OF INTEREST FOR MUNICIPAL LEADERS AND ADMINISTRATORS

Doing a Favour Doesn't Make it a Road

The Court of Appeal recently reiterated that the threshold for proving municipal assumption of responsibility for a road is quite high. The Court found that notwithstanding that the municipality was the registered owner of the road, and that it had been referred to as a "public highway" in deeds dating as far back as 1911, the applicant had failed to prove that the municipality had ever assumed responsibility for maintenance.

The Court noted that dedication and assumption requires an applicant to establish three things: that the road was dedicated by the owner for public use; that it became open to the public; and that the municipality demonstrated a clear and unequivocal intention to accept and assume responsibility for the road. If no assumption by-law exists, it can be inferred from regular improvements or maintenance work performed by the municipality, or carried out at its expense. However, irregular maintenance or repairs that are trivial or infrequent are not sufficient to establish a public highway.

In this instance, although there was evidence that the municipality had maintained the road for use by a permanent resident for over 60 years, the trial judge found that the evidence of infrequent, unplanned and sporadic measures taken by the municipality during this time pointed to municipal courtesy extended to a long time resident rather than to an intention to assume.

This is a very important case for rural municipalities with an extensive network of private roads, unmaintained municipal roads, seasonally maintained roads and other less than straightforward situations. This case, from Ontario's highest court, is an affirmation of the notion that sporadic or occasional acts of maintenance in the past do not forever obligate a municipality to maintain private roads in the future. ■

No Doctrine of Non-Conforming Lights

The Court of Appeal recently upheld an order issued by the City of Waterloo requiring a property owner to change their existing lighting to conform to the City's Property Standards by-law.

The Court of Appeal found that the by-law was not retrospective in effect. The by-law did not seek to penalize for past brightness violations but rather required that going forward, all properties comply with the new light standard. Although there was no evidence that the respondent had any vested right in the lighting as it existed before the standard was enacted, the court determined that even if it had, the by-law clearly demonstrated the intent to affect such rights.

The court also held that the order was not overly broad as it was possible to discern an objective standard by which compliance and enforcement could be measured. To make the standard clear, the word likely was read into the by-law and the respondent was ordered to redirect its external lighting so that it was "not likely to cause light to disturb adjacent inhabitants, trespass onto another property, or shine directly into a dwelling unit."

No one has a legal right to maintain a property in a state that becomes illegal under a property standards by-law. There is no non-conforming right to keep lights or other aspects of a property as they were once a new standard is enacted. ■

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A By-law that rubbed the wrong way

You may recall a case from our Winter 2013 newsletter where the court upheld the City of Brantford's adult entertainers licensing by-law. A more recent decision serves as a reminder that regulations relating to such industries must still be enacted for valid municipal purposes.

The City of Vaughan attempted to curtail illegal activities associated with "body rub parlours" by enacting a by-law regulating location, advertising, cleanliness, customer and attendant dress, hours of operation, hiring practices and services offered. Although the court upheld the majority of these restrictions, those related to manner of dress and hours of operations were struck down as being criminal in purpose and therefore outside the municipality's jurisdiction.

Municipalities have the authority under s. 150 of the Municipal Act to regulate businesses for the purpose of addressing concerns related to health and safety, nuisance control and consumer protection. The Court rejected the City's argument that minimum dress requirements would serve to protect attendants and patrons from the spread of communicable diseases, rather it found that their dominant purpose was to restrict nudity (as is the purpose of most clothing).

The real purpose of limiting operating hours was not to prevent neighbourhood disruption and disorder as the city claimed. Instead council records indicated that these restrictions were meant to "take the night away from the ladies of the night"; an improper purpose outside of council's jurisdiction. The court was prepared to find that most of the by-law was enacted for a valid municipal purpose, but would not allow the municipality to regulate morality or criminal activity. ■

'Caveat Cycler' (let the biker beware)

A recent Divisional Court case (Cotnam v The National Capital Commission (NCC) considered The Occupiers Liability Act (OLA). The OLA imposes a duty on property owners to take reasonable steps to ensure the safety of persons entering onto their property. This duty is reduced; however, where individuals willingly accept the risks present. Section 4 of the OLA, individuals who enter recreational trails (reasonably marked by notice), for the purpose of a recreational activity, and where no fee is paid, are deemed to have willingly assumed the associated risks. Consequently, the duty owed is reduced to not creating a danger and not to act with reckless disregard to occupiers.

This reduced duty allows municipalities or other public authorities to operate public trails at a reasonable cost and/or without unnecessarily interfering with the natural landscape. In the case at hand, Mr. Cotnam fell off his bicycle at a curve in a pathway and sued the NCC.

The NCC sought to have his claim for resulting injuries summarily dismissed on the basis that the NCC had met its reduced duty under the OLA. Mr. Cotnam was on a recreational trail, he had not paid an entrance fee, and signs were posted advising of the upcoming bend. The judge at first instance refused to dismiss the claim, finding that the reduced standard was a rebuttable presumption, and that summary judgement could not be granted where facts were in dispute.

Fortunately (and correctly in our view), the Court of Appeal overturned the decision, reiterating the long-standing interpretation that the purpose of section 4 was to reduce the duty of care owed by occupiers for recreational trails.

This case is important for municipalities in particular because it is a confirmation of the existing interpretation of section 4 of the OLA and overturned a decision with potentially costly implications for any municipality with a recreational trail. It also confirms the ability of municipalities (among others) to have meritless claims dismissed at the earliest opportunity. ■

Minimum Walking Standards

The City of Stratford was held liable for failing to maintain its highways in an appropriate state of repair for pedestrian users. Mr. Walker (ironically, his real name) injured his knee when he stepped into a pothole and fell while getting into his car. The Court found that although the size of the pothole was permitted by the Minimum Maintenance Standards, the highway was not in a reasonable state of repair for pedestrian traffic.

The Court concluded that the extent of a municipality's duty to maintain highways under s. 44(1) of the Municipal Act was dependent upon the surrounding circumstances. In this case the municipality had clearly designated the part of the highway where the fall occurred for parking. It was reasonable to infer that drivers would walk on the highway to reach the curb. Therefore, like a crosswalk, the municipality was required to maintain the parking spaces in a state of repair for pedestrian, as well as vehicular traffic.

The Court held that the municipality had failed to meet minimum standards. As a result, the city was found negligent and the applicant was awarded $25,000 for pain and suffering.

This case reinforces the importance of having a robust inspection policy and adhering to it. It also demonstrates the importance of understanding the "circumstances" (use and user of roads) so that inspectors know what to inspect. ■

By-law UN-BEAR-ABLE, but valid

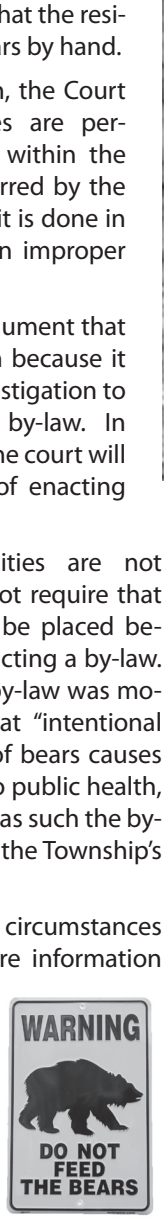
The Court of Appeal upheld the principle that municipal by-laws are presumed to be valid and enacted in good faith (and implicitly confirmed that some by-laws are necessary to protect people from themselves). The Township of Seguin sought a permanent injunction against a resident who continued to defy a by-law against feeding bears. The Township's application was supported by evidence demonstrating that the resident was feeding area bears by hand.

In granting the injunction, the Court noted that municipalities are permitted to enact by-laws within the sphere of authority conferred by the Municipal Act, so long as it is done in good faith and not for an improper purpose.

The court rejected the argument that council acted in bad faith because it had done no study or investigation to support the need for the by-law. In the absence of bad faith the court will not review the wisdom of enacting the by-law.

Moreover, as municipalities are not courts, good faith does not require that evidence of actual harm be placed before a council prior to enacting a by-law. The court ruled that the by-law was motivated by a concern that "intentional human artificial feeding of bears causes an escalation in a threat to public health, safety and wellbeing" and as such the by-law was on its face within the Township's power to enact.

While there may be other circumstances where council needs more information before it to demonstrate that it was acting within its authority, in this case the court did not need to consider the wisdom of hand-feeding bears; that was self-evident. ■



Termination of Benefits not Discrimination

A recent case at the Human Rights Tribunal found that exemptions contained in the Human Rights Code (Code) permitting discriminatory treatment on the basis of age were appropriate. Mr. Karta was a firefighter who had been receiving long term disability. Upon reaching the age of 65, his benefits were terminated in accordance with the terms of the plan.

Section 25(2.1) of the Code permits discrimination on the basis of age provided it is in compliance with the Employments Standards Act (ESA). Although s. 44(1) of the ESA generally prohibits differential treatment by an employer on the basis of age, the regulations do in fact permit it in the context of long-term disability plans. The applicant argued that this exemption had the effect of forcing employees into retirement, which has been held to be discriminatory.

The Tribunal dismissed the application as having no reasonable prospect of success, finding that the termination of the applicant's benefits fell squarely within the exemption permitted by the ESA and therefore by the Code. The tribunal further noted that its role was to interpret the provisions of the Code and not to rewrite them. While this is a narrow exception, it is an important one for municipalities, as employers, to be aware of. ■

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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SAVE THE DATE

Invitations for the 3rd annual South East Ontario Municipal Law Seminar are coming soon. Plan on joining us on:

November 12th in Kingston
November 13th in Eganville

Topics for this half day event include:

- **What is harassment Anyway?**
- **Practical strategies to correct road problems**
- **Using condos to facilitate rural development**
- **Environmental Law Update**
- **Ask us anything over desert**

Please contact us by November 1st at:
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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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