

What You Need to Know: A Municipal Case Law Update

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Overview

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2. Cannabis Legislation Update
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Overview

1. The Provincial-Municipal Relationship
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The Provincial-Municipal Relationship:

Toronto (City) v Ontario (Attorney General), 2018 ONCA 761

- Province passed Bill 5, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 in the middle of the City of Toronto's municipal election period, redrawing and resizing its 47-ward structure to 25

The Lower Court:

- No dispute that the Province had plenary authority under s. 92(8) of the *Constitution Act, 1867* to pass laws in relation to "Municipal Institutions in the Province"
- The timing of the legislation was "without parallel in Canadian history"

The Provincial-Municipal Relationship:

Lower Court Findings:

- Bill 5 Breached Section 2(b) of the *Charter*:
 - (a) As the Bill was enacted in the middle of an ongoing election campaign it breached the **municipal candidate's** freedom of expression by interfering with candidate's ability to effectively communicate his or her political message and undermined an otherwise fair and equitable process; and
 - (b) As the Bill more than doubled the population size of the City's wards, it breached **municipal voter's** right to cast a vote that can result in effective representation

Court of Appeal:

- Application judge's decision blurred the demarcation between the protection of expressive activity in s. 2(b) and the s. 3 guarantee of the democratic rights of citizens to vote and be qualified for office.

The Provincial-Municipal Relationship:

- The s. 3 right to vote and stand for office does not apply to municipal elections
- **Municipal Candidates:**
 - Candidates' expectation that they would be operating under a 47-Ward platform when developing their messages for their campaign is not constitutionally guaranteed.
 - Legislation that has the effect of diminishing the effectiveness of a message, but does not prevent the communication of that messages does not violate s. 2(b)
- **Municipal Voters:**
 - A voter's right to "effective representation" is at the core of Section 3 of the *Charter*. In the context of a municipal election, the *Charter* does not provide such protection
 - The size of the City's electoral wards is a question of policy and choice to be determined by the legislative process,. Whether wards of specific sizes are required to ensure effective representation was a debatable issue that does not engage section 2(b).

Court of Appeal stayed the Superior Court's Order

Municipal Ownership and Adverse Possession

Richard v. Niagara Falls, 2018 ONSC 7389

- Application by private property owner for declaration that the applicant was the owner, by adverse possession, of a strip of land (the disputed land) owned by the Respondent Municipality
- The disputed land adjoined the backyard of the Applicant Property as its south boundary, which comprised of approximately 15 mature evergreen trees

Three-Part Test:

1. Applicant personally or through his predecessors had actual possession of the disputed land;
2. Applicant's possession was with the intention of excluding the true owner from possession; and
3. **That the true owner was effectively excluded from possession**



Municipal Ownership and Adverse Possession

- Higher threshold under the **third factor** when the disputed land is owned by a municipality
- Application of the inconsistent use test on this third factor must be applied from the **perspective** of the Municipality.
- Very difficult for an applicant to obtain ownership by adverse possession of property that is held for a public benefit. The primary reason, in the Court's view, is that it is difficult to prove that any encroachment onto such property by a private citizen is inconsistent with public use.
- Application dismissed

Legality of By-law Imposing Penalties

Altmann v The Corporation of the Town of Whitchurch-Stouffville, 2018 ONSC 5306

- Application by Mayor pursuant to section 273 of the *Municipal Act*, for declaration that the Respondent Town's by-law was, *inter alia*, *ultra vires* and of no force and effect.
- At issue were the following impugned terms in the by-law:
 1. Provided that, other than during Council Meetings, the Mayor could only communicate with municipal staff solely by email. No other form of communication was shall be permitted nor responded to for the duration of Council term, with exceptions as authorized by the CAO;
 2. Required the Mayor to return his keys and access card to the municipal office and facilities for the duration of Council term; and
 3. Prohibited the Mayor from having access to municipal facilities except Town Hall during business hours and only for prescribed purposes

Legality of By-law Imposing Penalties

- The terms of the By-law went beyond the jurisdiction of Council
- The Court found that the offending terms were **sanctions or penalties** imposed by Council against the Mayor, which flowed and were imposed from the Mayor's failure to provide an apology
- The offending terms were not "other actions" as contemplated by the *Act*
- The offending terms were not explicitly permitted by either of the two sanctions permitted by the *Act*, namely a reprimand or sanction of no remuneration for up to 90 days

Judicial Review of Municipal Action

Sorensen v The County of Frontenac, 2018 ONSC 3912

- Application for judicial review of the Respondent Council's decision to exempt agricultural vehicles from restrictions initially imposed in 2003 on heavy vehicle use on the Howe Island Ferry
- The legal authority of the Council to remove or ease a restriction that it imposed was not in dispute
- Applicants argued that Council:
 - Improperly fettered its discretion;
 - Exercised its discretion under a misapprehension of the law; or
 - Otherwise declined its jurisdiction by improperly determining the restrictions were in contravention of the law and illegal

Judicial Review of Municipal Action

- Pursuant to section 272 of the *Municipal Act, 2001* a Court is prohibited from quashing or reviewing a bylaw on the basis that it is unreasonable
 - Even if Council was incorrect in its determination that the 2003 Restrictions contravened the *FPPA*, it remained within the Council's jurisdiction to change its bylaw restriction.
 - **No basis** for court to inquire into the **correctness of the legal opinion** which might have been considered by Council as the correctness of the opinion would not affect Council's jurisdiction to act in the manner it did
- No Fettering of Discretion:
 - No evidence that Council arrived at the meeting having already made an irreversible decision;
 - Councilors are entitled to be guided by legal opinions obtained by staff;
 - Councilors retained discretion to determine which factors to balance or weigh in arriving at their voting decision, including legal advice

Judicial Review of Municipal Action

Whiteley et al v. The Corporation of the City of Guelph, 2019 ONSC 118

- Application for judicial review of the Respondent's decision to replace a one-lane, load restricted heritage bridge with a two-lane, highway standard bridge
- Applicants argued decision was in contravention of section 24 of the *Planning Act* as the Respondent failed to conform to its own Official Plan.
- Citing *Sorensen v the County of Frontenac*, the standard of review was:
 - Reasonableness. Municipality's decision involved it applying its **own policy** to a given set of facts.

Judicial Review of Municipal Action

Failure Conform with Official Plan:

In reviewing a Municipality's Official Plan, the Court should give the Plan a **broad liberal interpretation** with a view to furthering its policy objectives:

- Provision of Official Plan provided that the City would work with certain institutions “as appropriate” to co-ordinate transportation infrastructure planning and implementation.
- Court was not in a position to determine what is “appropriate” in terms of the project before the Court.
- Court rejected the applicant's strict reading of the Official Plan as contrary to prior jurisprudence. In adopting such a reading, the Respondent Municipality would be required to amend its Official Plan every time a project was considered.

Application dismissed.

A Cannabis Legislation Update
In Reference to The
Cannabis Licence Act, 2018, S.O.
2018, c. 12, Sched. 2

Cannabis Legislation Update

Sections 41 and 42

- Section 41: Gives a municipality the ability to pass a resolution by January 22, 2019 prohibiting cannabis retail stores from being located in their municipality.
 - The prohibition of retail stores may be later lifted by the municipality under subsection (1)
- Section 42 restricts municipalities from passing by-laws that address matters related to the sale of cannabis.

Cannabis Legislation Update

Retail Store Authorizations

- Notice will be given to municipal governments and their public, of a proposed store with a **15 day** notification period. This period is to receive public input and hear concerns from the local community.
- Under the legislation, the Registrar will consider written submissions from both the lower and upper tier municipalities. The Registrar will also give public notification of a proposed cannabis retail site by displaying notices on the proposed store and on the Commissioner's website

Cannabis Legislation Update

Subsection 4(12) States:

Circumstances where no issuance

(12) The Registrar **shall refuse** to issue a retail store authorization,

(a) if the proposed cannabis retail store would be located less than the distance specified by or determined in accordance with the regulations from,

(i) a school as defined in the *Education Act*, or

(ii) any other prescribed land use; or

(b) in any other circumstance that may be prescribed

Cannabis Legislation Update

Relationship to Other Applicable Laws affecting Municipalities:

Land use Planning:

- The municipality's Official Plan and Zoning By-Law still determines what is applicable as a retail space, which include cannabis retail stores.

Municipal Building Inspections and the Building Code:

- The Alcohol and Gaming Commission of Ontario is responsible for the store operation and licensing. However, the building code still applies to retail stores. Therefore, if a building permit is required, building inspections will take place as usual.

Cannabis Legislation Update

115 (1) Without limiting sections 9, 10 and 11, a municipality may prohibit or regulate the smoking of tobacco in public places and workplaces. 2001, c. 25, s. 115 (1); 2006, c. 32, Sched. A, s. 56 (1).

Crown bound

(2) A by-law under this section binds the Crown. 2001, c. 25, s. 115 (2).

Restriction

(3) A by-law under this section shall not apply to a highway but may apply to public transportation vehicles and taxicabs on a highway.

Public Nuisance

128 (1) Without limiting sections 9, 10 and 11, a local municipality may prohibit and regulate with respect to public nuisances, including matters that, in the opinion of council, are or could become or cause public nuisances. 2001, c. 25, s. 128 (1); 2006, c. 32, Sched. A, s. 68.

Not subject to review

(2) The opinion of council under this section, if arrived at in good faith, is not subject to review by any court.

Local Planning Appeal Tribunal Act, 2017 –
Section 42(3)

- 42(3) At an oral hearing of an appeal...,
- (a) each party or person may make **an oral submission** that does not exceed the time provided under the regulations; and
 - (b) no party or person **may adduce evidence or call or examine witnesses.**

O.Reg 102/18 – No party or person may call or examine witnesses prior to the hearing of an appeal

Local Planning Appeal Tribunal Act, 2017

- SECTION 33 Powers and Section 42 Restrictions
 - INCONSISTENCY = CONFUSION = LITIGATION
- *CRAFT Acquisitions Corp et al v City of Toronto*

Two-Tiered Appeal System Under the Planning Act

1. Process Applicable to Decisions to
 - Approve or Adopt OP or OPA
 - Pass a Zoning By-law or ZBA
2. Process Applicable to Decisions to
 - Refuse to Adopt OPA
 - Refuse to Pass ZBA
 - Non-Decision to Adopt OPA or Pass ZBA

Two-Tiered Process – Approve or Adopt OP or OPA; Refusal of Approval of OP or OPA; Pass ZBA

- Appeals Commenced under 17(24), 17(36), 34(19)
- Grounds of Appeal Limited
 - Decision is inconsistent with the Provincial Policy Statement, fails to conform with or conflicts with an provincial plan, or fails to conform with an applicable official plan.
- First Appeal = Pure Appeal Proceeding

Steps in a First Appeal – Preliminary Screening

- Tribunal also required to find that appeal is invalid and dismiss if:
 - Appeal is not made in good faith or is frivolous or vexatious
 - Appeal is made only for the purpose of delay
 - Appellant has persistently and without reasonable grounds commenced before the Tribunal proceedings that constitute an abuse of process
 - The appellant has not paid the required fee and has not responded to a request by the Tribunal to pay the fee
 - The appellant has not responded to a request by the Tribunal for further information

Steps in a First Appeal

4. Parties Can Challenge the Preliminary Finding of the Tribunal
 - Appeal found to be Valid – Motion Under Rule 26.06
 - Appeal Found to be Invalid – Written Motion under Rule 26.08
5. Parties are Notified of the Date of the Case Management Conference
 - Required Notice Period is 75 Days

Steps In a First Appeal

6. Appellants File Appeal Record and Case Synopsis

- Must be served and filed within 20 days of the receipt of the Tribunal's notice of the result of its preliminary determination (Rule 26.11)
- Rule 26.12 – appeal record must contain certain documents, including:
 - Notice of Appeal
 - Resolution of Council or Notice of Decision
 - List or excerpts of any document in the Municipal Record that will be Relied On
 - List of all Relevant and Applicable Statutory and Policy Provisions with extracts
 - Chronology of the Relevant Policy Documents Applicable to the Proposal

Steps in a First Appeal

- Appeal Record Must also contain

“An affidavit by a person, or persons, both setting out the material facts associated with the application and, where the person can be qualified to offer opinion evidence on a matter, that person’s opinion with respect to the matters in issue in relation to the appeal of the decision or non-decision, along with a signed copy of the acknowledgement form attached to the Rules, and the person’s resume supporting their qualification to present opinion evidence.”

Steps In a First Appeal

6. Appellants File Appeal Record and Case Synopsis

– Case Synopsis must consist of

- Summary of the application;
- Statement of the decision made by council or approval authority or statement that no decision has been made in time following a complete application
- The nature of the appeal and a list of issues raised in the appeal relating to questions of consistency with the PPS, conformity with or conflicting with a provincial plan, or conformity with an applicable official plan.
- A detailed overview of the facts
- The arguments and/or opinions that address the issues raised
- Listing of relevant authorities and how the authorities inform the issues

Steps in a First Appeal

8. Participation in Case Management Conference

- Any individuals who wish to participate in the proceeding must make written submissions to the Tribunal. Tribunal will determine whether such individuals can participate as a party or on such terms as may be determined by the Tribunal
- Rule 26.20 requires the Tribunal to do several things at the Case Management Conference, including discussing settlement opportunities

Steps in a First Appeal

9. Hearing

- Hearing conducted orally, in writing, or electronically by the Tribunal
- Only individuals that may participate in an oral hearing are the parties to the proceeding
- At an oral hearing:
 - Limited to oral submissions
 - Prohibition on adducing evidence or calling or examining witnesses

Two-Tiered Process – Decision to Refuse or Non Decision Regarding Adoption of OPA and Zoning By-law Amendment

- **HIGH BURDEN** - Appellant is required to demonstrate:
 1. That the current zoning/official plan provisions that are requested to be amended are inconsistent with the Provincial Policy Statement, fail to conform or conflict with a provincial plan, or fail to conform with an applicable official plan.
 2. That the amendments that are the subject of the application are consistent with the Provincial Policy Statement, conform with or do not conflict with all applicable provincial plans, and conform with all applicable official plans

Practical Suggestions

- Much higher onus on municipalities to ensure record is clear, detailed, and addresses all relevant issues for all official plan and zoning by-law matters to ensure a full record can be considered by the Tribunal on appeal
- Obtain more materials prior to deeming an application complete and commencing time period for decision to be made

Combining Appeals

- Several situations where appeals that used to be combined into one proceeding no longer can be due to different procedures
- Eg. Simultaneous appeal of consent and ZBA no longer available.

Questions?

PROFILE

Tony Fleming is a Partner in the Land Use Planning, Development and Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Our municipal clients consult Tony on all aspects of municipal governance and complex land use planning matters. Tony appears frequently before the Ontario Municipal Board to defend decisions of municipal Councils and Committees of Adjustment. Tony also appears regularly before the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including defending challenges to municipal by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer.

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