



# Municipal Case Law Update

## **Northwestern Ontario Municipal Association**

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# Agenda

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- Ontario's new Anti-Strategic Lawsuit Against Public Participation ("SLAPP") Legislation
- Freedom of Expression/Barring from Municipal Facilities
- Fees and Charges
- Trusts
- Local Boards, Or Not?
- Health and Safety By-Laws
- Jurisdiction of Integrity Commissioner

# Anti-SLAPP Legislation



<https://www.thestar.com/news/gta/2017/07/26/court-dismisses-companys-libel-lawsuit-against-teacher-over-facebook-postings.html>

- ***United Soils Management Ltd. v. Mohammed, 2017 ONSC 4450 (Ont. S.C.J.)***

- The defendant was concerned that contaminated material would leak into the plaintiff's gravel pit, and posted comments online that were critical towards the defendant
- The plaintiff demanded an apology, and got one, but sued the defendant for \$120,000 anyways

# Anti-SLAPP Legislation

- ***United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450**
  - The Attorney General created an Advisory Panel on Anti-SLAPP legislation to advise the government as to how the Ontario justice system might prevent the misuse of courts without depriving anyone of appropriate remedies for expression that actually causes significant harm
  - The *Courts of Justice Act* ("CJA") was amended to allow strategic law suits against public participation to be dismissed on summary motion
  - Section 137.1(1) confirms the policy rationale of encouraging participation in debates of public interest and discouraging the use of litigation as a means of limiting expression
  - The case turned on the presence and impact of the word "poison" posted by the defendant in proximity to the word children

# Anti-SLAPP Legislation

- ***United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450**
  - A review of evidence such as the risk that the operation of the gravel pit and tests and controls put in place could fail demonstrated that there were grounds to believe there was a valid defence of justification
  - The only way the comments relied on could be taken literally as “poisoning children” was if they were taken out of context
  - Having heard from a colleague, having reviewed the tweets on the Town website, and having read an article in the news, the defendant exercised sufficient diligence to overcome the allegation that she was reckless in publishing the comments
  - The policy goal is to encourage public discourse, not to control the quality of the debate

# Freedom of Expression/Barring from Municipal Facilities

- ***Bracken v Fort Erie (Town)*, 2017 ONCA 668 (Ont. C.A.)**
  - The appellant was angered by the Town's decision to introduce a by-law permitting a medical marijuana facility to be built across the street from his home, but when he protested outside the Town Hall, an employee placed the building under lockdown, and the police arrested him
  - The public square is the paradigmatic place to express public dissent



<http://www.niagarafallsreview.ca/2017/08/26/ban-on-protester-from-town-property-overturned>

# Freedom of Expression/Barring from Municipal Facilities

- ***Bracken v Fort Erie (Town)*, 2017 ONCA 668**
  - *Canadian Charter of Rights and Freedoms*
    - 2. Everyone has the following fundamental freedoms:
      - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
  - Acts of physical violence or threats of violence do not come within the scope of s. 2(b)
  - While the Town employees were frightened, the evidence did not disclose any reasonably basis for their fear
  - One person, alone in front of Town Hall with a megaphone and a camcorder, is not, of itself, an interference with public space that displaces the protection of s. 2(b)

# Freedom of Expression/Barring from Municipal Facilities



- ***Bracken v Fort Erie (Town)*, 2017 ONCA 668**
  - The trespass notice prevented the appellant from conveying his message to his intended audience not only then but for a year thereafter, unquestionably limiting his s. 2(b) rights
  - In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes



# Calculation of Wastewater Fees

- ***Nylene Canada Inc. v. Arnprior (Town)*, 2017 ONSC 795**
  - Plaintiff sued the municipality on the basis that it had been overcharged by 11% for wastewater services that it did not use
  - Municipality argued that it benefitted from statutory immunity under the *Municipal Act, 2001*, on the basis that its wastewater calculation was a policy decision, and also that the limitation period had expired
  - Municipality succeeded

# Calculation of Wastewater Fees

- ***Nylene Canada Inc. v. Arnprior (Town)*, 2017 ONSC 795 (Ont. S.C.J.)**

- Plaintiff argued that s. 394(1)(c) of the *Municipal Act, 2001* prevented Arnprior from charging it more for wastewater services than the amount it actually discharged. Clause 394(1)(c) provides:

394. (1) No fee or charge by-law shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

...

(c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;

- Plaintiff argued that clause 394(1)(c) should be interpreted to mean that "municipalities are prohibited from charging for services they do not actually provide"

# No Nexus based on “Best Estimate”

- ***Angus v. Port Hope (Municipality)*, 2016 ONSC 3931 (Ont. S.C.J.)**
  - Municipality passed a by-law prescribing permit fees for the importation of fill material
  - Plaintiffs brought motion to determine whether by-law was a tax and therefore outside of the municipality's power
  - Issue was whether there was a nexus between the fees charged and the actual estimated cost of administering the scheme or whether the fees were part of a regulatory scheme
  - Municipality provided no hard data, calculations or cost estimates and analysis to the court for review

# No Nexus based on “Best Estimate”

- ***Angus v. Port Hope (Municipality)*, 2016 ONSC 3931**
  - Director testified that the calculations for the fee schedule were based on his experience and “best educated estimate considering it was a new By-law”
  - A municipality may pass a by-law to prohibit the placing or dumping of fill is contained in s. 142 of the *Municipal Act, 2001*, and may impose fees and charges pursuant to s. 391.(1), but s. 17 is clear that municipalities do not have the authority to impose taxes

# No Nexus based on “Best Estimate”

- ***Angus v. Port Hope (Municipality)*, 2016 ONSC 3931**
  - The Court applied the five part test to determine whether a fee is a tax and considered whether the fee imposed by the by-law was:
    - enforceable by law;
    - imposed under the authority of the legislature;
    - levied by a public body;
    - levied for a public purpose; and
    - a nexus between the charge and the cost of providing the service or program to those subject to the fee.

# No Nexus based on “Best Estimate”

- ***Angus v. Port Hope (Municipality)*, 2016 ONSC 3931**
  - The Court also considered:
    - whether the fee is designed to be revenue neutral;
    - whether the calculations of fees are based on best estimates of the costs associated with the service — including staffing and non-staffing expenditures relating to processing applications and enforcement efforts;
    - whether the fees are used to defray expenses or raise revenue; and
    - whether the fees are intended for a public purpose.

# No Nexus based on “Best Estimate”

- ***Angus v. Port Hope (Municipality)*, 2016 ONSC 3931**
  - The Court determined that the permit fee imposed by the by-law was in fact a tax on the basis that no evidence had been submitted to support the municipality’s argument that the by-law permit fee was prescribed “in a way that will both allow the municipality to recoup administration costs in overseeing operations involving fill while also effectively addressing numerous health and safety issues relating to large levels of fill being imported into the municipality”
  - The Court noted that a surplus was not a problem, just as long as the municipality made reasonable attempts to match the fee revenues with the administrative costs of the regulatory scheme, which was not the case here – best estimates based on work experience were insufficient to establish a nexus

# Trusts

- ***Angus v. Port Hope (Municipality)*, 2017 ONCA 566 (Ont. C.A.)**
  - In 2000, Canada struck a deal with Port Hope in which Canada would make a payment of \$10 million in exchange for storing low-level radioactive waste at a safe site
  - An agreement between the parties enabled Port Hope to invest its payment at its discretion and to spend any income earned from investing it



<http://www.waterkeeper.ca/blog/2016/11/8/what-you-need-to-know-about-the-port-hope-area-radioactive-waste-cleanup>



# Trusts

- ***Angus v. Port Hope (Municipality)*, 2017 ONCA 566**
  - The issue was whether the agreement created a trust in favour of ratepayers, and if so, was it a charitable trust?
  - To settle property on trust, one must intend that the property is the subject of the trust, and here Canada simply intended to discharge its contractual obligations under the agreement
  - As there were no words in the agreement legally constraining Port Hope's use of the payment, it did not create a trust over the payment

# Trusts

- ***Angus v. Port Hope (Municipality)*, 2017 ONCA 566**
  - To find that an express trust for persons has been created, there must be certainty of intention, subject matter and objects
  - Here, the parties did not know whether the regulatory approvals would be granted at the time of the agreement, so the Town could not have intended to have given away beneficial entitlement to the payment to the ratepayers, as it might have to use the payment to fulfill its obligations under the agreement
  - As well, the parties could vary the agreement without the consent of the ratepayers, indicating there was no intention to create an express trust

# Trusts

- ***Angus v. Port Hope (Municipality)*, 2017 ONCA 566**
  - It was uncertain whether the subject matter of the purported trust was to be a payment, investment income earned on the payment, or both the payment and investment income earned on it
  - As the payment was to be held for an indefinite period of time, the class of objects – the ratepayers – consisted of an indeterminate number of people with unidentifiable future members
  - If the agreement had created a trust, it could not be a non-charitable trust because people would be the direct beneficiaries
  - While the income earned on the payment had not been used exclusively to defray the lower tier municipal taxes of the ratepayers, the other public uses of the funds served to indirectly benefit those ratepayers, and in the absence of a trust, there was no breach in so using the income

# Local Boards, Or Not?

- ***City of Hamilton v. Ombudsman of Ontario*, 2017 ONSC 4865 (Ont. S.C.J.)**

- ***Ombudsman Act* s. 14.1(3):**

- If a person makes a request under clause 239.1(b) of the *Municipal Act, 2001*... the Ombudsman may... investigate, (a) whether a municipality or local board of a municipality has complied with section 239 of the *Municipal Act, 2001* or a procedure by-law under subsection 238 (2) of that Act in respect of a meeting or part of a meeting that was closed to the public



<https://www.ombudsman.on.ca/About-Us/The-Ombudsman/Message-from-the-Ombudsman.aspx>

# Local Boards, Or Not?

- ***City of Hamilton v. Ombudsman of Ontario, 2017 ONSC 4865***
  - The City of Hamilton successfully argued that the Ombudsman's jurisdiction to investigate compliance with the open meeting requirements of the *Municipal Act, 2001* does not extend to the Election Compliance Audit Committee ("ECAC") or Property Standards Committee ("PSC"), each of which holds public hearings but deliberates and prepares reasons in private
  - While a local board is a separate entity from a municipality, all separate entities are not necessarily local boards, and the degree of independence from a municipality can indicate that the entity is not a local board

# Local Boards, Or Not?

- ***City of Hamilton v. Ombudsman of Ontario, 2017 ONSC 4865***
  - The ECAC does not derive its authority from the City, and the clear legislative intent under the *Municipal Elections Act* is that members of a municipal council should not be making the decisions about whether a compliance audit should be initiated regarding a candidate in a municipal election, yet if the ECAC were a local board, the municipality could do just that by dissolving the Committee and taking over its functions
  - Likewise, the purpose of the PSC is inconsistent with the power to dissolve a local board and assume the power itself - if the City could dissolve the PSC and assume its powers, it would defeat the statutory regime under the *Building Code Act*
  - It is difficult to see how the PSC, charged with deciding an appeal on the merits from an order, could effectively deliberate in public after its hearing, as it would mean discussions about witness credibility, factual inferences etc. would have to be discussed in front of all concerned

# Health and Safety By-Laws

- **2326169 Ontario Inc. v. Toronto (City), 2017 ONSC 6221 (Ont. S.C.J.)**

- The City of Toronto passed a by-law that amended the *Municipal Code* to prohibit hookah smoking in all establishments licensed by the City to carry on business
- A group of business owners tried to quash the by-law as confiscatory



[https://www.thestar.com/news/city\\_hall/2017/06/13/toronto-hookah-ban-upheld-by-appeal-court.html](https://www.thestar.com/news/city_hall/2017/06/13/toronto-hookah-ban-upheld-by-appeal-court.html)

# Health and Safety By-Laws

- **2326169 Ontario Inc. v. Toronto (City), 2017 ONSC 6221**
  - The Ontario Court of Appeal found that the by-law was not confiscatory, and even if it were, that the City of Toronto has the legal authority to pass the by-law and the specific power to shut down a business
  - The purpose of the by-law is to deal with health and safety, and the only basis upon which a City of Toronto by-law can be quashed is illegality
  - Given the broad and purposive approach to interpreting municipal legislation adopted by courts in recent years, the by-law is clearly valid



# Health and Safety By-Laws

- **2326169 Ontario Inc. v. Toronto (City), 2017 ONSC 6221**
  - The by-law does not expropriate any property, impose extra property or municipal taxes, or prevent the applicants from running their businesses
  - There has been no changes to the business licenses of the applicants, who operate eating establishments, and no applicant has a hookah lounge licence because the City does not issue such a thing
  - The by-law does not prevent the applicants from doing what they are licensed to do
  - City Council made a policy choice i.e. that hookah smoke is harmful, and the courts will not second-guess such policy decisions

# Jurisdiction of Integrity Commissioner

- ***DiBiase v. Vaughan (City), 2016 ONSC 5620***
  - Municipal councillor, who was also Deputy Mayor, was subject of complaint to municipal Integrity Commissioner
  - Councillor was alleged to have violated municipality's Code of Ethical Conduct for Members of Council by receiving benefit from contractor, assisting contractor in its attempts to obtain municipal business, and voting improperly on matters before Council
  - Commissioner decided to investigate two allegations:
    - Councillor improperly interfered with tendering processes to assist contractor
    - Councillor attempted to exercise influence to benefit contractor

# Jurisdiction of Integrity Commissioner

- ***DiBiase v. Vaughan (City), 2016 ONSC 5620***
  - Council accepted commissioner's final report and imposed recommended penalty of suspension of pay for 90 days
  - Councillor brought application for judicial review; application dismissed
  - Commissioner had properly refused demand for production of materials beyond supporting material provided by the complainant as allowed under s. 10 of municipality's Complaint Protocol for Council Code of Conduct, and there was no basis for reviewing commissioner's decision to commence investigation
  - Councillor knew case against him and had decided not to respond to substance of it

# Jurisdiction of Integrity Commissioner

- ***DiBiase v. Vaughan (City), 2016 ONSC 5620***
  - Although not required to do so by complaint protocol, commissioner had provided Councillor with preliminary findings and asked Councillor's counsel for comments prior to finalizing report and submitting recommendations to Council for consideration
  - Prior to voting to accept the commissioner's final report, Council had before it all of the responses that counsel for the Councillor chose to make

# Jurisdiction of Integrity Commissioner

- ***DiBiase v. Vaughan (City)*, 2016 ONSC 5620**
  - Various other arguments were rejected, including
    - alleged bias of another councillor,
    - alleged lack of jurisdiction of commissioner before being re-appointed with retroactive effect,
    - alleged lack of jurisdiction to investigate non-criminal matters after referring criminal matter to police, and
    - alleged exceeding of jurisdiction in searching the Councillor's emails on the municipality's computer systems
  - Because there was no merit in any of the Councillor's submissions, his contention that the municipality erred in law in accepting the commissioner's final report was rejected

Presented by: **Jody E. Johnson**

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