Agenda

1. Integrity Commissioners
2. Elections
3. By-laws and Conflict of Interest
4. Freedom of Information and Protection of Privacy
5. Finance and Taxation
1. Integrity Commissioners

- DiBiase v. Vaughan (City), 2016 ONSC 5620
DiBiase v. Vaughan (City)

• 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
**DiBiase v. Vaughan (City)**

- Commissioner decided to investigate two allegations:
  - Councillor improperly interfered with tendering processes to assist contractor
  - Councillor attempted to exercise influence to benefit contractor
- 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
**DiBiase v. Vaughan (City)**

- 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.
DiBiase v. Vaughan (City)

- 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.
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.
2. Elections

- *Giannini v. Toronto (City), 2017 ONSC 1489*
Giannini v. Toronto (City)

- Applicant candidate ran unsuccessfully for seat on Toronto City Council in municipal election
- Candidate failed to file audited financial statements required by the Municipal Elections Act, 1996 (“MEA”) by prescribed filing date
- Candidate applied for relief from forfeiture pursuant to s. 98 of Courts of Justice Act to permit her to file financial statements and remove her name from "candidates in default" list maintained by respondent city; application dismissed
Giannini v. Toronto (City)

- Candidate had not established that her failure to comply with mandatory financial disclosure provisions of the MEA was inadvertent or that she had been sufficiently diligent in her attempts to repair the problem so as to warrant the exceptional relief she sought.

- Candidate was not reasonably careful or diligent in the manner in which she went about complying with her obligations under the MEA, as she effectively delegated entire and important matter of campaign compliance to a third party.

- Candidate’s faith in third party was based on his previous experience acting as CFO and financial controller, but that did not involve prior experience with MEA compliance and did not require certification as an accountant.
Delegation here amounted to abandonment and it was not reasonable or careful

Candidate knew or ought to have known from information sent to her:
- that MEA required audited financial statements;
- deadline for filing audited financial statements;
- that she could apply for extension of time; and
- that penalty for non-compliance was ineligibility to run in next election

When candidate discovered her breach she did not retain auditor immediately or take immediate steps to correct problems.
Giannini v. Toronto (City)

- Equitable jurisdiction of court should be applied cautiously, particularly where there was important expression of public policy involved such as campaign finance disclosure rules of MEA.

- Candidate was not successful in election and only real consequence she wanted to avoid was that of being described as a defaulting candidate, which was not legal impediment but informal policy that was not directly connected to MEA.

- Right to present oneself to people as candidate for election came with responsibility to make fair and timely disclosure of financial returns in manner prescribed, and this was not appropriate case to exercise discretion to order relief from forfeiture.
3. By-laws and Conflict of Interest

- *Burlington (City) v. Burlington Airpark Inc.*, 2017 ONCA 420
- *wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)*, 2016 ONCA 496
- *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54
Burlington (City) v. Burlington Airpark Inc.

- Airpark owns aerodrome in Burlington
- Airpark appealed order requiring it to file application for a permit under By-Law 64-2014 for work carried out before the By-law was passed and while a 2003 by-law was in effect
- Can City require Appellant to apply for a permit under the 2014 by-law for work Airpark did before that by-law was enacted?
  - No
Burlington (City) v. Burlington Airpark Inc.

- Sharpe J.A.: “nothing in the 2014 by-law that can justify requiring remediation of work conducted or a situation created before the by-law came into force”; “entire thrust of the 2014 by-law is prospective”

- Sharpe J.A. held that “the order under appeal amounts to a retroactive application of the 2014 by-law”
  - “by its terms, the 2014 by-law has neither retroactive nor retrospective application”

- “To require Airpark to obtain a permit in 2014 based upon standards set in 2014 for work already conducted years ago in 2008 and 2009 is plainly to change the law from what it was at the time the work was undertaken.”
Burlington (City) v. Burlington Airpark Inc.

- City argued that earlier proceedings it commenced against Airpark under the 2003 by-law are continued by s. 52(3) of the Legislation Act, 2006
  
  *If an Act or regulation is repealed, revoked, replaced or amended, “[p]roceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible.”*

- Sharpe J.A. held that the Act does not apply to municipal by-laws—the definition of “regulation” under the Act specifically excludes municipal by-laws

- Even if s. 52(3) does apply to municipal by-laws, it would not continue the substance of a repealed provision; Sharpe J.A. agrees with Airpark that this application was a fresh proceeding
“[W]e must respect important principles of our legal order, one of which is that, in the absence of clear legislative intention, to interpret an enactment as ‘reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law’ (Ruth Sullivan, *Construction of Statutes* (Markham: LexisNexis Canada Inc., 2014))”
wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)

- Company obtained Renewable Energy Approval ("REA") in December 2013
- REA authorized construction of industrial wind turbines and associated infrastructure in the City
- Company successfully brought application for judicial review of the City’s resolution denying it access to the road, and for orders directing the City to consider and decide in good faith the company’s applications for upgrading and use of road, and for permits to allow expeditious construction and operation of wind turbine project
wpd Sumac Ridge Wind Inc. v. Kawartha Lakes (City)

• City appealed; appeal dismissed
• There was no error in concluding that the City acted in bad faith by exercising its jurisdiction over roads for improper purpose, which was to frustrate approval and prevent wind energy projects
• City could not reasonably take position that in exercising its jurisdiction over roads, it was permitted to refuse to even consider applications
Divisional Court’s order was not order of mandamus directing result of municipality’s discretionary decision-making power, but rather order’s effect was to merely prohibit the City from continuing to frustrate approval and act in bad faith.

Requiring the City to act in good faith was not mandamus, but rather statement of established principle of law.
Windsor (City) v. Canadian Transit Co.

- Applicant owns and operates Canadian half of the Ambassador Bridge
- Applicant purchased more than 100 residential properties in City with intention of demolishing homes and using land to facilitate maintenance and expansion of the Ambassador Bridge and its facilities
- City issued repair orders against properties pursuant to its property standards by-law
**Windsor (City) v. Canadian Transit Co.**

- Applicant applied to Federal Court for declarations that applicant had certain rights under the federal *Canadian Transit Company Act* that superseded by-law and any repair orders.

- City brought successful motion to strike applicant's notice of application on ground that Federal Court lacked jurisdiction to hear application.

- Applicant appealed to the Federal Court of Appeal which found that the Federal Court has the power to make constitutional declarations about the validity, applicability and operability of legislation.
Windsor (City) v. Canadian Transit Co.

- City appealed to the Supreme Court of Canada
- Issue: whether Federal Court had jurisdiction to decide claim that municipal by-law was constitutionally inapplicable or inoperative in relation to a federal undertaking
- Role of the Federal Court is constitutionally limited to administering "the Laws of Canada", which in this context meant federal law
- Supreme Court applied the three-part test for jurisdiction set out in certain case law that was designed to ensure the Federal Court did not overstep this limited role
Windsor (City) v. Canadian Transit Co.

- The first part of the test, which required that a federal statute grant jurisdiction to the Federal Court, was not met. No need to consider the other parts.
- Majority of the Supreme Court found the Federal Court did not have jurisdiction to decide whether City’s by-laws applied to applicant's residential properties.
- Issue of whether the City’s by-laws apply to the Company’s residential properties has to be decided by the Ontario Superior Court of Justice.
4. Freedom of Information and Protection of Privacy

- Toronto-Dominion Bank v. Ryerson University, 2017 ONSC 1507

- Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") and workplace harassment investigations, including orders of the Information and Privacy Commissioner ("IPC")
Toronto-Dominion Bank v. Ryerson University

- New bank acquired former bank's assets and became party to an affinity agreement whereby the university received compensation for promotion of the bank's financial service products to alumni, staff and students.
- University received request under the Freedom of Information and Protection of Privacy Act for disclosure of the agreement.
- University decided to grant requester access to the agreement other than the schedule containing commercial and financial information disclosed in confidence.
- Bank and requester appealed the university’s decision to the IPC.
Toronto-Dominion Bank v. Ryerson University

- IPC applied three-part test developed with respect to third party information
- IPC rejected the bank's contention that the agreement was proprietary business information exempted from disclosure
- IPC found that the agreement constituted commercial information, but was not "supplied" in confidence to the university as it fit within neither inferred disclosure nor immutability exception but represented a negotiated agreement
- IPC ordered the bank to disclose agreement
- Bank brought application for judicial review
Divisional Court dismissed the application finding that the IPC’s application of the third party record exemption was reasonable.

Given that some agreement terms were changed and that the agreement was a result of contractual negotiations, it was reasonable for the IPC to conclude that agreement was not "supplied" in confidence.

IPC’s approach was consistent with past decisions of the IPC that were upheld on judicial review and with the approach to information in contracts adopted in other jurisdictions.

IPC’s approach was consistent with the purpose of the Act, namely that information be available to the public and that exemptions be limited and specific.
Toronto-Dominion Bank v. Ryerson University

- The Bank has sought leave to appeal to the Court of Appeal
- If leave is granted, it will be the first time the third party information exemption has been squarely considered by the Court of Appeal
• Case of two orders (MO-3385 and MO-3386) dated November 30, 2016 involving a workplace harassment investigation at the Municipality of St. Charles
MO-3385 and MO-3386

- St. Charles IPC orders relate to an appeal of a decision by the City not to release an investigation report and related records regarding a workplace harassment complaint.

- The orders consider s. 52(3) of MFIPPA:

  Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following: 

  3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
MO-3385 and MO-3386

- IPC set out a three-part test to determine whether s. 52(3)(3) applies. The municipality must establish that:
  1. The investigation report was collected, prepared, maintained or used by an institution or on its behalf;
  2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
  3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.
MO-3385 and MO-3386

- In MO-3385, the IPC found that the report was employment-related “because it is about the employee’s complaints and the subject of the complaints and resulting investigation report was the employee’s work environment”

- Even though the records may contain information about the conduct of municipal councillors, “it is part of the municipality’s responsibilities as an employer to investigate complaints of workplace harassment, which directly related to the employee relationship. The investigation report arises out of the municipality’s employment relationship with its employee”

- IPC dismissed the appeal; records at issue excluded from scope of MFIPPA
5. Finance and Taxation

- **Angus v. Port Hope (Municipality), 2016 ONSC 3931**
- **Poplar Point First Nation Development Corp. v. Thunder Bay (City), 2016 ONCA 934**
- **Sarnia (City) v. Municipal Property Assessment Corp., Region 26, 89 OMBR 152**
- **St. Catharines Seniors Apartments Phase Three Inc. v. Municipal Property Assessment Corp., 2015 ONSC 3896**
Angus v. Port Hope (Municipality)

- 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
Angus v. Port Hope (Municipality)

- 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
Angus v. Port Hope (Municipality)

• 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.
Angus v. Port Hope (Municipality)

• 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.
Angus v. Port Hope (Municipality)

• 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.
• Appeal by Poplar Point First Nation from the decision of the trial judge – trial judge held that if he had authority to grant relief from forfeiture, he would have done so in this case

• Issue was whether the court has jurisdiction to grant relief from a deemed forfeiture occurring under s. 380(6) of the Municipal Act, 2001 in the case of a municipal tax sale

• Under s. 380(6), the Appellant had one year from the date of payment of the surplus into court to bring an application for payment out of court; otherwise the surplus was deemed forfeited to the Public Guardian and Trustee or the municipality

• The Appellant applied to the Court 3 weeks after the deadline

• The municipality sought payment out of court of the surplus
The Court allowed the appeal on the basis that s. 98 of the *Courts of Justice Act* gives courts the authority to grant relief from forfeiture under s. 380(6).

The Court considered the “broad and general language” of s. 98, and held that determining whether s. 98 applied to the municipal tax sales scheme was a question of whether the language and statutory scheme of municipal tax sales excluded (expressly or by necessary implication) the Court’s power to grant relief from forfeiture in civil proceedings.
Poplar Point First Nation Development Corp. v. Thunder Bay (City)

- The Court held that the purpose of forfeiture under s. 380 is not a penalty for failure to pay taxes or release of security for an obligation owed the municipality, it is to ensure that money does not sit in court in perpetuity.
- “Forfeiture arises from failure to meet a time limit, not as the consequence of any breach of statutory right.”
- The statute does not provide that the unclaimed surplus belongs to the municipality. The municipality has no right to the funds absent a forfeiture, and then it receives a windfall.
Poplar Point First Nation Development Corp. v. Thunder Bay (City)

- Court held that to grant relief from forfeiture in this case would not undermine the purpose of the Act or interfere with the finality, certainty or integrity of the municipal tax scheme – the taxpayer was not challenging the sales process, only asserting a claim to the surplus
  - There was only a 3 week delay
  - Forfeited surplus would be a “windfall” for the municipality as surplus was substantially more than unpaid tax arrears – the municipality had already been made whole upon receipt of the cancellation price
• Subject property owned by the United Church of Canada, subject to long-term ground lease to developer

• Developer constructed an office building on the property, which it leased to the Ministry of the Environment and Climate Change

• Developer was entity paying property taxes

• Property was originally in the Commercial Tax Class, but MPAC decided to change it to the Residential Tax Classification in 2015

• The municipality appealed this change to the Assessment Review Board (“ARB”); the ARB determined that the property was properly classified as Commercial
MPAC argued that:

- The property was owned by the church and leased to a government agency which was not carrying on a commercial operation
- That s. 3(1)2.iii of O. Reg. 282/98 provides that such property is subject to the Residential Class
The municipality argued that:

- The land was occupied by a tenant and used for commercial activity
- The land lease between the church and the developer is the only tenant arrangement with the church – MOECC only had a lease with the developer
- The development, ownership, maintenance and control of the building were under the control of the developer
- The exemption under s. 3(1)2.iii of O. Reg. 282/98 only applied to “land owned by a religious organization other than land occupied by a tenant and used for commercial activity”
The ARB held that the relevant lease to be analyzed in this case was the ground lease between the church and the developer, under which the developer carried on a commercial business; the developer’s relationship with the MOECC was not relevant.

The ARB also held that there was no provision for the transferability of s. 3(1)2.iii of O. Reg. 282/98 to a third party, it only applies to benefit religious organizations.

The ARB noted that there was no justification for MPAC's argument that government services are not commercial activities.
St. Catharines Seniors Apartments Phase Three Inc.

- Applicant property owner owned, used and occupied charitable, non-profit, philanthropic, residential apartment building for seniors of low income
- MPAC claimed that owner provided affordable housing to seniors, rather than relieving poverty and did not regard owner as exempt from paying property taxes
St. Catharines Seniors Apartments Phase Three Inc.

- Owner brought application for declaration that property was exempt from municipal taxation pursuant to s. 3(1)(12)(iii) of the Assessment Act

3(1) All real property in Ontario is liable to assessment and taxation, subject to the following exemptions from taxation:

12. Land owned, used and occupied by,

(iii) any charitable, non-profit philanthropic corporation organized for the relief of the poor if the corporation is supported in part by public funds.
St. Catharines Seniors Apartments Phase Three Inc.

• Application granted
• Owner met all criteria in s. 3(1)(12)(iii) of the Act, including “relief of poor”
• Property provided accommodation for senior citizens with average age of 75 years, average annual income of $24,140.74 and median annual income of $22,042
• Such figures equated with any common sense notion of “poor” as envisioned by s. 3(1)(12)(iii) of the Act
St. Catharines Seniors Apartments Phase Three Inc.

- Primary actual purpose of owner was to provide affordable housing for poor senior citizens, which was consistent with corporate objectives.
- Exemption did not require that property be occupied by poorest of poor.
- Exemption recognized important public interest in providing affordable housing for poor senior citizens.
This presentation may contain general comments on legal issues of concern to organizations and individuals. These comments are not intended to be, nor should they be construed as, legal advice. Please consult a legal professional on the particular issues that concern you.

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