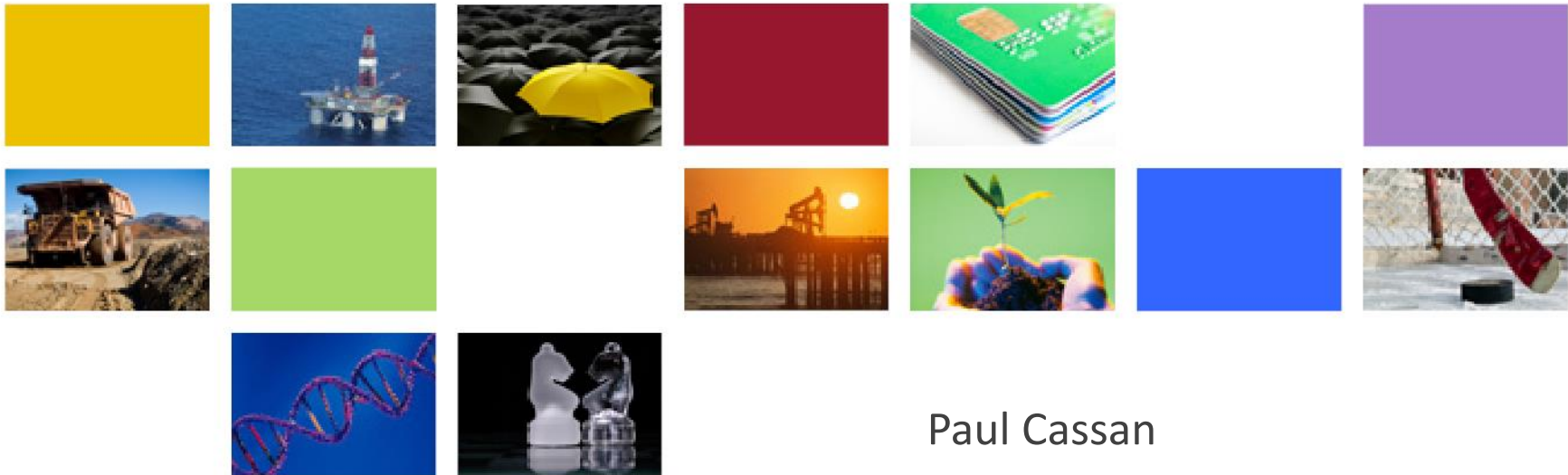


Seasonal²: Seasonal Zoning and Seasonal Roads



Paul Cassan
Wishart LLP

Raivo Uukkivi
Cassels Brock LLP



Seasonal² – Roads and Zoning

- Case study
 - Issues faced at trial
 - Ultimate judgment of the Court
- Challenges and pitfalls
 - seasonal zoning
 - seasonal roads

Usual legalese and qualification: despite the title, this is not a “legal opinion” and the presentation is for general guidance

Prince Lake

- The Tale of Warning
- History
 - 1950's
 - Water access cottages, accessed from landing
 - Road extended – private works
 - Road seasonally maintained by municipality
 - Public road
 - Insurance – none for enforcement

Cast of Characters



Cast of Characters – Continued



Prince Lake – Trial Strategy

- Extremely important:
 - Be prepared for the fight
 - Clerks play an important role in strategy
 - Confirmatory by-laws
 - Minutes of in camera meeting – reflect key decisions and key points of discussion
 - Ensure insurance survives

Prince Lake – con't

- Why the fight:
 - Zoning: Summer cottage only
47. *"Summer Cottage"* shall mean a detached single-family dwelling used as a secondary residence for recreational purposes such as vacationing, hunting, fishing and similar uses on a seasonal basis as opposed to permanent occupancy and shall be so used primarily only in the summer months, or, for clarity, shall not be used as a primary residence. Any such building may be of light frame construction without a basement, interior finish on its walls and ceiling and any source of heat, but not without an adequate foundation.

The provision

II. SUMMER COTTAGE (S.C.)

The following provisions shall apply in all Summer Cottage Zones (S.C.):

No person shall hereafter use any land, building or structure and no person shall erect any building or structure except in accordance with the following provisions.

1. PERMITTED USES:

(a) SUMMER COTTAGES:

One Summer Cottage per lot, and any accessory buildings such as "steam bath huts", "boat houses", "laundry huts", tool and wood sheds, and similar type accessory uses.

The issues and risks

- Building Code
 - section 35 – Building Code supersedes
- People zoning – No no
- Ambiguity
- Discrimination
- Challenge to by-laws
 - Strike sections, definitions, entire by-law

The (Fantastic) Result

- Summary Judgment against claim for services
- Admission of Authenticity of Documents
 - Filed volumes of 200 documents established factual background – essentially established our claim
 - Avoided two weeks of trial
- **Professional Responsibility Issue - IMPORTANT**
- Exclusion of tainted evidence and summons
- Zoning by-law upheld, enforceable and applicable to properties around Prince Lake
- Legal costs were recovered through application fees (Public settlement attached to Judgment)
- Settlement – declining use – created non-transferrable right to use property
 - Fair result - Policy, Environmental, Political, Financial

Can we do it – yes we can – seasonal zoning

Seasonal Zoning:

- Common restriction on the use of land
- Problem is created where there is an attempt to regulate the user as opposed to the use of the land
- “People Zoning” is specifically prohibited by *Planning Act s.35*

Planning Act s.35

- No distinction on the basis of relationship
- 35(2) The authority to pass a by-law under section 34, subsection 38 (1) or section 41 does not include the authority to pass a by-law that has the effect of distinguishing between persons who are related and persons who are unrelated in respect of the occupancy or use of a building or structure or a part of a building or structure, including the occupancy or use as a single housekeeping unit.
- By law is of no effect to the extent that it contravenes the restrictions described in subsection (2). 1994, c. 2, s. 43; 1996, c. 4, s. 21 (2).

Muller v Tiny (Township)

- Ontario HCJ (Superior Court level)
- Largely ineffectual case, ignored by courts, sometimes argued by lawyers
- Definition of "seasonal dwelling"
 - "a dwelling for vacation and recreational purposes by a person who maintains and regularly resides in a permanent dwelling at another location".
- might operate to prohibit persons (such as commercially unemployed married women or children, travellers and roomers) who do not maintain a permanent dwelling at another location

Horseshoe Valley v. Medonte (Ont.H.C.J.)

- Vagueness issue – “sanctioned” the “seasonal use” restriction
- Speaks to timing of a by-law challenge requiring a fact scenario to apply the by-law – in other words the bylaw may not be challenged in the abstract/hypothetical

Smith v. Tiny Township (Ont.H.C.J.)

- Land use restricted to a particular type or group of persons may be unreasonable or discriminatory and thus *ultra vires*

Polai v. Toronto (Supreme Court of Canada)

- Municipalities **may** discriminate in ENFORCEMENT of zoning bylaws.
- Toronto had a list of people that it would NOT enforce its rooming house by-law against.

Can we do it – YES we can - seasonal roads

Roads overview

- Many roads in existence that have not been opened by by-law
- Key date is January 1, 2003
 - No highway without by-law after that date
 - Highways in existence on December 31, 2002 continue to be highways

Dedication and Acceptance

Cook's Road Maintenance Ass. v. Crowhill Estates (Ont.C.A.)

- Owner intention to dedicate
 - Express or implied by action/inaction
- Intention carried out by road “thrown open” to public
- Road was accepted by public
 - By-law or express actions by municipality

Prince Lake Rd

- Informally and incrementally created
- Road on the ground did not follow the road allowance
- Road not to standard – very difficult geography
- Road municipally maintained
- Road is vulnerable to seasonal damage
- Seasonally maintained by municipality
- Winter maintenance (now) by residents pursuant to settlement agreement
- Insured at residents cost

Issues that Arise from Prince Lake Rd

- Road not to standard – still a public highway
- Maintenance by residents
- Maintenance by Municipality
- Cost to improve to standard
- Insurance
- New Municipal Act permits restriction of common law right of passage at Municipality's discretion
- Deemed expropriation s.65
- Provision of services – fire, garbage, school bus, winter ploughing

Questions

Paul Cassan

Wishart LLP

705-949-6700

pcassan@wishartlaw.com

Raivo Uukkivi

Cassels Brock LLP

416-860-6613

ruukkivi@casselsbrock.com