Municipal Case Law Update 2019

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Association of Municipal Clerks & Treasurers of Ontario

AIRD BERLIS

Selection of Cases

1. *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761
2. *Bracken v. Fort Erie (Town),* 2017 ONCA 668
3. *Clublink v. Town of Oakville*, 2018 ONSC 7395
4. *New Tecumseth (Town) v. Snieg*, 2018 ONSC 634
5. *Reid v. Corporation of the Township of Puslinch*, 2018 CanLII 61467 (ON NFPPB)
6. *2424155 Ontario Ltd. v. King (Township)*, 2017 ONSC 1406
7. *Kett v. The Corporation of the Township of Scugog* 2019 ONSC 942

Municipal Elections – Charter - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Hoy A.C.J.O., Sharpe and Trotter JJ.A.

Facts:

- The City of Toronto, like other municipalities in Ontario, had an election scheduled for October 22, 2018.
- The election was set for a 47-ward structure, which was determined in accordance with a statutory review of electoral boundaries.
- The election period commenced on May 1, 2018.
- On July 30, 2018, the Province introduced Bill 5 which changed the course of the elections by imposing a 25-ward structure on the City of Toronto. Bill 5 also eliminated the election of Regional chairs in Peel, York, Niagara and Muskoka. Bill 5 received Royal Assent on August 14, 2018, less than three months before the election.

Municipal Elections - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Facts Continued:

- Candidates had planned their participation in the election and were actively canvassing for votes in accordance with a 47-ward structure.
- The Superior Court held that Bill 5 infringed Section 2(b) of the Charter (freedom of expression) and could not be justified pursuant to Section 1 and therefore was of no force and effect with respect to the Toronto election. The Superior Court did not make a determination on the Regional Chair election provisions of Bill 5.
- The Attorney General appealed the decision to the Court of Appeal and sought a stay of the application judge's determination to allow the October 22, 2018 election to proceed with a 25-ward structure.
- This decision deals with the stay aspect of the appeal.

Municipal Elections - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Issue:

- Should the Court of Appeal issue a stay of the Superior Court decision that declared Bill 5 of no force and effect with respect to the City of Toronto's municipal election?

Ruling & Reasoning:

- The Court of Appeal issued a stay of the Superior Court's decision, allowing a 25-ward election to proceed on October 22, 2018 without requiring a further legislative instrument.
- The Court of Appeal applied the three-part test reasoning from *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 in deciding to grant a stay.

Municipal Elections - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Ruling & Reasoning Continued:

- Within the stay analysis, as to whether there is a likelihood of success in the matter, the Court of Appeal was critical of the Superior Court's decision.
- The Court of Appeal stated "… [the application judge] perceived [the Bill] as being unfair to candidates and voters. However, unfairness alone does not establish a Charter breach. The question for the courts is not whether Bill 5 is unfair but whether it is unconstitutional. On that crucial question, we have concluded that there is a strong likelihood that application judge erred in law and that the Attorney General's appeal to this court will succeed."
- "The inconvenience candidates will experience because of the change… does not prevent or impede them from saying what they want to say about the issues arising in the election."

Municipal Elections - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Ruling & Reasoning Continued:

- "Legislation that has the effect of diminishing the effectiveness of a message, but does not prevent the communication of that message, does not violate s. 2(b)"
- "The size of the City's electoral wards is a question of policy and choice to be determined by the legislative process subject to other provisions of the *Charter*, including s. 15(1)… [not] the right to freedom of expression."

Next Steps:

- The Court of Appeal hearing is in June 2019. The decision may be released this year.

Municipal Elections - *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761

Key Takeaways:

- The Court of Appeal's stay decision foreshadows a forthcoming decision on the dominant role of Provincial legislation with respect to municipalities. It is in keeping with previous leading municipal law decisions when considering the power of the Provincial government to amend or control municipal processes through legislation.
- The Court of Appeal decision may become the leading statement on provincial legislative power in relation to municipalities. It will be an important decision to watch, not only for Toronto but for provincial powers in relation to municipal institutions in general.

Trespass Notices – Charter - *Bracken v. Fort Erie (Town),* 2017 ONCA 668

Feldman, Lauwers and Miller JJ.A.

Facts:

- Mr. Bracken protested outside the Town Hall in Fort Erie in June 2014.
- He was “confrontational, loud, agitated and excitable”.
- He was a large individual, who could appear aggressive and intimidating.
- A municipal employee, fearing for her safety and the safety of others alerted the CAO.
- The CAO gave instructions to call the police, issue a trespass notice, and direct Mr. Bracken to leave.

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town)*, 2017 ONCA 668

Facts cont:

- The police attended and directed Mr. Bracken to leave. He refused.
- He was arrested, handcuffed, and held in the back of a police cruiser for 15 minutes. He was then issued a trespass notice banning him from all Town property for one year, as well as given a provincial offences ticket for failing to leave.
- He tore up the trespass notice but left the premises without further incident.

Issue:

- Did the application judge err and should the trespass notice be quashed as an infringement of Mr. Bracken's constitutionally protected freedom of expression which cannot be justified in a free and democratic society?

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town)*, 2017 ONCA 668

Legislative Provisions:

Constitution Act, 1982, Canadian Charter of Rights and Freedoms:

Fundamental 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;

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town)*, 2017 ONCA 668

Ruling & Reasoning:

- The Superior Court held that Mr. Bracken's acts of protest were not protected by s. 2(b) of the Charter because his protests "crossed the line of peaceful assembly and protest", he was engaged in acts of violence, and that his expression therefore "cannot be protected under section 2(b) of the Charter."
- The application judge did not need to address Section 1 of the Charter.
- The Court of Appeal overturned the Superior Court decision, quashed the trespass notice and held that the trespass notice was an unconstitutional breach of the individual's freedom of expression.

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town),* 2017 ONCA 668

Ruling & Reasoning:

- In so doing, it quoted the Supreme Court of Canada in *Irwin Toy*, [1989] 1 S.C.R. 927, at pp. 968-969:

  > Freedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

- The Court of Appeal focused on the history of jurisprudence granting broad protection to the freedom of expression and speech.

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town)*, 2017 ONCA 668

Ruling and Reasoning Continued:

- "There can be no question that the area in front of a Town Hall is a place where free expression not only traditionally occurred, but can be expected to occur in a free and democratic society. The literal town square is paradigmatically the place for expression of public dissent."
- The Court of Appeal did not find that Mr. Bracken's conduct fell within the violence of threats of violence limits to Section 2(b) protection.
- The Court of Appeal's reasoning was critical of the depth of facts provided by the Town's affiants and found the details insufficient to support the application judge's finding that Mr. Bracken's expression constituted violence or threats of violence.

Trespass Notices – Charter Rights- *Bracken v. Fort Erie (Town)*, 2017 ONCA 668

Ruling and Reasoning Continued:

- "Violence is not the mere absence of civility. The application judge extended the concept of violence to include actions and words associated with a traditional form of political protest, on the basis that some Town employees felt 'unsafe'… A person's subjective feelings... are not in themselves capable of ousting expression categorically from the protection of s. 2(b)."

Post-ruling facts:

- Mr. Bracken violently assaulted a student at Brock University during a further public protest and was sentenced to a prison term.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Morgan J.

Facts:

- The applicant owns the Glen Abbey golf course in the Town of Oakville.
- The Town of Oakville enacted five by-laws with the intent and effect of establishing Glen Abbey golf course as a cultural heritage property under the *Ontario Heritage Act*.
- The Town of Oakville also passed a resolution to approve a Cultural Heritage Landscape Conservation Plan for Glen Abbey.
- The applicants sought to quash the by-laws and enactment of the conservation plan.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Legislative Provisions:

- *Ontario Heritage Act*, RSO 1990

> **Designation by municipal by-law**
>
> **29** (1) The council of a municipality may, by by-law, designate a property within the municipality to be of cultural heritage value or interest if,
>
> (a) where criteria for determining whether property is of cultural heritage value or interest have been prescribed by regulation, the property meets the prescribed criteria; and
>
> (b) the designation is made in accordance with the process set out in this section.

- Subs. 273(1) of the *Municipal Act, 2001*: "Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality." Per subs. 273(2), "by-law" includes an order or resolution.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Ruling & Reasoning:

- The Court quashed the By-laws, including the Conservation Plan.
- The Court in its reasoning focused on arguments regarding jurisdiction, vagueness and bad faith. It found that the Town violated all three principles, where only one violation was required to quash the by-laws and resolution.
- The Court held “there is nothing in the OHA or otherwise in provincial legislation and policy that empowers a municipality to require a private business … - to keep running as a business”.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Ruling & Reasoning cont:

- The Court highlighted what constitutes “badges of bad faith” including: “questionable timing; decisions made under false pretenses; improper motives; lack of notice; the usual practices and procedures are set aside; the parties most affected are kept in the dark; or the law singles out one individual or property”: *Toronto Taxi Alliance Inc. v City of Toronto*, 2015 ONSC 685 (CanLII).
- Any one of these on its own may not be sufficient, but the cumulative effect must be taken into account collectively.
- By-law was purportedly applicable to all cultural heritage landscapes in the municipality, but its application was aimed at Glen Abbey alone.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Ruling & Reasoning cont:

- With respect to vagueness, the Court cited *Wainfleet Wind Energy Inc. v Township of Wainfleet*, 2013 ONSC 2194 (CanLII), at para 31.

  A by-law is invalid for vagueness and uncertainty if: (a) it is not sufficiently intelligible to provide an adequate basis for legal debate and reasoned analysis; (b) it fails to sufficiently delineate any area of risk; and, (c) it offers "no grasp" for courts to perform their interpretive function. This standard is exacting, and the onus is on the applicant to establish that the by-law should be declared invalid.

- The Court was very critical of the vagueness of the By-laws and related its reasoning to bad faith and the rule of law.

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Ruling & Reasoning cont:

- At paragraphs 83 and 84 of the decision: "These municipal instruments appear to suffer from an attempt to bury specifically targeted policies within general language" … "The 'doctrine of vagueness' is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion.": *Nova Scotia Pharmaceutical*, at 626-627.
- By-laws are vague where they use terminology that is not susceptible to an agreed-on definition or where the terminology is too general and cannot be readily applied to specific cases.
- "… An owner cannot determine from the face of this by-law what the particular legal requirements are, and a Town official cannot determine what it is that needs to be enforced."

Quashing By-laws - *Clublink v. Town of Oakville*, 2018 ONSC 7395

Ruling & Reasoning cont:

- "… Standards that are vague run the risk of transforming applicable standards to subjective value judgments."
- The impugned by-laws are vague, and therefore undermine the rule of law. They cannot survive the present challenge.

Next Stage:

- Appeal to the Ontario Court of Appeal heard and decision is pending.

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

Facts:

- The Town passed its Site Alteration and Fill By-Law (2012-136), which prohibited fill importation and placement, except where there was an exemption.
- "Fill" is defined broadly in the By-Law and includes among other things soil or earth, as planned for use on the respondent's property.
- The owner (respondent) purchased the property and took certain steps toward using the property as a fruit farm - an apple orchard.
- The owner applied to Town Council in 2014 seeking an exemption from the By-Law, but since no exemptions applied, the Town refused.

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

Facts Continued:

- The owner then applied to the Normal Farm Practices Protection Board (the "Board") to determine if his proposal to import and re-grade his farm was a "normal farm practice" under the *Farming and Food Production Protection Act, 1998* and therefore permissible despite the By-Law.

Statutory Framework

- Subs. 6(1) provides that: "No municipal by-law applies to restrict a normal farm practice carried on as part of an agricultural operation."
- "Agricultural operation" means an agricultural, aquacultural, horticultural or silvicultural operation that is carried on in the expectation of gain or reward
  - And includes, "activities that are a necessary but ancillary part of an agricultural operation"

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

Statutory Framework – Continued:

- "Normal farm practice" means a practice that,

  (a) is conducted in a manner consistent with proper and acceptable customs and standards as established and followed by similar agricultural operations under similar circumstances, or

  (b) makes use of innovative technology in a manner consistent with proper advanced farm management practices;

- Application may be brought by: (a) farmers who are directly affected by a municipal by-law or (b) persons who want to engage in a normal farm practice and have demonstrable plans for it.

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

NFPPB Decision:

- The Board held:
  - That the Applicant is a person entitled to apply to the Board.
  - That the Applicant's proposed practice of land improvement by way of the importation of fill is a part of or ancillary to the proposed agricultural operation.
  - That the proposed practice is a normal farm practice as it makes use of innovative technology provided that it is consistent with proper advanced farm management practices, such as the MOECC – Management of Excess Soil Guidelines
  - That the Town of New Tecumseth By-Law restricts that normal farm practice.

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

NFPPB Decision Continued:

- "The proposed practice is not apple farming. The proposed practice is bringing in fill to change the topography of the subject site to improve the land for use as an apple orchard."
- "The Respondent argues that this cannot be a normal farm practice because it is, in fact, a commercial fill operation. The Applicant answers that a commercial fill operation and normal farm practice are not mutually exclusive. We agree."
- "The public should realize that if the Board finds that a fill operation or proposal is not a farm practice in any particular case it may, depending on the circumstances, find it to be a normal farm practice in another."

New Tecumseth (Town) v. Snieg, 2018 ONSC 634

Issue on Appeal to the Divisional Court:

- Did the Board err in applying the definition of a “normal farm practice”?

Decision on Appeal

- The two parts of the definition are disjunctive: the practice need be either innovative or consistent with proper advanced farm management practices.
- The Board reasonably applied plain and ordinary dictionary definitions of “innovative” and “technology”.
- The Act does not require the plan or practice to be necessary.
- Appeal dismissed.

Reid v. Corporation of the Township of Puslinch, 2018 CanLII 61467 (ON NFPPB)

Facts:

- The Township passed a Site Alteration By-law (31/12), being a by-law for prohibiting or regulating the alteration of property.
- The Applicants alleged that the Township's by-law prevented their normal farm practice pursuant to Section 6 of the *Farming and Food Production Protection Act* by restricting the proposed importation of fill.
- Proposal was to remove existing shallow topsoil, import fill, and level out the area to serve as a training and grazing area for horses.
- Proposed fill would bring in 1500 loads in addition to 7500 loads already brought in.

Reid v. Corporation of the Township of Puslinch, 2018 CanLII 61467 (ON NFPPB)

Issue:

- Did the Township's by-law prevent a normal farm practice in this case?

NFPPB Decision:

- Proposed practice is the bringing of fill to create additional usable space for an agricultural operation.
- Even though the evidence was contradictory as to whether the practice was "necessary", the Act is remedial and should be interpreted broadly to find the practice was necessary but ancillary.
- "Where the practice is not already ongoing, then demonstrable plans are required."

Reid v. Corporation of the Township of Puslinch, 2018 CanLII 61467 (ON NFPPB)

Decision & Reasoning:

- "It should be noted that in site alteration by-law matters, where there is a high degree of regulation, demonstrable plans may always be required."
- "Demonstrable" means "clearly apparent or capable of being logically proved".
- The only evidence was the owner's verbal description of what he wanted to do and his estimate that 1500 loads of fill would be required. The owner failed to provide any reports, studies or grade plans or call any expert witnesses.
- Where the impact on the farm itself, neighbours and other residents could be at risk, the applicant has a duty to provide as much detail as possible to allow the Board to address these concerns.
- The owner did not have demonstrable plans for the project.

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Facts:

- In April 2016, a numbered company purchased a 40 hectare parcel of rural land.
- Following discussions with the municipality, the owner proceeded to add a ten-metre berm to the site ostensibly to provide an acoustical and visual barrier between Highway 400 and the property.
- It was estimated that the proposed berm would require approximately 500,000 m^3 of fill (50,000 truckloads) to be brought onto the property, dumped, and then shaped by earthmoving equipment.
- Owner entered into a contract with a business to import the fill, generating $1.9M in revenue to the owner.

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Facts:

- Since 1997, the Township has had a Fill Control By-law (No. 97-84) which controls the dumping of fill and alteration of grades of land.
- The By-law contains a general prohibition against dumping fill or altering the grade of any land in the Township except in accordance with the By-law.
- It sets out a process by which a landowner may apply for a permit to dump fill or alter the grade of land.
- The By-law contains several exceptions, including s. 3(7) which provides that the By-Law does not apply "[w]here fill is placed on lands zoned for residential use within the meaning of the Zoning By-law for the purposes of lawn dressing, landscaping, adding to flower beds or vegetable gardens ….”

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Facts continued:

- The owner took the position that the installation of the berm amounted to landscaping and thus it fell within the exceptions to the By-law set out in s. 3(7).
- The owner sought a road permit from the Region.
- But did not seek a site alteration permit from the Township, expecting to rely on the exemption.
- In January 2017, truckloads of fill started to arrive at the property – this came to the attention of the Township.
- The Township issued a formal Site Alteration Order pursuant to which the owner was ordered to stop all importation of fill and site alteration immediately.

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Facts continued:

- The owner sought a mandatory injunction against the municipality to stay the Order and permit site alteration to continue.

Issue:

- Should the Court issue an interlocutory mandatory injunction that would require the Township to lift the Site Alteration Order and allow the continued importation of fill, subject to the load restriction limits applicable to all heavy trucks travelling on rural roads?

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Decision & Reasoning:

- The Court refused the mandatory injunction to stay the Site Alteration Order.
- The test for an injunction from the Supreme Court decision in *RJR-MacDonald Inc. v. Canada (Atty. Gen.)* is:
    - i. the court must make a preliminary assessment of the merits of the case to ensure that there is a serious question to be tried;
    - ii. the court must determine whether the moving party would suffer irreparable harm if the motion were refused; and
    - iii. the court must assess which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. This third branch of the test is often referred to as the “balance of convenience."

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Decision & Reasoning Continued:

- The Applicant (owner) could not meet the first branch of the test.
- The Court considered the wording of the exemption in the by-law and held “[the owner] it is unable to demonstrate that it is clearly right and almost certain to be successful at the main hearing of the application”.
- The words “for the purposes of lawn dressing, landscaping, adding to flowerbeds or vegetable gardens” must be read in context, suggesting the exemption was meant for modest additions and not significant alteration of terrain.
- By-law applied to fill exceeding 50 cubic metres, providing indication of overall intent.

2424155 Ontario Ltd. v. King (Township), 2017 ONSC 1406

Decision & Reasoning Continued:

- The Applicant also did not meet the second branch, because while it would suffer financial hardship, the Court could not overlook "the fact that the applicant itself has created the situation of potential harm that brings it to court … Well before it purchased the property, 242 was aware that the Township considered that the construction of a berm of the magnitude proposed would require a permit…".
- The Court also focused on the fact that the subject lands were environmentally sensitive and that allowing the importation of fill may later require its removal.
- The Court held that the Township would potentially suffer far greater harm from the granting of an interlocutory mandatory injunction than the applicant may suffer from its refusal.

Recount - *Kett v. The Corporation of the Township of Scugog* 2019 ONSC 942

J Di Luca J.

Facts:

- Mr. Kett was unsuccessful in his bid to become a Regional Councillor in the 2018 municipal election in the Township of Scugog.
- He placed third out of four candidates.
- “He seeks a court ordered recount and raises a litany of questions, purported concerns and possible issues about the process that was used to conduct the election. In his view, there is a cloud of suspicion and doubt that hangs over the election results.”

Kett v. The Corporation of the Township of Scugog 2019 ONSC 942

Legislative Provisions:

- Section 58(3) of the *Municipal Elections Act*,

  (1) A person who is entitled to vote in an election and has reasonable grounds for believing the election results to be in doubt may apply to the Superior Court of Justice for an order that the clerk hold a recount.

  Order, notice

  (3) If satisfied that there are sufficient grounds for it, the court shall make an order requiring the clerk to hold a recount of the votes cast for all or specified candidates, on a by-law, or for all or specified answers to a question, and shall give the clerk a copy of the order as soon as possible.

Kett v. The Corporation of the Township of Scugog 2019 ONSC 942

Ruling and Reasoning:

- The Court held that the applicant did not meet the test contained in Section 58(3) of the *Municipal Elections Act*, where an individual must have "reasonable grounds" to doubt the election result and rejected Mr. Kett's application.
- "[The] complaints are based on speculation that something *could* or *might* have happened with the process."
- Applicant does not need to prove the election result was incorrect, but there must be a credible basis.

Key Takeaways:

- The Court focused on the detailed recordkeeping of the Township Clerk – highlighting again the importance of detailed records.

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