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CURRENT MUNICIPAL ISSUES WITH NUISANCES

Nasty Neighbours, Notoriously Noisy Nablas & Nefarious Ne'er – do – Wells

Still Causing Nuisances for Municipalities

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Overview:

The law of nuisance is a hodgepodge of common-law and statutory components. The shared purpose of these components is to seek to prevent the "over-flow" effects of one individual's legal entitlements from denying others a minimum standard of enjoyment of their own legal entitlements.

The first part of this paper will provide a brief summary of the law of nuisance, while the second part will deal with the relatively new provisions contained in the *Municipal Act, 2001*[2] and the corresponding provisions in the *City of Toronto Act, 2006*[3] (hereinafter "*COTA, 2006*"). These provisions were designed to provide new and more effective legal mechanisms for municipalities to address the conduct of activities which could cause annoyances to others.

Disputes over what is or is not a nuisance and how to address a particular situation may be quite difficult for a municipality to resolve. Often parties on both sides of a dispute over a potential nuisance are in long-term relationships of close proximity. For example, nuisance disputes often arise between two residential neighbours. A common element of nuisance disputes is that the offensive action is often produced not for the purpose of annoying one's neighbours, but rather as a side effect of an individual's "day-to-day" activities. Due to the nature of nuisances, the parties involved often have quite divergent opinions on whether the activity is offensive to others. Therefore, it is often the activities which may seem to be the more minor transgressions, which cause the greatest difficulties for municipalities to resolve.

2 *Municipal Act, 2001*, S.O. 2001, c. 25.
3 *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A.

Some common subject matters which give rise to a complaint of nuisance include individuals' personal activities interfering with their neighbours' enjoyment of their homes. These could include: loud noises, smoke, smells, dogs running at large, or the effect of the weather (snow, rain ice) on one's property from the neighbours' actions (or lack thereof).

Outside of residential uses, other land uses can lead to others making a complaint of nuisance. Such nuisances could include: vibration and noise resulting from construction or demolition, noxious emanations from garbage dumps or other industrial activities, odours of animal excrement from the raising of livestock, and light or visual pollution arising from illuminated commercial billboards. Other land uses may lead to an interference with the public's general interest in safety, health, or comfort and it often falls to municipalities to address these nuisances. Some examples include: bawdy-houses, body-rub parlours, "biker" club-houses, and marijuana grow-ops.

Traditionally, it has been difficult for municipalities to obtain speedy solutions to rectify situations where competing opinions exist between neighbours over the suitability of a land use. As municipalities did not have the legal authority to establish whether or not an activity was definitively a nuisance, such disputes required a judicial determination. This lack of authority may have contributed to laggard municipal reactions in resolving on-going disputes between individuals concerning the suitability of a particular land use.

However, the new provisions in the *Municipal Act, 2001* have sought to resolve this lack of municipal authority by providing municipalities with the ability to define what sort of activity would constitute a nuisance. This paper will outline the difficulties

and opportunities the new municipal powers and enforcement mechanisms have provided municipalities in their efforts to address nuisances.

Introduction to the Law of Nuisance:

The common-law conceptualizes the law of nuisance as a notion related to real property. There are two types of common-law nuisance which may form a concern in the municipal context:

1. private nuisance which protects people from interference with the use, enjoyment, and comfort of their land; and
2. public nuisance which primarily protects the public in the exercise of rights that are common to all citizens.[4]

Nuisance is most often the result of an interference caused by the exit of an element from one individual's land intruding into the land of another. Common examples of such intrusive elements which may cause a nuisance include: noise, vibration, fumes, or water. However, an unreasonable interference with land may occur without such an intrusion. Physical damage to property may be inflicted without an intrusive element, although it is rare.[5] Generally non-intrusive nuisances are limited to matters of interference with enjoyment and comfort of land.

While the usual principles of nuisance remain applicable to cases of non-intrusive nuisance, there is a general reluctance to intervene in matters where there is no invasion of another's property. This is especially true where the non-intrusive nuisance is one which is alleged to have caused interference with the enjoyment and comfort of land

4 The right of passage on public highways would be an example of such a "public right."
5 For an example of a non-intrusive nuisance causing damage to land, please see *Pugliese v. Canada (National Capital Commission)* (1977), 17 O.R. (2d) 129 (C.A.), varied [1979] 2 S.C.R. 104. In *Pugliese v. Canada*, it was the indirect removal of water through a newly constructed sewer system rather than any intrusion of elements onto the plaintiff's land which resulted in damage.

rather than physical damage to property. Generally non-intrusive inferences such as blocking another's view, preventing the entry of sunlight onto neighbouring land, or changing the circulation of air to the plaintiff's property will not rise to an unreasonable interference suitable for a finding of nuisance. Likewise the non-intrusive effects of a difference in aesthetic sensibility between neighbours will not usually support a finding of nuisance.

Private Nuisance:

The tort of nuisance is one of the common-law concepts designed to protect a person's interest in the integrity, and enjoyment of his or her own land. In this respect, private nuisance is similar to the three common-law concepts of trespass, negligence, and the rule in *Rylands v. Fletcher*.[6]

The tort of trespass is available in respect of any direct physical intrusion onto land that is in the possession of the plaintiff. Negligence is available in respect of all physical damage to land caused by a failure to take care. The rule in *Rylands v. Fletcher* is similar to, yet distinct from, the doctrine of nuisance, and merits a separate discussion.

The tort of nuisance addresses any indirect physical interference with the enjoyment or use of land by the owner as well as addressing any direct or indirect non-physical interference with the right of the owner to the use or enjoyment of his or her property. An indirect physical interference would arise where a tangible physical element interferes with another's property as an unintended consequence rather than the objective of the activity in question.[7] The tort of nuisance is frequently called upon to

6 *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, aff'g (sub nom. *Fletcher v. Rylands*) (1866), L.R. 1 Ex. 265 (Ex. Ch.).

7 For example, an indirect physical interference, and therefore a potential nuisance, could arise where a flood of water entered a neighbouring property as a result of being inadvertently redirected by a neighbour's blocked drainage system. Comparatively, a direct physical interference, and therefore a

provide an avenue for relief for interference with the use or enjoyment of land brought about by an intrusion of a physical element caused by an unintended "side-effect" of another's activities.

The tort of nuisance may also be used to deal with noise, odour, fumes, dust, smoke, or other similar intangible elements that emanate from the defendant's land and directly, or indirectly, interfere with the plaintiff's use, enjoyment, and comfort of land.

Private nuisance is primarily focussed on drawing an appropriate balance between conflicting claims of landowners. In particular, the law of nuisance seeks to balance the interest of one land owner to use land as he or she pleases and the other's interest in the use and enjoyment of his or her own land, unfettered by interference from the activities of others. Unlike trespass which is actionable without proof of damage, private nuisance is not actionable unless the plaintiff has suffered some damage. The essence of private nuisance is that an individual, by an act or omission, unreasonably and substantially interfered with another's reasonable use and enjoyment of his or her land or of some right over, or in connection with it.[8]

While it is not a defence to nuisance to establish that all possible care had been taken in carrying on the activity which causes the interference, a lack of negligence on the part of the defendant is a relevant consideration as to the reasonableness of the activity.[9] Liability in nuisance depends primarily on the extent of the interference caused to the plaintiff. Reasonableness is viewed not only from the standpoint of the convenience of the individual undertaking the activity, but must also take into account the interests and convenience of the surrounding occupiers. Nuisance is established where an

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potential trespass, would arise from a flood of water entering a property as a result of someone intentionally pumping the water from their own property onto the front lawn of his or her neighbours.

8 *Walker v. Pioneer Construction Co. (1967) Ltd.* (1975), 8 O.R. (2d) 35 (H.C.J.) (hereinafter "*Walker*").

9 *Jackson v. Drury Construction Company* (1974), 49 D.L.R. (3d) 183 (ON C.A.); *Gertsen v. Metropolitan Toronto (Municipality)* (1973), 41 D.L.R. (3d) 646 (ON H.C.) (hereinafter "*Gertsen*").

individual is found to be using his or her land unreasonably having regard to the interests of his or her neighbours.[10]

Minor or trivial nuisances arising out of a normal and reasonable use of land are not actionable. In order to constitute a nuisance, the damage complained of must not be merely a nominal injury, but a sensible and real damage such that if a reasonable person was subjected to the action, he or she would find it injurious.[11] Therefore, liability in nuisance arises when it is unreasonable for an individual to tolerate the interference caused by the actions of another. Interference is unreasonable when it is in excess of what other occupiers in the vicinity can be expected to bear, having regard to the prevailing standard of comfort of the time and place. This discretionary concept, while providing the advantage of a high degree of sensitivity and flexibility in light of the facts of various situations, leads to difficultly in predicting what exactly would constitute a nuisance in all cases. A distinction must be drawn between the standard of reasonableness imposed on interferences causing damage to the land of others and interferences which merely adversely affect another's enjoyment and comfort of land.

Interference Leading to Physical Damage to Land:

Strict liability is imposed for a nuisance which causes harm to the plaintiff's land or property. Nuisances which would result in the infliction of physical damage to another's property would be seen, in almost all cases, as an unreasonable interference with another's use and enjoyment of land. Some examples of such forms of nuisance could include:

a) damage to the paint of buildings on the land resulting from the discharge of pollutants;

10 *34909 Ontario Limited v. Huron Steel Products (Windsor) Limited et al*. (1992), 10 O.R. (3d) 95 (C.A.).
11 *Flaro v. Roffy*, [1993] O.J. (O.C.) (G.D.).

b) structural damage to premises caused by vibrations from the operation of construction equipment; and

c) water damage to structures resulting from a blocked drain on neighbouring properties to the defendant's land.

Simply establishing physical damage as a result of another's use would not automatically establish a private nuisance. A trivial or nominal form of physical damage may not be beyond the bounds of reasonable tolerance and may not rise to the level of actionable nuisance. Damages arising solely as a result of the abnormal sensitivity of the land use normally will not attract liability.[12]

An exception arises in the situation where an individual, armed with the foreknowledge of another's sensitive operation, undertakes an activity which interferes with the sensitive land use of another. In such a circumstance, it does not appear that it is necessary that an informed individual undertake a course of action with malice or spite,[13] as simple disregard for the considerations of others may suffice for a finding of nuisance.[14]

12 *Robinson v. Kilvert* (1889), 41 Ch.D. 88 (C.A.).

13 See *Hollywood Silver Fox Farm v. Emmett*, [1936] 2 K.B. 468. In *Hollywood Silver Fox Farm v. Emmett*, a real estate developer and a fox farmer had differing opinions as to the desirability of a sign indicating the location of a silver fox farm. The real estate developer thought that the commercial success of his residential real estate development would be adversely affected by a sign advertising the neighbouring fox farm. Naturally, the fox farmer was much more favourably disposed to the sign. The real estate developer asked the fox farmer to remove the sign. The fox farmer refused. The real estate developer attempted to persuade the fox farmer to change his position through the use of shotguns. The real estate developer knew that the loud noise caused by discharging shotguns near the fox farm would, due to the foxes' temperament, disrupt the foxes' breeding season. Due to the defendant's knowledge of the sensitivity of the land use, and the malicious nature of the defendant's conduct, the interference was unreasonable in the circumstances, although generally the noise arising from the discharge of shotguns in rural areas is not a nuisance.

14 See *MacGibbon v. Robinson*, [1953] 2 D.L.R. 689 (B.C.C.A.). Where the Court found that in the absence of an intent to cause his mink raising neighbour any harm, the failure to suspend the blasting of stumps for one month was a nuisance. The court found that the defendant could have, at no inconvenience to himself, suspended the blasting of stumps for the one month whelping season where the mink were breeding and avoided causing damage to the plaintiff. Therefore, based on this knowledge, the choice to blast caused an unreasonable interference to his neighbour's legal entitlements.

Normally, either a continuing interference or a continuing series of related interferences is required for a finding of nuisance. However, interferences leading to physical damage need not be the result of continual interference with the property, as an isolated incident causing physical damage may be sufficient to establish nuisance.[15] For example, liability in private nuisance could result from a single unfortunate incident of a blocked sewer drain and a heavy rainfall, resulting in the flooding of the basement of a neighbouring house.[16]

Interference with Enjoyment and Comfort of Land:

The surrounding circumstances are much more relevant to a finding of nuisance when dealing with an interference with an owner's enjoyment and comfort of land, than an interference causing physical damage to land. Liability for nuisance based on interference with enjoyment and comfort arises from the balancing of competing factors among which are the nature of the locality and the consequent reasonableness of the activity.

In matters of interferences affecting comfort and enjoyment of land, the courts balance these competing factors to determine what level of interference would be reasonable for a citizen to tolerate. The tort of private nuisance is not designed to provide protection for fastidious or delicate sensibilities.[17] The following is a brief discussion of the various factors which are balanced in the determination of whether an interference with enjoyment and comfort of land rises to the level of private nuisance.

15 *Aldrigdge v Van Potter*, [1952] 14 D.L.R. 93 (ON H.C.J.).
16 *Tock v. St. John's (City) Metropolitan Area Board*, [1989] 2 S.C.R. 1181 (hereinafter "*Tock*").
17 *Walter v. Selfe* (1851), 4 De G. & Sm. 315, 64 E.R. 849.

Character of the Neighbourhood:

Although by no means conclusive, a finding of nuisance is largely dependent on the kind of neighbourhood where the activity takes place. There is a distinction from what is acceptable in a residential area and the level of interference individuals must tolerate in an industrial area. For example, the noise and smells that are tolerable in industrial and commercial areas may be excessive for a residential neighbourhood. Also, the standard and nature of what must be tolerated in an urban area in comparison to a rural area may differ.[18]

Municipal zoning is a relevant factor in determining the character of a neighbourhood. While such compliance is a factor in determining both the character of the neighbourhood and the standard of tolerable interference for individuals to bear who reside therein, it is not conclusive of the issue. It is not a defence to private nuisance to merely establish compliance with zoning by-laws or other rules or regulations controlling land use.

Coming to the Nuisance

As municipalities are aware, the characters of neighbourhoods are not static; new land uses replace previous land uses. The change in uses in a neighbourhood may bring about a change in the interferences which individuals would reasonably tolerate. In *Sturges v. Bridgman*,[19] Sturges, a physician, expanded his medical practice by adding consulting rooms. This change moved Dr. Sturges' operations closer to the boundary of the neighbouring property. As a result, the noise and vibrations of the defendant's commercial operation, which previously were of no concern to Dr. Sturges, began to

18 For example, residents of Wellesley Street in Toronto would be expected to tolerate a much diminished level of the odour of animal waste then what is expected of the residents of the Township of Wellesley, while the noise level reasonably tolerated by a resident of Wellesley Street would likely to be quite more than the noise level reasonably tolerated by a resident of the Township of Wellesley.
19 *Sturges v. Bridgman* (1879), 11 Ch.D. 852.

interfere with the use of his property. The defendant, Bridgman, suggested that it was the actions of Dr. Sturges and not his own commercial activities which were to blame for the misfortune now suffered by Dr. Sturges. However, the court refused to give priority to Bridgman's activities simply because the activities constituted the initial land use. As a result of the principle established in this case, it is often said that, it is not a defence to state that the plaintiff "came to the nuisance." Therefore, while the pre-existing character of a neighbourhood may establish the generally acceptable level of interference, a reasonable degree of readjustment and accommodation is expected from previously existing land uses as a result of new additions to a neighbourhood.

Intensity and Duration of the Interference:

Private nuisance does not establish a liability for an occasional and transitory interference. Rather the interference must be of sufficient intensity and duration to be "intolerable." Some matters of intensity may lend themselves to the use of objective standards. For example, noise levels may be judged through decibel levels being measured. However merely evaluating interference on objective standards, outside the particulars of the situation of the individuals affected, is not conclusive on the issue of nuisance. To determine whether interference rises to the level of nuisance, consideration will need to be given not only to the objective measurements, where available, but also to the subjective evidence of the nuisance and its effect on the parties affected.[20]

A significant interference which is temporary and short-lived may be deemed a reasonable interference. To the contrary, when the interference is persistent and long-term, what would be a tolerable temporary interference may become intolerable.

20 *Sutherland v. Canada (Attorney General)*, [2001] B.C.J. No. 1450 (S.C.); (2002), 215 D.L.R. (4th) 1, (B.C.C.A.); leave to appeal dismissed, [2002] S.C.C.A. No. 385 (hereinafter "*Sutherland*").

Timing of Activity:

Interferences which are incompatible with the dominant schedule of a community are more likely to be an unreasonable interference with another's enjoyment of land. For example, a residential neighbourhood is more likely to find loud noises in the early hours of the morning, rather than loud noises at midday, to be an unreasonable interference.[21]

Nature and Utility of the Offending Activity:

It is not a defence to simply establish that the use of land is generally publicly beneficial. The alleged social benefit of a land use does not affect whether the manner in which the property is being used is reasonable or not. However the nature of an activity bears on the standards of tolerance of reasonable persons. There are many industrial, agricultural and commercial activities, which are generally thought to provide a considerable benefit to Canadian society, while causing a general level of interference with others. Based on the social importance of an activity, reasonable persons would generally be more tolerant of interference with their enjoyment of land. Conversely, a less favourable approach to interferences may be taken towards activities which are seen as having a less vital social benefit. For example, people would be less favourably inclined to view the interferences caused by loud rock concerts in residential areas as reasonable.[22]

Behaviour of Parties:

While the primary focus in a private nuisance action is the *impact* of the defendant's activities on the plaintiff's enjoyment of property, the nature of the defendant's conduct is also a relevant consideration. An individual who is acting with

21 *Walker*, *supra* note 8; *Haddon v. Lynch*, [1911] V.L.R. 5 (S.C.), aff'd [1911] V.L.R. 230 (F.C.); *Laing v. St. Thomas Dragway*, [2005] O.J. No.254 (S.C.J.).
22 *Ontario A.G. v. Orange Productions Ltd.*, [1971] 3 O.R. 585 (H.C.J.) (hereinafter "*Orange*").

malice towards another, is more likely to have his or her land use deemed a nuisance than one whose intent is to act for a purpose other than annoying his or her neighbour.[23]

Non-Intrusive Nuisances:

Non-intrusive interferences with the comfort and enjoyment of land rarely interfere with others to such a degree as to support a finding of nuisance. However an exception may be found where non-intrusive interferences arise from activity done for no other reason than the desire to cause distress and annoyance to another; e.g., positioning a trailer on one's property to block the sea view from a neighbouring property for the purpose of intentionally adversely affecting the value a disliked neighbour could obtain for selling his house.[24] The non-intrusive interference caused by an individual erecting a steel tower for no other purpose than maliciously disrupting night landings at a neighbouring airport was found to be sufficient to support a finding of nuisance.[25]

Also, in determining whether a non-intrusive interference is an unreasonable imposition on others, therefore constituting a nuisance, particular importance is placed on the social benefit of the offending action.[26] Non-intrusive interferences with peoples' sense of safety or their property values arising from a socially legitimate but generally unwelcome use, such as an isolation hospital (or a group home for mentally ill individuals) would be unlikely to constitute a nuisance.[27] However, non-intrusive

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23 *Christie v. Davey*, [1893] 1 Ch. 316. *Christie v. Davey* deals with noises caused by two neighbours living side by side in a semi-detached house. Christie caused, as a result of his profession as a music teacher, sound to travel through the common-wall between the two residences. Davey, for the purpose of annoying Christie and interfering with his vocation, also caused noises to travel through the common-wall between the two residents. Davey chose the comparatively less benign method of hammering and banging items on the common-wall as the source of his noise. As a result in the difference of motives between the two neighbours, it was Davey's actions which were deemed to be the nuisance.

24 *White v. Leblanc*, [2004] N.B.J. No. 384 (Q.B. (T.D.)). The Court recognized that specific views from property are generally not protected.

25 *Manitoba (A.G.) v. Campbell* (1983), 24 Man. R. (2d) 70 (Q.B.), varied [1985] 4 W.W.R. 334 (Man. C.A.).

26 *Ontario (A.G.) v. Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.), additional reasons (1995), 22 O.R. (3d) 785 (Gen. Div.).

27 See for example *Shuttleworth v. Vancouver General Hospital* (1927), 38 B.C.R. 300 (S.C.).

interference arising from a socially illegitimate use, such as the use of a residential house for prostitution (or marijuana cultivation), is much more likely be held to be a nuisance.[28]

The Rule in *Rylands and Fletcher*:

The common-law doctrine of the rule in *Rylands v. Fletcher*, while not a part of the common-law tort of nuisance as it exists in Canada, overlaps significantly with the tort of private nuisance. This overlap has led the House of Lords to recently "prune" the rule in *Rylands v. Fletcher* into a narrow sub-class of the tort of nuisance which imposes strict liability for "exceptional dangers" arising from extraordinary and unusual land uses.[29] However, the traditional rule in *Rylands v. Fletcher* remains a part of Canadian law.

The traditional rule in *Rylands v. Fletcher* imposes strict liability for damages arising from the escape of a thing likely to cause mischief from land being used in a non-natural fashion. Therefore to establish liability under the rule in *Rylands v. Fletcher*, the plaintiff must show the following three essential elements:

1. a "non-natural" use of land;
2. an escape of a mischievous thing from the land; and
3. damage.

"Non-Natural" Use of Land

For purposes of the rule in *Rylands v. Fletcher* a "non-natural" use is limited to an extraordinary or special use which carries an increased risk of danger to the surrounding community with no general benefit to the community at large. The increased danger to the community may be either land uses that are commonly regarded by the public as

28 *Thompson-Schwab v. Costaki*, (1956) 1 All E.R. 652 (C.A.); *Stein v. Gonzales* (1984), 14 D.L.R. (4th) 263 (B.C.S.C.) (hereinafter "*Stein*").
29 *Transco plc. v. Stockport Metropolitan Borough Council*, [2004] 1 All E.R. 589 (H.L.).

dangerous in themselves[30] or uses which are not normally dangerous but, due to particular or special circumstances of the time and place, carry an increased risk of danger.

Situations where the activity is not dangerous in itself but, rather, rely on the special circumstances, require consideration of the following: the degree of danger of the land use, the utility and normality of the land use, and the circumstances of time and place to determine whether the use is "non-natural." Such a review is by its very nature a fact based analysis and it is often difficult to make definitive predictions as to what will be a "non-natural" use. Some examples of such non-natural uses include: spraying herbicide from an aircraft,[31] disposing of garbage containing organic material in a landfill located in a small ravine adjacent to a residential area,[32] and operating a dirt race track without significant barriers adjacent to a park.[33]

Escape of a Mischievous Thing

To establish the escape of a mischievous thing from land controlled by the defendant, both the presence of a mischievous thing and its escape must be established. As the concept of non-natural use carries the connotation of special danger, there are few occasions where the establishment of a mischievous thing warrants independent consideration. Therefore this element of the rule in *Rylands v. Fletcher* is generally predisposed with the establishment of an escape from land,[34] although it is worth noting, that the concept of escape may be construed quite liberally.

30 Some examples of such uses which are considered "dangerous in themselves" include; manufacture or use of explosives; use of poisonous gas; storage or use of nuclear materials or dangerous biological agents; and the bulk storage or transportation of natural gas, propane, or gasoline.
31 *Mihalchuk v. Ratke* (1966), 57 D.L.R. (2d) 269 (Sask. Q.B.).
32 *Gertsen, supra* note 9.
33 *Aldridge v. Van Patter*, [1952] O.R. 595 (H.C.J.). (hereinafter "*Aldridge*").
34 *Read v. J. Lyons & Co*., [1947] A.C. 156 (H.L.)

Damages

For purposes of the Canadian rule in *Rylands v. Fletcher*, damages arising from the natural consequences of the escape of something likely to cause mischief may include both damage to neighbouring property and damages for personal injuries or inconvenience.[35] The Canadian articulation of the rule in *Rylands v. Fletcher* has extended liability for damages to all the direct consequences of an escape of a mischievous thing, whether such direct damages are foreseeable or not.[36]

Public Nuisance:

Public nuisances generally fall into one of two broad categories. The first category of public nuisances occurs when an individual's actions result in an interference with rights and interests which all persons share in common. This type of public nuisance is concerned with interference with public interests, such as the use of rights of way, or public property (for example, a provincial park), or the public's general interest in safety, health, or comfort.

The second category of public nuisance arises from an interference so indiscriminate in effect and widespread in range to lead to such a multiplicity of private nuisances that the interference becomes a public responsibility to be remedied by governmental rather than private action.[37] These two general categories may not exhaustively describe all possible public nuisances but do address the situations that arise most frequently.[38]

35 See for example, *Gertsen*, *supra* note 9 and *Aldridge*, *supra* note 33.
36 See *Cambridge Water Co. v. Eastern Counties Leather Plc.*, [1994] 2 A.C. 264 (H.L.). which adopts the contrary view that only foreseeable damage is compensatable under the rule in *Rylands v. Fletcher*.
37 *Attorney General v. P.Y.A. Quarries Ltd.*, [1957] 2 Q.B. 169 (C.A.) (hereinafter "*P.Y.A.*").
38 *Attorney General of Ontario v. Dieleman et al.* (1994), 20 O.R. (3d) 229, (O.C.)(G.D.).

It is possible that the same conduct can constitute both private and public nuisance.[39] However, due to the public nature of the interests protected by public nuisance, an individual may bring a private action in public nuisance only by showing that he or she has suffered damages different from that suffered by other members of the community. Except where an individual has shown special damages, it is the Attorney General who holds the exclusive jurisdiction to commence an action in public nuisance. The "core" of public nuisance is the desire to protect the use and enjoyment of public resources and facilities. Common nuisance is an offence defined under section 180(2) of the *Criminal Code*[40] but it is not necessary that a crime be found to have been committed, in order to be liable for public nuisance. Negligence is generally a more important factor in the tort of public nuisance than in questions of private nuisance.[41]

Interference with Public Interests:

In dealing with the category of public nuisances that concerns interferences with a right the public at large enjoys, there is little emphasis on the number of persons directly affected. The focus is on the fact that a right enjoyed by the public at large has been adversely affected. Some classic examples of public nuisances affecting common interests include:

a) obstructing a public highway or sidewalk with temporary structures, demonstrators, or a stalled motor vehicle;

b) denying access to, or enjoyment of, a public park or provincial forest;

c) blocking a navigable waterway;

d) polluting a river or stream; and

39 *Sutherland*, *supra* note 20.
40 *Criminal Code* R.S.C. 1985, c. C-46.
41 *Ryan v. Victoria(City)* (1991), 168 D.L.R. (41) 513(S.C.C.) (hereinafter "*Ryan v. Victoria*")

e) general social interferences.[42]

As in matters of private nuisance, trivial interferences with rights enjoyed by the public in common will not amount to a public nuisance. Like private nuisance, consideration must be given to all the surrounding circumstances. These include the aforementioned issues of: the utility of the defendant's conduct, the difficulty in lessening or avoiding the risk, the general practice of others, the character of the neighbourhood, as well as the nature and extent of the interference with the public's rights and interests.[43] For example, a temporary obstruction of a street to conduct a delivery, or closure of a highway to carry out repairs, or the partial obstruction of a sidewalk to undertake construction of a neighbouring building are unlikely to amount to a public nuisance.

Widespread Interference with Private Interests:

The major issue in the second category of public nuisances is determining when an interference with the use and enjoyment of private land, is sufficiently widespread to constitute a public interference. The threshold of when a matter becomes a public concern has been articulated as occurring when:

a) a combination of private nuisances affect a "class" or a "neighbourhood"; or

b) the interference with private property is so widespread in its range and so indiscriminate in its effect that it is inherently a public responsibility to remedy.

Neither one of these articulations provide a specific direction with respect to the number of private nuisances required to rise to the level of a public nuisance.[44] Examples

42 The classic example being the running of a bawdy house.
43 *Ryan v. Victoria, supra* note 41.
44 Although no firm guidelines on the subject exist, it appears that while an interference affecting the private interests of only 2 or 3 separate individuals is not of a sufficiently public nature to constitute a

of a public nuisance arising from a multiplicity of private interests include a quarry providing unwelcome dust, noise, and vibrations over a widespread area,[45] a training centre for ultra-light aircraft causing high noise levels throughout a rural area,[46] or a rock concert in a predominately residential area marked by large amounts of people, noise, dust, disorderly conduct and a deficiency in sanitary facilities.[47]

Defences to a Claim of Nuisance:

Although many nuisance actions turn on whether the interference constitutes an unreasonable interference with the interests of others, the creation of a nuisance may be defended under certain conditions. There are four main defences to an action in nuisance: statutory immunity, consent to the nuisance, prescription, and statutory authorization.

Statutory Immunity

There are situations where legislatures have immunized individuals or institutions from the adverse effects of activities which are deemed to be in the public interest. Specific legislative provisions have been passed to immunize individuals from claims in nuisance. For example, interferences from agricultural activities are routinely protected from claims in nuisance through legislation.[48]

A specific example may be found in section 449 of the *Municipal Act, 2001*[49] which prevents an action in nuisance from being commenced against a

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public rather than a private nuisance, an interference which affects the private interests of approximately 10 separate individuals would be sufficiently public in nature to constitute a public nuisance. See *Manitoba (Attorney General) v. Adventure Flight Centres Ltd.* (1983), 22 Man.R. (2d) 142 (Q.B.); *British Columbia (Attorney General) ex rel. Eaton v. Haney Speedways Ltd. et al.* (1963), 39 D.L.R. (2d) 48 (B.C. S.C.); *P.Y.A., supra* note 37 at p. 190 per Denning L.J.

45 *P.Y.A., supra* note 37.

46 *Manitoba (A.G.) v. Adventure Flight Centres Ltd., supra* note 44.

47 *Orange, supra* note 22.

48 See for example, s.2 of Ontario's *Farming and Food Production Act, 1998,* S.O. 1998, c. 1.

49 Also see, s. 393 of *COTA, 2006*.

municipality or local board, or the municipality's or local board's council members, officers, employees or agents, in relation to the escape of water or sewage from facilities for the collection, storage, transmission, treatment or disposal of sewage, or the collection, production, treatment, storage, supply or distribution of water. Parties seeking to rely on statutory regimes in immunizing their actions from liability in nuisance will need to establish that the action was conducted in compliance with any applicable legislative requirements.

Consent

It is rare that the defence of consent arises in cases of nuisance. The defence of consent requires an individual to approve or actively encourage the nuisance-generating activity of which he or she subsequently complains. Therefore, the defence of consent appears to be limited to the narrow situations where an individual subsequently complains of actions which he or she previously accepted.[50]

Prescription

The factual situation where a right to commit a nuisance may have been acquired by prescription is rarer still than that which gives rise to the defence of consent. The defence of prescription may be established through establishing an easement for the particular nuisance. It is important to note that any rights, whether obtained through adverse possession or otherwise, would need to provide for the nuisance itself and not merely the activity which could cause the nuisance.

50 See *Kacsmarik v. Demenlenaere*, (2002) 209 Nfld. & P.E.I.R. 284. (P.E.I. S.C.(T.D.)), where the plaintiff complained of the effect of herbicide spraying after discussing the matter with his neighbour and agreeing to close the windows of his greenhouse to protect his crops. The court found Mr. Kacsmarik had consented to the nuisance caused by his neighbour's spraying of herbicide, and any damages Mr. Kacsmarik suffered were due to his choice to open his greenhouse windows before the danger caused by the herbicide had passed.

Statutory Authority

Similar to the defence of statutory immunity, the defence of statutory authority is established to protect activities determined to be in the public interest. Statutory authority provides a rather narrow defence to nuisance. To establish the defence, an institution will need to establish the activity is authorized by statute and that the nuisance is the inevitable result or consequence of exercising that authority. For purposes of the defence of statutory authority, the activity may be either a consequence of discharging a positive statutory duty or exercising a permissible statutory power authorized in the manner or location specified by statute.

However where a nuisance results from such an activity, it falls on the defendant seeking to establish the defence of statutory authority to negate the possible existence of alternative methods which would not cause the nuisance while carrying out the authorized activity. To negate the other alternatives, the defendant must establish that the method chosen is the only practicably feasible alternative.[51] It is insufficient to merely establish that the alternative chosen is considerably less expensive than other options. Also, it is insufficient for the defendant to merely disprove negligence in the manner in which the action was undertaken.[52] The defence of statutory authority is limited to providing protection for nuisances which are shown to be an inevitable and unavoidable result of an authorized activity.[53]

Traditional Remedies:

Although there is a privilege for a victim of a nuisance to enter the wrongdoer's property to abate the nuisance, outside of situations where the risk to life or property necessitates immediate action, this manner of self-help is generally not appropriate.

51 *Tock*, *supra* note 16.
52 *Ryan v. Victoria*, *supra* note 41.
53 *Sutherland*, *supra* note 20.

Entering on another's property is most appropriate where the nuisance can be quickly and easily abated without undue disruption of the wrongdoer's activities.[54]

Notice of entry and a request for abatement are generally required prior to taking self-help action. The exception is when providing such notice is impractical in the circumstances due to the nature of the threat to life or property. Where self-help action is conducted exclusively outside the land from which the nuisance emanates, abatement of the nuisance may be taken without notice.[55] Regardless of the nature of the nuisance, any self-help remedies must not lead to any unnecessary damage to the land from which the nuisance emanated. Although self-help abatement of nuisances may be available, the remedy of choice in nuisance is an injunction, although a claim for damages for nuisance is also available.

Injunction

An injunction is the usual remedy sought in private nuisance actions. The continuing nature of most nuisances makes damages an inadequate remedy. Both prohibitory injunctions[56] and mandatory injunctions[57] may be ordered to address a nuisance. In cases of nuisance, once the plaintiff has established an unreasonable interference with his or her legal entitlements, effectively the burden shifts to the defendant to establish that another remedy (such as damages), rather than an injunction, would be appropriate.[58] In determining whether or not to issue an injunction, the courts

54 Examples would include situations such as unblocking a drain to prevent imminent flooding, or extinguishing an uncontrolled fire.
55 An example would include trimming branches or roots of trees that intrude across the property boundary from a neighbouring property.
56 I.e. requiring the cessation of the activity from which the nuisance results.
57 I.e. requiring positive steps to be taken to adjust the activity to abate the nuisance.
58 Often plaintiffs in nuisance cases will seek an interlocutory injunction in hopes of obtaining a prompt intervention concerning the nuisance. In these circumstances, as it has not been determined that the activities complained of constitute an unreasonable interference with another's legal entitlements, the plaintiff continues to bear the standard burden to obtain interlocutory relief.

give consideration to the following: the social utility of the defendant's activities, the conduct of the parties, the nature of the continuing loss, and the overall public interest.

In matters of a public nuisance, an injunction may be sought by an action commenced by the Attorney General. Less commonly, the Attorney General may empower a private citizen to seek an injunction in the name of the Attorney General. Outside of the available "public remedy" of the Attorney General seeking an injunction, private remedies for an individual seeking a remedy for a public nuisance are available only under rather limited circumstances.

It is not necessary to prove that every member of a class has been injuriously affected. Simply establishing that a representative cross-section of the class has been so affected should be sufficient to obtain an injunction to prevent a public nuisance. Where a public nuisance arises from a multitude of private nuisances, each of the individual occupiers could personally bring an action for an injunction to remedy the distinct private nuisance which each of them suffered. Where a public nuisance arises from an interference of a right enjoyed by the public at large, the right to seek relief (injunctive or otherwise) is enjoyed exclusively by the Attorney General, except where private individuals can establish that they have suffered special or particular damage distinct from the damages suffered by members of the general public.[59] Harm of a greater degree of the same kind of damage suffered by the public at large will not satisfy the requirement for distinct special or particular damage.[60]

Damages

Although injunctions are the favoured remedy in nuisance, damages are also available. In claims for damages arising from nuisance, liability is restricted to

59 *Culp et al. v. Township of East York et al.* (1956), 6 D.L.R. (2d) 417 (ON.H.C.), aff'd (1957) 9 D.L.R. (2d) 749 (ON. C.A.).
60 *Stein, supra* note 28.

consequences which are reasonably foreseeable. Generally damages are awarded for past losses suffered from a nuisance. Where a nuisance has terminated, damages for past losses may be a complete remedy. In circumstances where a nuisance is ongoing, damages for past losses combined with an injunction to prevent future losses may be an appropriate remedy. There is a general reluctance to order damages in lieu of an injunction for *future* losses as such an award would effectively constitute a compulsory purchase and sale of a privilege to continue the wrongful interference with the interests of another. Damages are awarded in lieu of an injunction only where an injunction would create intolerable hardship for the defendant, the harm suffered by the plaintiff is small and adequate damages are easily estimated.

Similar to matters of injunctive relief, standing to seek damages for a public nuisance are enjoyed exclusively by the Attorney General, other than in the same limited circumstances where a member of the public suffering special or particular damages distinct from the public as a whole. Members of the public who suffer the aforementioned distinct special harms may seek a remedy in damages for foreseeable losses not suffered by the public at large.[61]

Although it is rare, public nuisances can give rise to a situation where damages would be a suitable remedy. Where the public at large suffers harm due to the interference with a right the public enjoys in common, the government has standing to seek damages for the public nuisance.[62]

History and Overview of the New *Municipal Act, 2001* Provisions:

The *Municipal Act, 2001* was enacted on December 12, 2001, and primarily came into effect on January 1, 2003, although a few provisions came into effect upon the date

61 *Hickey v. Electricity Reduction Co. of Canada* (1970), 2 Nfld. & P.E.I.R. 246 (Nfld. S.C.).
62 *British Columbia v. Canadian Forest Products*, [2004] 2 S.C.R. 74.

the *Municipal Act, 2001* was enacted. The *Municipal Act, 2001* contained a series of new provisions dealing with conduct affecting matters concerning health, safety and nuisances within municipal borders.

The most notable change to municipal authority over nuisances was the introduction of section 128. This section provided municipalities with the general ability to prohibit or regulate any activity which, in the opinion of municipal council, is or could become a public nuisance. Section 128 was one of the few provisions of the *Municipal Act, 2001*, which came into force on the date of its enactment.

Initially the *Municipal Act, 2001* contained a mix of general powers, overlapping with other specific powers provided in the traditional "laundry-list" format. There existed an initial concern that the highly prescriptive tone and content of some of the "laundry-list" sections of the *Municipal Act, 2001*, would be interpreted as limiting the scope of the powers granted by section 128.[63]

Recently, courts have articulated that municipal powers to regulate nuisances should be interpreted in a broad and purposeful fashion. For example, in dealing with a municipal by-law of the City of Montréal, the Supreme Court of Canada stated that a broad view should be taken in interpreting municipal authority to regulate nuisances and noted that "the City has had the authority to regulate nuisances since before Confederation."[64] Similarly, this judicial deference to municipal authority to regulate nuisances was present in the recent case of *Croplife Canada v. Toronto (City)* (hereinafter "*Croplife*").[65] In *Croplife*, the Ontario Court of Appeal, in reliance upon the Supreme Court of Canada's decision in *114957 Canada Ltee (Spray-Tech Societe d'arrosage) v.*

63 For example section 129 provides for specific powers for municipal regulation of noise, odour, and dust which are matters which are commonly considered to fall under the rubric of nuisance.
64 *Montréal (Ville) v. 2952-1366 Québec inc.*, [2005] 3 S.C.R. 141 at para. 154.
65 *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (C.A.).

Hudson (Ville),[66] concluded that the proper interpretive approach was to provide a broad view to both the specific powers provided in the traditional "laundry-list" fashion as well as the general powers provided under the *Municipal Act, 2001*.

Outside of an increasingly favourable judicial approach to municipal authority, there have been further legislative reforms with regards to municipal authority. *COTA, 2006* has been enacted to act as separate municipal legislation for the City of Toronto. The introduction of *COTA, 2006* removed many of the pre-existing restrictions on the authority and powers which had been provided to the City of Toronto under previous municipal legislation. Also, the *Municipal Statute Law Amendment Act, 2006*, brought about significant amendments to the *Municipal Act, 2001*. These amendments removed many of the restrictions which were present in the initial version of the *Municipal Act, 2001*. As a result of these legislative reforms, many of the specific powers addressing subject matters in relation to health, safety, and nuisance within municipal boundaries, which were previously provided to Ontario's municipalities under traditional "laundry-list" provisions, have been provided to municipalities under new general powers.

Recent Developments Concerning Specific Municipal Powers:

The recent amendments to the *Municipal Act, 2001*, brought about by the *Municipal Statute Law Amendment Act, 2006* have removed many of the prescriptive restrictions which were previously placed on the specific powers provided to municipalities. However the recent amendments have not removed all of the restrictions previously attached to specific municipal powers. For example, Section 99 of the *Municipal Act, 2001*[67] provides particular authority for the regulation of advertising devices including signs. Municipal authority over advertising devices is currently

66 *114957 Canada Ltee (Spray-Tech Societe d'arrosage) v. Hudson (Ville),* [2001] S.C.C. 40.
67 See *COTA, 2006*, s.110.

articulated as a general power. The only remaining explicit restriction on the authority to regulate advertising devices is contained in subsection 99(1). Subsection 99(1) reads as follows:

> (1) A by-law of a municipality respecting advertising devices, including signs, does not apply to an advertising device that was lawfully erected or displayed on the day the by-law comes into force if the advertising device is not substantially altered, and the maintenance and repair of the advertising device or a change in the message or contents displayed is deemed not in itself to constitute a substantial alteration.

Subsection 99(1) provides a form of legal non-conforming status for signs which are legally erected and displayed prior to the day a new sign by-law comes into force, until such time as the advertising device undergoes a substantial alteration. This would include signs which were erected at such a time as there were no municipal regulations on advertising devices.[68] Subsection 99(1) is a continuation of section 210, paragraph 144(3), of the *Municipal Act*, *1980*.[69] There does not appear to be an obvious rationale for the continuation of this restriction on municipal authority over advertising devices. It should be noted that prior to the *Planning Statute Law Amendment Act*,[70] municipalities enjoyed the right to require pre-existing advertising devices to conform to subsequent regulations.

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68 *118143 Ontario Inc. v. Mississauga (City)*, [2004], O.J. No. 4143 (ON C.A.) aff'g [2003], O.J. No. 5311 (ON S.C.).

69 See section 210, paragraph 144(3), of *Municipal Act*, R.S.O. 1980, c. 302, which reads:
"No by-law passed under paragraph 141 of section 210 of the *Municipal Act*, as re-enacted by subsection 1(1) of this Act that prohibits or regulates signs or other advertising devices, applies to a sign or advertising device that is lawfully erected or displayed on the day the by-law comes into force, so long as the sign or advertising device is not in any way substantially altered, provided that the maintenance and repair of the sign or advertising device or a change in the message displayed shall be deemed not in itself to constitute an alteration."

70 *Planning Statute Law Amendment Act*, 1983, S.O. 1983, c. 5, s. 1.

The scope to be provided to this restriction on municipal authority over pre-existing advertising devices has received little judicial consideration. However to the extent that the scope of this protection for pre-existing advertising devices has been considered, judicial interpretation has been favourable for municipalities. For example, in *Urban Outdoor Trans Ad v. Scarborough (City)*[71] the Ontario Court of Appeal reviewed the interaction of the specific and restricted authority over advertising devices and the general authority of the municipality to charge a fee for all services provided by it.[72] The Court of Appeal determined that a municipality may use its general fee authority to pass a by-law introducing an annual fee for all holders of sign permits, including pre-existing lawfully erected advertising devices, in relation to the municipality's inspection and enforcement services.

Section 129 of *Municipal Act, 2001* provides a municipality with the ability to regulate with respect to: noise, vibration, odour, dust, and outdoor illumination. Section 129 introduced broader powers with respect to noise and vibration than contained in previous legislation. Additionally, section 129 extended a municipality's authority to regulate to include: dust, odour, and outdoor illumination. Initially section 129 contained several restrictions on a municipality's authority concerning outdoor illumination. The recent amendments to the *Municipal Act, 2001*, brought about by the *Municipal Statute Law Amendment Act, 2006* removed the previously imposed restrictions on a municipality in dealing with outdoor illumination.

Although section 129 deals with subject matter which may overlap with issues of nuisance, the section imposes no onus on a municipality to articulate a concern of nuisance, prior to being able to exercise its authority to regulate or prohibit specific

71 *Urban Outdoor Trans Ad v. Scarborough (City),* (2001), 52 O.R. (3d) 593 (C.A.).
72 See s. 220.1 of the *Municipal Act,* R.S.O. 1990, c. M.45. (hereinafter "*Municipal Act, 1990*") and s. 391 of the *Municipal Act, 2001*.

odours, dust, or illumination. Currently, section 129 allows a municipality to establish a permit system with respect to any of the abovementioned subject matters and, outside of such permit being obtained, prohibit such activities. The question remains whether a municipality may use the power provided in section 129 to regulate outdoor illumination to address the light pollution resulting from previously erected commercial billboards, or whether the protection provided under subsection 99 (1) would extend to prevent such additional requirements concerning illumination levels of commercial billboards.

As noted above, the Ontario Court of Appeal in *Croplife*[73] concluded that the proper interpretive approach was to take a broad view of both the general powers provided to municipalities as well as the specific powers provided to municipalities in the traditional "laundry-list" manner. In an ironic twist, the recent restructuring and amendment to the *Municipal Act, 2001*, brought about by the *Municipal Statute Law Amendment Act, 2006*, has resulted in the repeal of section 130 of *Municipal Act, 2001*. The specific power in section 130 was repealed and replaced with a general power to pass by-laws respecting the health, safety and well-being of persons under section 11 of the amended *Municipal Act, 2001*.

Both the introduction of the *Municipal Act, 2001* and its recent amendments have gone a long way to rectify many of the issues which municipalities have encountered in dealing with nuisances. For example, the initial version of the *Municipal Act, 2001* contained an expansion of municipal licensing powers. The initial expansion of authority was limited to matters of health and safety, nuisance control, or consumer protection. The recent amendments to the *Municipal Act, 2001* have further expanded municipal licensing powers. However the most notable changes to municipal authority are contained in sections 128 and 447.1 of the *Municipal Act, 2001* which provide

73 *Croplife, supra* note 65.

municipalities with both the ability to define public nuisances, and a specialized remedy to address matters of public nuisance.

S.128 – Specific Municipal Power Concerning Public Nuisances:

The *Municipal Act, 2001* contains section 128, which permits a municipality to prohibit and regulate matters with respect to public nuisances. Section 128 includes the power to regulate matters that in the opinion of council are, could become, or cause public nuisances. Section 128 states that the opinion of the municipal council as to whether a matter is or could be a public nuisance, if exercised in good faith, is not subject to review by any court. This privative clause contained in section 128 extends significant protection to the municipality's opinion of what is or could be a public nuisance. Section 128 reads, in part:

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

Section 128 appears to permit a municipality to regulate the manner or time that any activity is carried out to ensure the activity does not cause an unreasonable interference with a multiplicity of private interests or the interests held by the public at large.[74] Under previous municipal legislation, municipalities did not enjoy this discretion. As a consequence, municipalities were previously required to establish that specific activities which constituted the subject matter of the by-law were a public

74 For example, the selling of event tickets on a public right of way.

nuisance for the by-law to have effect. As noted above, the determination of whether an activity forms a public nuisance is often a difficult matter for a municipality to establish. Municipalities are especially likely to encounter difficulties where the determination of whether an activity forms a public nuisance is sought prior to the occurrence of the activity in question. Under section 128, municipalities are now able to have some scope to exercise discretion to form an opinion as to whether or not the particular manner of a land use constitutes a public nuisance.

For example, in *Uukkivi v. Lake of Bays* (hereinafter "*Uukkivi*")[75] the municipality passed a by-law establishing that a specific sauna and boat storage facility, encroaching upon a 66-foot wide shore road allowance owned by the municipality, was a public nuisance. The owner of the sauna, Mr. Uukkivi, noted that there were numerous other encroachments on the shore road allowances in the municipality. Furthermore, Mr. Uukkivi stated that a failure of the municipality to take action against the other structures, established that all encroachments on shore road allowances, including his own, did not constitute public nuisances. Mr. Uukkivi alleged that the municipality had singled him out for discriminatory treatment as the municipality had, to that date, only designated his structure as a nuisance. Mr. Uukkivi alleged that the specific nature of the municipality's designation, in itself, revealed that the opinion of the municipal council had not been reached in good faith.

The court rejected the proposition that all encroachments on municipal property are necessarily equal in effect. *Uukkivi* concluded that section 128 provided a municipality with the ability to regulate public nuisances on an individual basis. The court noted that there were specific reasons why the municipality had not taken actions

75 *Uukkivi v. Lake of Bays* (2004), 2 M.P.L.R. (4th) 240 (ON S.C.).

against other encroachments in the past.[76] More importantly, the court noted that it was the particulars of the structure in question, and its specific effects on the municipality, rather than the effect of encroachments on public property in a general sense, which formed the appropriate basis to determine whether Mr. Uukkivi's sauna constituted a public nuisance. The court found that the municipality's decision to declare the specific encroachment of Mr. Uukkivi as a public nuisance was an opinion formed on a reasonable basis. Specifically, the municipality based its belief on the basis that:

a) the sauna in question was of unknown structural integrity;

b) the sauna had been erected without building permits;

c) the sauna was erected in contravention of zoning by-laws; and

d) it was unknown whether the wastewater disposal from the sauna was environmentally appropriate.

The court noted that although only Mr. Uukkivi's structure was designated as a public nuisance the indvidual nature of the designation was insufficient proof of a lack of good faith on the part of the municipality in its exercise of its discretion.

The *Uukkivi* decision states that courts should adopt a deferential approach to reviewing municipalities' determinations of what is or is not a public nuisance.[77] It appears that a municipality would only be required to establish that the decision to characterize the specific activity as a public nuisance was made on a reasonable basis to satisfy the courts that the discretion under section 128 has been properly exercised. The court in *Uukkivi* suggested that a permissive approach to interpretation of the powers provided under section 128 was appropriate as section 128 extends the authority of

76 These reasons included the fact that enforcement occurred on a complaint basis, and that the municipality's archives were destroyed by fire, and as a result the municipality's records of concerning the various encroachments were incomplete.
77 *Uukkivi, supra* note 75 at paras. 44, 45.

municipalities over regulation of public nuisances beyond what was previously understood to "have constituted nuisance at common law".[78]

COTA, 2006 does not have a specific provision which mirrors the language of section 128. However it appears that the City of Toronto enjoys the same ability to designate matters as a public nuisance under the general powers provided under subsection 8(2) of *COTA, 2006*. Subsection 8(2) of *COTA, 2006* and subsection 10(2)[79] and section 11[80] of the *Municipal Act, 2001* provide Ontario's municipalities with wide-ranging general powers to address issues of municipal interests. *COTA, 2006* and *Municipal Act, 2001* provide municipalities with the ability to address their own well-being by establishing municipal powers to provide any service or thing that the municipality considers necessary or desirable for the public. The area of these general powers includes: highways, structures, parks, business licensing, culture, recreation, heritage, health, and safety.

As a point of interest, it appears from the discussion of the by-law in *Uukkivi* that the municipality enacted the by-law in question under the general authorities provided under the *Municipal Act, 2001*, and not by structuring the by-law as expressly relying on the authority provided in section 128. In evaluating the authority of the municipality to designate a structure as a public nuisance, the court in *Uukkivi* noted that the municipality had the power to pass by-laws which regulate or prohibit matters under the *Municipal Act, 2001*, and it was these general powers which are to be interpreted in accordance with section 128, rather than a specific authority under section 128 itself.

78 *Uukkivi, supra* note 75 at para. 44.
79 Section 10(2) of the current *Municipal Act, 2001* addresses single-tier municipalities.
80 Section 11 *Municipal Act, 2001* establishes the general powers for both lower-tier and upper-tier municipalities and the rules for the interaction of the two tiers of jurisdiction.

Uukkivi suggests that a municipality may rely upon the authority provided by section 128, without necessarily requiring that the by-law in question be enacted as a "section 128" by-law. However, a prudent course of action may be for a municipality to include an express statement of the municipality's opinion that the subject matter at which the by-law is directed is, could become, or cause a public nuisance. As well, this statement may mention that the municipality is acting under its authority to regulate public nuisances under section 128.

An example of the utility of such a form of by-law drafting may be seen in the decision in *R. v. Koverko.*[81] *R. v. Koverko* required the determination of whether a municipal by-law designating the use of public sidewalks and streets for the selling of event tickets as a public nuisance was in conflict with the provincial *Ticket Speculation Act.*[82] Prior to the enactment of the municipality's by-law, resellers of event tickets often chose to resell event tickets in excess of the prices printed on the ticket faces in violation of the *Ticket Speculation Act* while located on public highways within the municipality.

The court concluded the purpose of the *Ticket Speculation Act* was to prevent the resale of event tickets at prices that exceed the prices printed on the face of the tickets. The by-law expressly stated that its purpose was to disallow the use or occupation of public highways for the sale, or display for sale, of event tickets. The by-law stated that the municipal council had declared the use or occupation of the public highway for the purposes of the sale, or offer for sale, of event tickets to be a public nuisance under section 128 of the *Municipal Act, 2001*. As a result, there was no conflict between the provisions of the Municipality's by-law regulating a nuisance on public highways and the provincial legislation restricting the price at which event tickets could be resold. The

81 *R. v. Koverko* (2005), 15 M.P.L.R. (4th) (ON C.J.) 147. Also see: *City of Toronto v. Cacciatore*, [2007] O.J. No. 842. (ON C.J.).
82 *Ticket Speculation Act*, R.S.O. 1990, c. T.7.

court found that vendors could choose to sell event tickets at a price at or below its face value anywhere in the municipality except on public highways without violating either the *Ticket Speculation Act* or the by-law.

Various Enforcement Powers:

Although the recent amendments to the *Municipal Act, 2001* provide municipalities with additional powers in the regulation of nuisances, there still remain considerable concerns with the ability of municipalities to obtain an appropriate remedy in response to a nuisance. Under section 133[83] of the *Municipal Act, 2001*, a municipality may regulate with respect to the fortification of and protective elements applied to land. The authority provided under section 133 is restricted to municipalities which are responsible for the enforcement of the *Building Code Act.*[84] Section 133 is designed to prohibit excessive fortification of land or buildings. This municipal power appears to provide municipalities with the ability to limit the adverse effect on the enjoyment of the public's sense of safety, which may result from excessive fortification of property. Excessive fortification is not only an aesthetic choice which may affect others' enjoyment of property, it is also an indicator of generally unwelcome land uses such as "biker" clubhouses or other similar endeavours.

Section 133 initially contained a specific provision which provided municipalities with the power to make an order requiring work to be done to correct the contravention of a fortification by-law. However, due to the recent amendments to the *Municipal Act, 2001*, this provision was repealed and now the power for municipalities to issue an order to require individuals to perform work to correct contraventions of a municipal by-law is now contained in section 445 of the *Municipal Act, 2001*.[85]

83 See *COTA,2006*, s.102.
84 *Building Code Act, 1992*, S.O. 1992, c. 23.
85 See *COTA,2006*, s.385.

Section 445 provides municipalities with the general authority to make a work order requiring the person who contravened the by-law or who caused or permitted the contravention or the owner or occupier of the land on which the contravention occurred to correct the contravention. Subsection 445(2) requires that the work order issued by the municipality set out reasonable particulars of the contravention adequate to identify the contravention, the location of the land on which the contravention occurred, the work to be done, and the date by which the work must be done to correct the contravention. Although a work order under section 445 must include the date by which the work must be done, there is no explicit requirement for a specific amount of time to be provided to allow for the correction of the contravention. However subsection 133(6)[86] establishes that in situations of pre-existing fortifications, a municipality is required to provide for a minimum of three months to allow the individual to correct the infraction. Section 446 provides municipal authority, in cases of a default of a work order made under section 445, to perform the work at the person's expense and to recover the costs of the work in the same manner as taxes.[87]

In recent years municipalities have been faced with the growing problem of residential properties being converted to provide clandestine indoor cultivation facilities for marijuana. Marijuana grow operations located in residential buildings may lead to adverse health and safety effects for individuals in the vicinity of the building. Residential buildings are not designed for large scale marijuana cultivation and, due to the insufficiency of the wiring and ventilation systems, the use of residential buildings as indoor marijuana grow operations carries significant risks of mould, fire, or structural degradation of buildings in the immediate vicinity.

86 See *COTA,2006*, s.102(5).
87 See s. 386 of *COTA, 2006.*

To deal with this problem, section 447.2[88] has been added to the *Municipal Act, 2001*. This section provides municipalities with the authority to enter, inspect and correct issues brought about by marijuana grow operations. However section 447.2 is not a power which would allow a municipality to undertake a preventive form of regulation to combat the adverse effects arising from indoor marijuana cultivation. Rather section 447.2 is a mandatory obligation imposed on municipalities, upon receipt of written notification from a police force that a building located within the municipality contained a marijuana grow operation, to enter, inspect and take actions to make the building safe and otherwise protect the public from the harms caused by a marijuana grow operation. Therefore section 447.2, while permitting municipalities to undertake actions to correct a municipal concern dealing with public safety, does not provide municipalities with the power to undertake regulation of marijuana grow operations in a self-directed manner.

S. 440 - Power to Restrain:

Section 440[89] of the *Municipal Act, 2001* provides a municipality, or a taxpayer, with the ability to make an application to court to obtain an order to restrain an individual from repeating a contravention of municipal by-law. Section 440 reads as follows:

If any by-law of a municipality or by-law of a local board of a municipality under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the municipality or local board.

Many municipalities are faced with individuals who, for a variety of reasons, insist upon repeating actions which are in contravention of municipal by-laws. In such circumstances, financial penalties imposed through prosecutions may be reduced to a

88 See s.388.1 of *COTA, 2006*.
89 This power was initially provided under section 443 of the *Municipal Act, 2001,* but is now found at s. 380 of COTA, *2006* and s. *440* of the current *Municipal Act, 2001.*

mere "licence fee" for continuation of the offence. Orders under section 440 are generally appropriate where other remedies have been insufficient to obtain compliance with the by-law in question.[90] However as recently articulated in the case of *Neighbourhoods of Windfields Limited Partnership v. Death* (hereinafter *"Windfields")*[91] a prior prosecution for a violation of the municipal by-law is not a pre-condition to seeking an order under section 440. An order made under section 440 takes the form of a final order under the *Municipal Act, 2001*. As repeated, or continuing, violations of a municipal by-law are in themselves injurious to the public interest, an application for relief under section 440 is often made for matters where the public interest is involved.[92]

Windfields[93] dealt with an application made by a limited partnership which developed a residential neighbourhood, and the City of Oshawa concerning violations of a zoning by-law seeking relief under section 440 of the *Municipal Act, 2001*. Individuals had purchased homes in the residential Windfields neighbourhood in the City of Oshawa. As the Windfields neighbourhood was near the University of Ontario Institute of Technology, several homeowners had chosen to use the properties purchased, not as traditional single family homes, but as a form of rental property commonly known as "student housing." Other homeowners in the neighbourhood purchased their homes for a traditional single family residential use. Due to the difference in the nature of land uses, the interaction between the rental tenants and the family tenants left many of the neighbourhood's residents displeased with the activities of their neighbours. The zoning by-law of the City of Oshawa contained restrictions on land use which prevented the lands in the Windfields neighbourhood being used for the provision of certain forms of short-term rental accommodation. It was determined that both the municipality and the

90 *Thunder Bay (City) v. Rebernik* (2006), 24 M.P.L.R. (4th) 249 (ON S.C.).
91 *Neighbourhoods of Windfields Limited Partnership v. Death* (2008), 48 M.P.L.R. (4th) 183 (ON S.C.) at para. 177. (hereinafter "*Windfields*").
92 *City of Toronto v. Polai*, [1970] 1 O.R. 483 (C.A.).
93 *Windfields, supra* note 91.

limited partnership which developed the neighbourhood had standing to apply for injunctive relief under section 440.

The court in *Windfields* found that irreparable harm must be established to obtain a final order under section 440 to restrain an individual from a specific activity. However the court in *Windfields* also concluded that a public authority will face a lower threshold to establish the irreparable harm required to obtain an order under section 440 than a party seeking to obtain an injunction to restrain activities on the basis of a private concern. The *Windfields* decision contains a review of the various decisions on the issue of irreparable harm. The court in *Windfields* concluded, in reliance upon *RJR MacDonald Inc.* v. *Canada (Attorney General),*[94] that irreparable harm sufficient to obtain injunctive relief to restrain a private party under section 440 will be made out where a municipality establishes that the by-law in question was passed for the purpose of the public interest under the legislative authority provided to the municipality. Furthermore, the *Windfields* decision concluded that the objective of seeking to prevent the on-going or fragrant breach of municipal by-laws is in the public interest, and that an order under section 440 should be refused only in exceptional circumstances. An order under section 440 may be obtained in addition to other remedies available to the municipality, and therefore it is not a relevant consideration in an application for an order under section 440 that alternative remedies may exist.

Closure Order - S. 447.1:

In addition to the general enforcement power provided under section 440, section 447.1 of the *Municipal Act, 2001* provides municipalities with the specific ability to make an application for an order to address situations concerning public nuisances. Section

94 *RJR MacDonald Inc*. v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (SCC).

447.1[95]of *Municipal Act, 2001* authorizes a municipality to make an application to the Superior Court of Justice for an order to close, all or part of premises from which a significant public nuisance emanates, to any use for a period not to exceed two years. Section 447.1 permits, in effect, a municipality to seek a mandatory injunction requiring that all uses of premises cease for a period up to two years, if any use of a property constitutes a nuisance. It should be noted that an order under section 447.1 would require all uses cease for the specified period, and that individuals be barred entry to the premises from which the nuisance emanated, whether or not every use of the property would constitute a nuisance.

As the possible relief available under section 447.1 constitutes a rather extraordinary interference with a private individual's property rights, the *Municipal Act, 2001* contains significant conditions for a municipality to satisfy to obtain such an order. Section 447.1 requires a municipality to notify the local police and the Attorney General prior to making an application for a closure order. Subsection 447.1(2) prevents a municipality from commencing an application for a closure order without the prior consent of the Chief of the municipal police force.[96] Consent may only be denied in circumstances where the Chief is of the opinion that the application may have an impact on the operations of the police. The court in *Newmarket (Town) v. Halton Recycling Ltd.*(hereinafter "*Halton Recycling*")[97] articulated its opinion that such impacts would include situations where the application would interfere with a police investigation or an order of closure would require the assistance of the police.

95 See *COTA,2006*, s.388

96 Where applicable, this requirement for prior notice may be satisfied by the detachment commander of the Ontario Provincial Police detachment that is responsible for policing the area which includes the premises for which the order is sought.

97 *Newmarket (Town) v. Halton Recycling Ltd*. (2006), 274 D.L.R. (4th) 447 (ON S.C.).

Subsection 447.1(3) requires that a municipality must give the Attorney General 15 days notice prior to making an application for a closure order. The Attorney General may at any time within this 15 day period communicate an opposition to, or support for, the application. If an opposition to the application is communicated within the 15 days comment period, a municipality may not proceed with the application. However if the municipality receives no comments in relation to, or receives comments in support of, the application from the Attorney General, the municipality may proceed with the application. Regardless of whether the Attorney General provides comments, the Attorney General may at any time take over or terminate the application or attend to be heard on the application. It appears that these provisions are to ensure that municipalities do not interfere with the role of the Attorney General to enjoin nuisances in the public interest. To ensure that municipalities do not infringe upon this right, subsection 447.1(15) expressly states that nothing in section 447.1 shall affect the Attorney General's right to bring an injunction in the public interest.

To obtain a closure order under section 447.1, a municipality will need to satisfy the court on the balance of probabilities of all of the following issues:

a) the activities or circumstances on or in the premises constituted a public nuisance or caused or contributed to activities or circumstances which constituted a public nuisance in the vicinity of the premises;

b) the public nuisance had a detrimental impact on the use and enjoyment of property in the vicinity of the premises;

c) that the owner or occupants of the premises knew or ought to have known that the activities or circumstances constituting the public nuisance were taking place or existed; and

d) the owner or occupants of the premises did not take adequate steps to eliminate the public nuisance.

A municipality must have sufficient evidence to satisfy all of the abovementioned conditions to obtain a closure order under section 447.1. Collection of such evidence may be difficult, as a municipality must establish not only the existence of a public nuisance having a significant detrimental effect on the properties in the vicinity, but also that the owners or occupants knew of the nuisance and did not take adequate steps to eliminate it. This would require that evidence be gathered from municipal employees and local residents to establish the particulars of the detrimental impact on the use and enjoyment of the property caused by the public nuisance. A municipality will also be required to establish sufficient evidence to demonstrate that, on the balance of probabilities, the owners or occupants of the premises or part of the premises knew, or ought to have known, that the activities or circumstances constituting the public nuisance were taking place or existed and failed to take adequate steps to eliminate the public nuisance. To date, section 447.1 has attracted limited judicial consideration and *Halton Recycling*[98] is the only example of a case involving judicial review of evidence to satisfy the abovementioned conditions.

Halton Recycling dealt with a situation where the storage and processing of organic wastes at a facility in the Town of Newmarket resulted in the production of odours which many people found extremely unpleasant. Over a period of two years, the municipality recorded approximately 1100 separate complaints concerning the odours emitted from the facility. The court had before it a large volume of diverse materials, including Ministry of Environment orders requiring action to be taken with respect to the

98 *Halton Recycling*, *supra* note 97.

odours, and affidavits from municipal employees, RCMP officers, and local residents concerning the nature and effect of the odours.[99]

S. 447.1 - Requirement for Public Nuisance:

The court in *Halton Recycling* determined that to establish a public nuisance in the circumstances of that case, the municipality would have to satisfy the factors articulated in the Supreme Court of Canada's decision in *Ryan v. Victoria.*[100] Therefore, *Halton Recycling* contains a review of the sufficiency of the municipality's evidence establishing whether the odour amounted to an unreasonable interference with the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. The court determined that the municipality, through its several affidavits and mapping of complaints, established that the organic waste processing facility created a 1,200 - 1,800 metre zone surrounding the facility which suffered from "offensive, putrid and noxious" odours. The court concluded that the municipality established that the effect of the 1,200 - 1,800 metre zone of impact arising from the offensive odours affected the enjoyment of mixed-use, office, commercial, industrial, and residential land uses and was of a sufficiently widespread and indiscriminate nature to constitute a matter of public nuisance.

Although the court concluded that the emissions resulted in an interference with the enjoyment of property to a significant segment of persons who lived and worked within the sphere of the organic waste processing facility, the municipality was required to satisfy that in these circumstances the interference was unreasonable. Therefore, to satisfy the test under section 447.1, the municipality was required to establish that, not only did the odours constitute an interference with the public's rights, but also in these

99 *Halton Recycling*, *supra* note 97, para. 3.
100 See *Ryan v. Victoria*, *supra* note 41; and *Halton Recycling*, *supra* note 97, paras. 61,62.

circumstances the interference caused by the odour was unreasonable. To this end, the municipality relied upon consultant reports, Ministry of Environment orders, conditions of Ministry of Environment certificates of approval, and zoning classifications to establish that a review of the factors articulated in *Ryan v. Victoria* established the odours arising from the organic waste processing facility as a public nuisance.

S. 447.1 - Detrimental Impact:

`Not only must a municipality establish a public nuisance to obtain a closure order under section 447.1, but the municipality must also establish that the public nuisance has a "detrimental impact" on others. Subsection 447.1(1)(b) articulates "detrimental impact" for purposes of section 447.1 as including, but not being limited to, such matters as: trespass to property, interference with the use of highways and other public places, an increase in garbage, noise or traffic, the creation of unusual traffic patterns, activities that have a significant impact on property values, an increase in harassment or intimidation, or the presence of graffiti.

The court in *Halton Recycling*[101] was called upon to determine the scope of subsection 447.1(1)(b). In its analysis of the scope and purpose of the listed detrimental impacts in subsection 447.1(1)(b), the court adopted the opinion of respected commentators[102] that the purpose of the enumerated list of detrimental impacts was to ensure that the legislation was in compliance with the provincial constitutional authority to regulate "property and civil rights" and did not result in an infringement of federal powers with respect to regulation of morality and criminal law. Furthermore, the court found the language of subsection 447.1(1)(b) enlarged the meaning of the general terms

101 *Halton Recycling*, *supra* note 97.
102 See George Rust-D'Eye & Ophir Bar-Moshe, *The Ontario Municipal Act: A User's Manual – 2006* (Toronto: Carswell, 2006) at p. 572.

"public nuisance" and "impacts" and did not limit the application of the section to the specific listed examples.

The examples of detrimental impacts listed in section 447.1(1)(b) address a wider scope of interferences than have traditionally been articulated as forming an unreasonable interference suitable for a finding of public nuisance at common-law. Although the establishment of a "detrimental impact" is to a large degree similar to the establishment of an unreasonable interference, it is a separate consideration for purposes of section 447.1. As a result of the extensive affidavit evidence led by the municipality concerning the extent and nature of the odours, the court in *Halton Recycling* determined that the interference caused by the noxious odours being emitted from the organic waste processing facility satisfied the requirement for a detrimental impact for purposes of section 447.1.

S. 447.1 - Knowledge of Owners & Owner's Failure to Remedy:

Municipalities are required to prove that the owner of the premises knew, or ought to have known, that the activities constituting the public nuisance were taking place and the owner did not take adequate steps to eliminate the public nuisance. Therefore, it will be often appropriate for a municipality to provide the owner or occupant of the premises with specific details of the nuisance and the steps which would adequately address the nuisance. In any application under section 447.1, the municipality will be required to establish the fact that a reasonable owner or occupant in the circumstances would have been aware of the nuisance.

In addition, to obtain an order under section 447.1, a municipality would be required to establish, on the balance of probabilities, that the owner or occupant has not taken adequate steps to eliminate the nuisance. Therefore, a municipality must be able to

establish that any steps taken by the owners were inadequate with respect to the nuisance. In *Halton Recycling*, the municipality was able to establish the inadequacies in the steps taken by the organic waste processing facility by reference to the failure of the facility to comply with provincial regulatory requirements.

Enforcement and Suspension of Closure Orders:

Although a municipality may have established all of the statutory criteria required to obtain a closure order under section 447.1 of the *Municipal Act, 2001*, the court may still exercise its discretion to refuse to grant injunctive relief, or stay enforcement of the closure order on such terms as it deems appropriate.[103]

If a closure order is made, subsection 447.1(9) requires the police to bar all entrances to the premises until the order has been suspended or discharged, and subsection 447.1(14) permits a municipality to register the closure order on title to the premises. Although a closure order may apply to the premises for up to two years, any person who has an interest in the premises may bring an application for the suspension or discharge of the closing order. Subsection 447.1(7) permits a court to suspend a closure order on such terms and conditions as may be appropriate where the court is satisfied on the balance of probabilities that a particular use of the premises will not result in a public nuisance.

Subsection 447.1(8) permits the court to terminate a closure order, if it can be established on the balance of probabilities, that the circumstances have changed to a sufficient extent to prevent the premises from being used in a manner which will result in activities and circumstances constituting a public nuisance. Therefore, section 447.1

103 *Halton Recycling*, *supra* note 97, paras. 110 - 118.

provides courts with discretion to vary or expunge closure orders if the court is satisfied that the underlying problems have been addressed.

Possible Developments of Municipal Authority over Nuisances:

The rule in *Rylands v. Fletcher* is often an imprecise manner in which to address the issues that may arise from the keeping of mischievous things within municipal boundaries. Due to the overlap between the scope of the law of nuisance and the rule in *Rylands v. Fletcher*, it may be worthwhile for a municipality to supplement its zoning regulation of land uses that involve the keeping of mischievous things,[104] with the authority to regulate and prohibit potential nuisances provided under section 128.

The current municipal authorities to regulate public nuisances are limited to regulating or prohibiting activities which could cause a nuisance to others, but do not provide municipalities with the tools to prevent individuals from imposing additional obligations on pre-existing land uses by intentionally "coming to the nuisance."[105] A municipality may contain many uses that, while desirable to the municipality as a whole, may result in a nuisance to others if individuals choose to bring themselves into the sphere of interference which arise from these uses.[106] Municipalities may regulate potential nuisances to strike the appropriate balance between the competing interests of neighbouring properties. However municipalities are currently unable to regulate the neighbouring land uses from developing in such a fashion to as to affect the balance

104 For example, perhaps the ability to regulate nuisances could be applied by a municipality to assist in the regulation of desirable, yet dangerous, industrial or commercial activities such as: bio-chemical research laboratories.

105 See page 9 of this paper for a discussion concerning "coming to the nuisance."

106 For example, see *Sammut v. Islington Golf Club, Ltd.*, [2005] O.J. No. 2674 (ON S.C.), which dealt with a situation where a couple intentionally built their home as close as possible to the third fairway of a golf club's 18-hole golf course. The club took steps, such as planting of some trees and the building of a partial fence along a portion of the club's property line, to attempt to abate the problem of errant golf balls from interfering with private residences. However, the efforts were insufficient to stop the golf balls from entering onto the Sammuts' property and pummelling the Sammuts' home. The court determined that the interference with property rights constituted a nuisance and that the Sammuts did not consent to the nuisance by intentionally building their home as close to the golf course as possible. As a result, the golf course was required to undertake efforts to mitigate their use of land to satisfy the Sammuts' interests.

obtained through municipal regulation of the potential nuisance. Therefore, it would assist municipalities' efforts to adequately balance competing land uses if municipalities had not only the authority to address activities that may cause nuisances, but also were also able to restrict the ability of others to "come to the nuisance."

Although municipalities have extensive general powers to restrain prohibited activities under section 440, municipalities would likely benefit from further amendments to section 447.1 to obtain a conditional closure of premises from which a nuisance emanates. These amendments to section 447.1 could expressly permit a municipality to seek a regulatory or conditional order to address a public nuisance rather than being restricted to requesting an order closing the premises from which a nuisance emanated. Such a conditional closure order may be more suitable to addressing municipal interests in the regulation of nuisances. A closure order itself may have significant impacts on lawful occupiers of the premises, who are not contributing to the public nuisance, or neighbouring properties in the vicinity of the closed premises. An application for suspension of a closure order permits the court to impose conditions on the use of premises to prevent a specific nuisance from arising. Currently section 447.1 requires municipalities to seek the closure of premises, and permits a second application by the affected parties to suspend portions of the closure order upon conditions sufficient to satisfy the court that the nuisance will not reoccur. Therefore, it would appear preferable to provide municipalities with the clear authority to seek such a conditional closure order in the first instance.

Conclusion:

While these changes have provided municipalities with wide-ranging authorities to regulate and prohibit matters on the basis of nuisance, the authority for municipalities to effectively enforce matters of nuisance are still marked by restrictions on municipal

autonomy. While the new enforcement powers provided to municipalities are an improvement over the ability of municipalities to seek a remedy for nuisances at common-law, the enforcement provisions continue to impose significant limitations on the ability of municipalities to adequately and promptly rectify nuisances which affect the public.

There appears to be no end to the unpredictable and unusual ways in which the competing rights of municipalities' citizens will continue to bump-up against each other. It appears that the series of changes which commenced with the introduction of *Municipal Act, 2001*, and furthered through the recent amendments to that Act have begun to provide municipalities with the tools required to take control of nuisances within their borders. Although the judicial interpretations of these new provisions have been generally favourable to municipal interests, the recent developments to municipal legislation have not resolved all of the issues facing municipalities in addressing nuisances