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Acting as the Approval Authority and the Intersection of Municipal, Planning, and Environmental Law

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I. INTRODUCTION

This paper concentrates on Ontario law, however its general principles are applicable beyond Ontario. It begins by examining at a high-level, numerous examples where municipal, planning, and environmental law collide, which municipalities and their legal counsel need to be aware of. It discusses the complexity of such interactions and the need for legal counsel for municipalities, in furtherance of competent risk management, to make recommendations to their clients to professional staff to further their due diligence in advance of the client making final decisions. Some examples and a case study of *Don Black Investments Ltd. v. Middlesex (County)* (PL160523) serve as interesting and practical examples of the intersection of municipal, planning, and environmental law and legal duties when such intersection occurs. The paper concludes with a reminder that legal counsel, when recommending certain due diligence to expert professionals, cannot substitute or allow their work to substituted for that of other professionals. The line between appropriate legal due diligence recommendations and inappropriate prohibited substitution of opinion is examined, along with the Supreme Court of Canada's recent clarification in *White Burgess Inman v. Abbott and Halliburton Co.*, with respect to the admissibility of expert evidence in tribunal and court proceedings.

II: THE INTERSECTION

Municipal Law

In Ontario, municipalities are divided into upper-tier municipalities, lower-tier or local municipalities, and single-tier municipalities (some of which are separated municipalities). Legislation in other jurisdictions may use different names, but similarly categorizes municipalities. The *Municipal Act, 2001*, in Ontario, like its counterpart legislation elsewhere, clarifies municipal roles and responsibilities for each category of municipality. Each category of municipality delivers certain types of services within, or sometimes outside of its geographical boundaries. The County of Middlesex for example, provides fire inspections and investigations outside of its border in neighbouring Perth County. Pursuant to section 189 of the *Municipal Act, 2001*, municipal responsibilities can be transferred between tiers, which is a technique that Middlesex County has used as a means to assist the common tax payer and prevent unnecessary taxation.

Planning Law

In Ontario, upper-tier municipalities, lower-tier municipalities, and single-tier municipalities regulate development within their boundaries through official plans, which regulates how land in the community should be used. Generally speaking, official plans deal with issues relating to: where new housing, industry, offices and shops will be located; what services, like roads, water mains, sewers, parks and schools will be needed; when, and in what order, parts of communities will grow; and community improvement initiatives. Ontario's *Planning Act* provides that an official plan shall contain:

> a) goals, objectives and policies establish primarily to manage and direct physical change and the effects on the social, economic, built and natural environment of the municipality or part of it, or an area that is without municipal organization;
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> b) a description of the measures and procedures for informing and obtaining the views of the public in respect of:
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> i) proposed amendments to the official plan or propose revisions of the plan;
> ii) proposed zoning by-laws;
> iii) proposed plans of subdivision; and
> iv) proposed consents (severances); and

c) such other matters that may be prescribed.[1]

In Ontario, the province is the approval authority for upper tier municipalities. An upper-tier municipality with an approved official plan is the approval authority for lower tier official plans and official plan amendments.[2] The County of Middlesex, for example, is the approval authority for local municipal official plans, amendments to local official plans, and plans of subdivision. An official plan amendment is a formal document that changes a municipality's official plan. Changes may be needed because of new circumstances in the community or because requests have been made by property owners. Amendments are proposed, discussed and processed in the same way as the original official plan. Municipal Council needs to ensure the official plan amendment is consistent with the Provincial Policy Statement.[3]

A plan of subdivision shows: the exact surveyed boundaries and dimensions of lots on which houses or buildings are to be built; the location, with names of streets; the sites of schools and parks; and necessary servicing and access easements. A registered plan of subdivision creates new, separate parcels of land that can be legally used for the sale of lots. The plan of subdivision needs to be: surveyed by a licenced land surveyor; in conformity with the municipal official plan and with any county, regional or district plan as well as provincial policies; approved by the proper authority; registered in the local land registry system; and accompanied by a subdivision agreement, which confirms the responsibilities of the subdivider or owner of the subdivision. The role of the lawyer for a municipality involves reminding staff to require all of the above from developers and it is the role of counsel for developers in good faith, to inform their clients that these needs will legitimately be required by municipalities.

The approval authority in providing approvals are required to ensure: it has regard for municipal council's decision in the documents considered when that decision was made; that any approved development conforms with the applicable official plans; that any approved development is consistent with the provincial policy statement; that the approved development constitutes overall good planning; and it has regard for matters of provincial interest. Section 2 of Ontario's planning act provides that in carrying its responsibility under the *Planning Act*, the minister, Council of the municipality, a local board, a planning board and the Municipal Board (now LPAT), shall have regard to, among other matters, matters of provincial interest.[4]

[1] *Planning Act*, RSO 1990, c P. 13, s. 16.
[2] *Ibid.,* at s. 17.
[3] *Ibid*., at ss. 3, 22.
[4] *Ibid.,* at s. 2.

Matters of provincial interest provide a very clear point of intersection between municipal law, planning law, and environmental law. What is defined as being included in the provincial interest includes: the protection of ecological systems, including natural areas, features and functions; the protection of the agricultural resources of the province; the conservation and management of natural resources and the mineral resource base; the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest; the supply, efficient use and conservation of energy and water; the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems; and the minimization of waste. Municipalities cannot conduct good planning without considering environmental particulars.

Environmental Law

Often, when municipalities have regard to matters of provincial interest and good planning, environmental matters will arise. Approval authorities must always be careful to identify other statutes which must be complied with in order for provincial interest prerequisites to be adhered to when engaging in service delivery or making good planning decisions. This often involves the advice of particularized experts. The role of the lawyer is often engaged at this time, when counsel retained to provide legal and risk management advice. As a matter of professional responsibility, where the lawyer is so retained, the lawyer must ensure, as much as possible, that the staff of their particular client are aware of their need to turn their minds to statutes that need to be complied with. This can be complicated where municipal law meets planning law and environmental and involve numerous lengthy statutes and areas of expertise. Non-legal professionals, including municipal staff professionals, have their own independent duty to conduct their own due diligence when opining on matters within their areas of expertise. While this duty exists, it is appropriate for legal counsel to remind his or her client of the need to comply with those statutes, including environmentally related statutes, and inquire as to whether or not the professional being relied on by his or her client has considered such statutes. That will allow legal counsel to provide risk analysis to his or her client.

Rule 3.2-1 of the Law Society of Ontario's rules of professional conduct, under the heading of competency, provides that the lawyer has a duty to provide competent service.[5] Competent service under the rules, includes under section 3.2-2, the requirements that the lawyer be honest and candid with his or her client. In the Law Society's commentary 1.1, it explains that a lawyer has a duty of candour on matters relevant to the retainer, which arises out of the rules and the lawyer's fiduciary obligations to the client. Such duty requires a lawyer to inform the client of information known to the lawyer that may affect the interests of

[5] Law Society of Ontario Rules of Professional Conduct, s. 3.2-1.

the client in the matter. The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, and adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.[6] When legal counsel is retained to provide municipalities or private clients with advice concerning municipal planning and development matters, it is necessary for such counsel to be able to advise on the potential applicability of environmentally related statutes, such as the *Environmental Assessment Act* and the *Environmental Protection Act* in Ontario.

Environmental Assessment Act

In Ontario, the *Environmental Assessment Act* is applicable prior to the commencement of projects and development. The Act's purpose is to protect the environment and it sets out a planning and decision-making process for ensuring that potential environmental effects are considered. It applies to provincial ministries and agencies, municipalities, public bodies, and private actors.[7] Section 5(1) of the *Environmental Assessment Act* states: every proponent who wishes to proceed with an undertaking shall apply to the Minister for approval to do so.[8] The *Environmental Assessment Act* defines *undertaking* as:

> a) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of her Majesty in right of Ontario, by a public body or public bodies or by the municipality or municipalities,
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> b) a major commercial or business enterprise or activity or proposal, plan or program in respect of the major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in clause a) that is designated by the regulations, or
>
> c) an enterprise or activity or proposal, plan or program in respect of an enterprise or activity of a person or persons, other than a person or persons referred to in clause a) if an agreement is entered into under section 3.0.1 in respect of the enterprise, activity, proposal, plan or program.[9]

[6] *Ibid.,* at Commentary 1.1
[7] *Environmental Protection Act*, RSO 1990, c E. 18, ss. 2-3.
[8] *Ibid*., at s. 5(1).
[9] *Ibid.,* at s. 1.

A great number of municipal projects or joint ventures fall under the broad definition of undertakings. The word *activity* under the actions of municipality subsection is extremely broad, and would catch items such as municipal roads and sewage plants, for example. Business enterprises are similarly broad for the private actor subsection. As seen from the *Planning Act* discussion in this paper, approvals and agreements are often necessary between municipalities and private actors in relation to enterprises, activities, proposals, and plans. Municipalities and private actors both have a need, as a result, to ensure that the needs of the *Environmental Assessment Act* are met. The result otherwise could lead to: judicial review, litigation, injunctions, serious offences and fines for not meeting environmental standards and regulations, project delay, or even the quashing of a project.

Where the definition of undertaking under the *Environmental Assessment Act* is met, approval for the project is required from the Minister.[10] Both individual or class approvals may be obtained to meet this requirement. Class environmental approvals apply to routine projects that have predictable and manageable environmental effects, are discussed under Part II.1 of the statute and in its regulations[11], and can deem certain projects to be preapproved. It is important for any municipality or proponent of undertakings to retain an appropriate engineer to determine if the undertaking appropriately belongs to a class, has pre-approved status, or requires individual approval. It is important for legal counsel to recommend that his or her client retain such engineer. Otherwise, the client may indicate that it was not aware of the application of such environmentally related statutes, but that it had retained legal counsel to provide legal risk analysis. Such response from a client could be awkward for legal counsel, if he or she had not advised the client of the need for the client to adhere to such statutes and retain an appropriate engineer to opine with respect to whether or not the particulars of the project required approvals under said statutes.

Example

The following example highlights the need for legal counsel to recommend adherence to environmentally statutes related to development. A lower-tier municipality owns an unopened road allowance in a rural and environmentally protected area near a river. The unopened road allowance is attached to an open road allowance, being a gravel road, which ends in a dead end at the unopened road allowance. The municipality receives a proposal by the owner of property beyond the open road allowance, who has used the unopened road allowance as a forced road creating a rudimentary path to his property, and he wishes to build a home on such property. The owner also wishes to pay, at 100% his cost, the costs of extending the open gravel road to his property, including all appropriate base and other engineering requirements. It is notable that

[10] *Ibid.,* sub note 8.
[11] *Ibid.,* at s. 13.

salt in not used in the maintenance of gravel roads and the proposed extension would only allow access to vehicles going to and from the individual's property, and potentially some additional vehicles parking to access another road allowance crossing the closed road allowance in perpendicular fashion, which is completely tree covered and not open by By-law, but is legally an open road allowance for use in its natural state due to its creation by an original Crown survey. The public used such road allowance from time to time for hiking/recreational purposes. The individual purported to the municipality of having obtained opinions from engineers and the applicable conservation authority that there is no issue with a home being built on his property, provided it had access to a public road. Prior to the retainer of any legal retainer by the municipality, the municipality took security from the individual and had draft engineering plans drawn up by an engineering firm, which proposed to end the gravel road in a 'T', making it easier for the municipality to plow the dead end in the winter (the plow currently needing to drive straight in and back up).

In this scenario, the municipality retained legal just-in-time, for otherwise, it would not have known of the need for adherence to environmentally related statutes. Given that the municipality in this scenario would own the extended road, and given that it, and not the private actor had retained the engineer who drew up the plans, the project would most certainly be an undertaking for the municipality. The municipality chose, after receiving legal advice and prior to proceeding with the project, to proceed to retain a qualified engineer to consider whether or not a Class EA for the potential road opening/extension would potentially be pre-approved or not and fulfill *Environmental Assessment Act* requirements. Given that the project would involve the conversion of an existing unopened road allowance to a gravel road, which would not use salt for maintenance, it was necessary for an engineer to opine whether such project would be preapproved or not. Further, regardless of pre-approved status, neighbours would need to be consulted in accordance with the *Environmental Assessment Act* if the project were to proceed.

Returning to the *Environmental Assessment Act*, regardless of whether the approval required is individual or class, the proponent is required to consult with such persons as may be interested when preparing the terms of reference of the project.[12] That includes neighbours and community stakeholders. With respect to Class EA's, proposed terms of reference must: indicate that the class environmental assessment will be prepared in accordance with the requirements set out in the Act; indicate that the class environmental assessment will be prepared in accordance with such requirements as may be prescribed for the type of undertaking to which it relates, or set out in detail the requirements for the preparation of the class environmental assessment. The prescribed requirements include: a description of the class to which he

[12] *Ibid.,* at ss. 6 and 13.

undertaking applies; the reasons for using a class assessment, the similarities and differences of the project do undertakings in the class; the expected range of in marked environmental effects; mitigation measures against adverse environmental effects; the means proposed by the proponent to consult with the public concerning undertaking; a description of the method used to evaluate the undertaking, including its final design; any other information that may be prescribed; or such other useful information.[13]

Environmental Protection Act

Another statute which is often applicable when approval authorities approve development is the *Environmental Protection Act*. In Ontario, at all times, individuals and persons, including municipalities when they so act, must follow the *Environmental Protection Act* when conducting operations or they run the risk of penalties and liabilities. The purpose of the Act and its regulations is to ensure the protection and conservation of the natural environment, public health, and safety during land use and development projects.[14] If there is a conflict between the provisions of the *Environmental Protection Act* and other legislation, the *Environmental Protection Act* prevails.[15]

Under the *Environmental Protection Act*, environmental compliance approvals ("ECAs") cover potential admissions and discharges related to air, noise, waste and sewage.[16] Pursuant the *Environmental Protection Act*: no person shall discharge into the natural environment any contaminant, and no person responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of the contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.[17] The definition of contaminant under the Act includes any solid, liquid, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect, but does not include animal waste disposed of in accordance with normal farming practices or under the regulations of the *Nutrient Management Act, 2002*.[18]

Pursuant to the *Environmental Protection Act*: no person shall, except under and in accordance with an ECA:

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[13] *Ibid.,* at. ss. 13.2(2), 14.
[14] *Environmental Protection Act*, RSO 1990, c E. 19, ss. 3, 1(3), 6, 182, 184.
[15] *Ibid.,* at s. 179.
[16] *Ibid.,* see Part II.1, s. 20.2.
[17] *Ibid.,* at. s. 6.
[18] *Ibid.,* at. s. 1(1).

> a) use, operate, construct, alter, extend or replace any plant, structure, equipment, apparatus, mechanism for things that made this charge or from which may be discharged a contaminant into any part of the natural environment other than water; or
>
> b) alter a process or rate of production with the result that the contaminant may be discharged into any part of the natural environment other than water or the rate or manner of discharge of a contaminant into any part of the natural environment other than water may be altered.[19]

It is notable with respect to waste management, facilities of which are operated by municipalities: no person shall use, operate, establish, alter, enlarge or extend the waste management system or a waste disposal site except and in accordance with an ECA. Further, there is a 25 year moratorium on the use of land following the cessation of use for a waste disposal site, and that's the minister approves otherwise.[20] Penalties for not adhering to ECAs are severe and can include up to millions of dollars in fines, extensive and expensive cleanup orders, and personal liability for directors of corporations and persons who know of the environmental issue and did not take steps to address it. When acting on municipal matters, legal counsel will from time to time find itself in situations where it needs to advise clients on the importance of following ECAs. With respect to ECAs, powers of the director include: the power to issue or refuse in ECA; the imposition of terms and conditions in an ECA, including updating approvals to new standards; amending or altering terms of ECAs, including altering the scope of approval; and suspension and or revocation of existing ECAs, with or without issuance of a new approval.[21]

Legal counsel for both municipalities and private actors should also be careful when a client purports to change in use of property from a previous use, even if that previous use was not a use by the current owner. Section 168.3.1 of the *Environmental Protection Act* provides that a person shall not change the use of the property in a manner prescribed by the regulations unless a Record of Site Condition ("RSC") has been filed in the environmental site registry and the use specified in the RSC is the use to which the property is changed.[22] A land use change is any use, activity, building, structure service facility or utility which is unrelated to the previous certified or uncertified use. Section 14 of Ontario Regulation 153/04 sets out a number of use changes that are prohibited unless a RSC has been filed.[23] Legal counsel learns of a potential change in use, they should recommend that their client retain a qualified engineer to determine whether or

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[19] *Ibid.,* at s. 9.
[20] *Ibid.,* at. s. 27.1.
[21] *Ibid*., at s. 20.3.
[22] *Ibid.,* at s. 168.3.1.
[23] *Ontario Regulation 153/01*, s. 14.

not certain changes in use require a record of site condition. Generally speaking, changes of use to more environmentally sensitive land uses can often require RSCs. On lands where land uses are subject to municipal official plans, responsibility rests with municipalities having delegated authority for certain *Planning Act* approvals to ensure that owners have obtained or will obtain all necessary environmental approvals. Municipalities are responsible for the actions they take on projects. A building code permit under the *Building Code Act* cannot be issued without environmental approvals having been covered off, the *Environmental Assessment Act* and *Environmental Protection Act* being applicable law. Section 168.7(1) if the *Environmental Protection Act* provides that where obtained, a record of site condition prevents a number of *Environmental Protection Act* orders (contaminant control orders, stop discharge orders, stop or control orders, repair or prevention orders equipment, monitoring or study orders, everything applicable orders, contravention or compliance orders, and preventative measure orders) from being issued.[24]

Example

The following example highlights the need for legal counsel to recommend adherence to environmentally statutes related to development. A local municipality owns a brownfield site and chose to obtain a phase 2 environmental assessment on and clean up a portion of the property. The municipality had wished for the cleaned up property in the future to potentially be used for residential purposes. It also wished to build a building, which it had originally planned to be located on the non-studied and non-cleaned up portion of the brownfield property. The municipality had tendered and contracted the construction of the building. The municipality believed that it would also like a quaint walking park beside the municipal building on the unstudied and non-cleaned up lands. The municipality contacted legal at that point, who confirmed that pursuant to the *Environmental Protection Act* and its regulations, a change in use from a former industrial use (which is what made the site a brownfield site) to a park use required a RSC. The municipality had retained an engineer and it is unknown if such conclusion had been brought to the municipality's attention by the engineer or not previously. Ultimately, the engineer later confirmed the change in use required a RSC. The municipality did not have time to study, clean up the unstudied lands, and obtain an RSC for a park use prior to the time when the building would need to be built. Ultimately, the municipality built the building on the cleaned up lands which had the phase 2 and RSC on them, and put the park use on hold.

[24] *Supra* note 14, at s. 168.7(1).

III: CASE STUDY ON THE INTERSECTION OF MUNICIPAL, PLANNING AND ENVIRONMENTAL LAW – *Don Black Investments Inc. v. Middlesex County* (PL160523 - July 19, 2017)

Developer #1 owned land where it had draft plan approval to develop the subdivision. There were no sewer or stormwater services in the area to do so, but their creation was a condition of draft plan approval. The local municipality conducted a Schedule B Class environmental assessment to determine how the area may best be serviced. The Class B environmental assessment concluded that the preferred method for wastewater servicing was a through force main pipes in an existing easement the municipality had rights to under a provincial park, to be built by Developer #1. The same assessment concluded that the best place for a pumping station was for such to built on the lands owned by Developer #1 and that that the preferred location for a stormwater management pond was on Developer #1's land as well. The Class B environmental assessment identified the preferred solution was for the local municipality to obtain all of the above through conditions of draft plan approval as part of the planning process.

With respect to potential cost-sharing, the local municipality did not expect Developer #1 to develop and pay for all servicing that would benefit the larger area without cost-sharing. Developer #1 refused to enter into a front attending agreement, however, and the local municipality and Developer #1 had attempted extensive negotiations to enter into a cost-sharing agreement, as part of a subdivision agreement, for five years without success. After five years, a neighbouring developer, Developer #2, had wanted to develop a subdivision. The local municipality and the approval authority applied the same rules it did with Developer #1 with respect to draft plan approval – development was conditional on servicing. Developer #1 decided to make an argument at the Ontario Municipal Board, now LPAT, that Developer #2 should not be allowed to obtain draft plan approval from the approval authority until Developer #2 entered into a cost-sharing agreement with Developer #1. Developer #1, however, refused to negotiate with Developer #2. Developer #1 believed it had a right to block Developer #2 and that it had a monopoly over development in the area because the Class EA had identified its lands as being the preferred lands for a pumping station and stormwater management pond and it had gone ahead and obtained some of its *Environmental Protection Act* approvals. Developer #1 argued that the Class EA could not be reopened or amended by the local municipality.

The approval authority argued that Developer #2 was in the same situation as Developer #1 with respect to draft plan approval. All that was required was servicing to proceed with development. The approval authority maintained that it was unfair to make Developer #2's development subject to the control of Developer #1 and its non-existent cost sharing agreement with the local municipality, non-existent

subdivision agreement with the local municipality, and Developer #1's control over the choice to either build or not build the servicing that would open the entire area to broader development. Further, it maintained that Developer #2 may end up cost-sharing with the local municipality, allowing Developer #1 to more easily proceed with servicing, from a cost perspective. During the Hearing, Developer #2 offered to pay for its share the servicing for the area (being approximately 60 to 70% of the cost). The local municipality and approval authority argued that if Developer #1 did not proceed, either the Class EA could be reopened and amended by the local musicality or Developer #2 could achieve servicing for its development in another way. Developer #1 argued that the local municipality and approval authorities' planning approval did not have regard to the matters of provincial interest (environmentally speaking), was inconsistent with the PPS, was not in conformity with the relevant official plans, and was not good planning.

The Ontario Municipal Board, now LPAT, ruled that the approval authorities' position:

- had regard to the provincial interest because it did not offend the local municipalities master servicing plan or Class environmental assessment and that the potential interim servicing proposed by Developer #2 was reasonable;

- was consistent with the provincial policy statement;

- was in conformity with the relevant official plans; and

- was good planning - other planning options including interim servicing being reasonable.

The *Don Black* case was significant in terms of confirming municipal autonomy. The case confirms three important principles. 1) that municipalities have jurisdiction and autonomy/control over the development and implementation of servicing in their communities; and 2) municipalities are able to deal with developers 'unshackled'. These two principles reconfirmed principles confirmed in *Milton Meadows Properties Inc. v. Milton* (OMB 2014) and *Regional Municipality of Hamilton Wentworth et al. and Samuel Roy Enterprises* (Ontario Divisional Court, 1980). The case also confirmed: 3) a municipality cannot be compelled to enter into agreements on terms they are not in agreement with. This reconfirmed the same principle set out in *314164 Ontario Limited v. City of Sudbury et al.* (Ontario Divisional Court, 1983) and *Mattamy Rouge Limited v. City of Toronto* (OMB 2003). In *Don Black*, Developer #1 had suggested its own wording for draft plan conditions that purported to remove municipal jurisdictional authority over the development and implementation of servicing, which if accepted by the Board, would have forced the

existing Class EA to certainly occur. The suggestion was argued by the approval authority and deemed by the OMB, now LPAT, to be unacceptable, especially where a developer, such as Developer #1, has a means of control over a preferred servicing solution and the neighbouring developer, i.e. Developer #2, does not. In the aftermath of the Board's ruling, Developer #1 chose to appeal its own draft plan conditions for its development, however, the matter settled, and the local municipality and Developer #1 reached the cost-sharing agreement and subdivision agreement. Developer #1 is now proceeding to build the servicing identified as the preferred solution in the Class environmental assessment.

Beyond this Case Study, there are many other examples of the intersection between municipal, planning and environmental law, all of which legal counsel working in the area of municipal law may become involved with. They include, without limitation: development compatibility issues arising in LPAT severance and zoning by-law amendment hearings; protection of prime agricultural land in the context of LPAT severance appeals, including severances as a result of farm consolidation and inadvertent merger cases; site plan control appeals under the *Planning Act*; Woodland's conservation by-law prosecutions; Site Alteration agreements/By-law prosecutions; Servicing/pre-servicing agreements; and Aggregate Hearings involving the need for Ministry of the Environment approval of planning/environmentally related particulars in the provincial interest under the *Aggregate Resources Act*.

IV: CAUTION WITH EXPERTS

Where municipal, planning, and environmental issues intersect, legal counsel will find itself in frequent contact and working relationships with numerous professionals. Legal counsel needs to be cautious with how it advises these professionals, in such circumstances, as there are professional conduct implications. Pursuant to section 3.2-1 of the Law Society of Ontario's Rules of Professional Conduct, a lawyer has a duty to provide competent service, which includes 3.2-2 honesty and candour requirements.[25] Commentary 1.1 provides: a lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter. The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts and adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose with the lawyer honestly thinks about the merits and probable results.[26] Lawyers need to inquire as to whether or not another professional, who is a potential witness, inquired as to all applicable law. While

[25] *Supra,* note 5.
[26] *Supra*, note 6.

lawyers can provide a client with legal advice concerning applicable law upon retainer, the lawyer cannot provide a professional with that professional's conclusion. Lawyers need to be wary and careful of clients/staff wanting legal to provide opinions beyond legal. The ability for professional experts to be qualified to provide opinion evidence is subject to the risk of exclusion at a court/tribunal.

The Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co*.[27] has recently clarified the test for admissibility of expert evidence. Prior to *White Burgess*, many litigants understood that an expert must be completely disassociated from the parties to provide expert evidence to a court/tribunal. In *White Burgess*, the Supreme Court of Canada confirmed that such is not necessarily the case. The facts in *White Burgess* involved a professional negligence claim against the company's former auditor. The potential expert witness was a partner at the new accounting firm now retained by the company, and it had found the issue giving rise to the negligence claim. The defendant challenged the admissibility of the evidence of the auditor, now retained by the company, on the basis of personal financial interest in the outcome of the matter and alleged the partners firm could have liabilities if it's accounting approach was not accepted by the court. The Nova Scotia Supreme Court struck out the expert's affidavit, holding that an expert evidence "must be, and must be seen to be, independent and impartial." The Court of Appeal for Nova Scotia and the Supreme Court of Canada confirmed that the Nova Scotia Supreme Court committed a legal error in the above statement.

The Supreme Court of Canada went on to clarify the test for admissibility of expert evidence:

> if the initial a violation of the matter by the proposed expert was conducted independently and impartially, such that his/her duty is first and foremost to the court, and the proposed witness is able to provide fair, objective and nonpartisan assistance to the court, such that the potential benefits of inclusion of the evidence outweighs potential danger of ache its inclusion, then the evidence will be admissible.

The Supreme Court of Canada noted that independence and impartiality had to be evaluated at both the second prong and fourth prong of the *Mohan* test (established in 1994) before a determination on admissibility could be made. The prongs of the *Mohan* test are as follows:1) relevance; 2) necessity in assisting the trier of fact; 3) absence of an exclusionary rule; and 4) a properly qualified expert.[28] The true clarification by the Supreme Court of Canada in *White Burgess*, compared to the Nova Scotia Supreme

[27] *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, [2015] 2 S.C.R. 182 (SCC).
[28] *R. v Mohan,* [1994] 2 SCR 9 (SCC).

Court's ruling, was to confirm that that judges have discretion when applying the *Mohan* test. As a result, when counsel in advising experts in relation to municipal, planning and environmental matters: they need to take care to ensure that it can be demonstrated that: 1) the expert is independent/impartial; 2) the expert's duty is to the court; 3) the expert is able to provide fair, objective and nonpartisan assistance; and 4) the expert evidence provides more benefit than risk to the court/tribunal. To assist with this, lawyers should confirm all advice, whether legal or practical in nature, in writing (including identification of the areas in which the lawyer is not opining, if necessary), in order to prevent either the client or the expert from misconstruing the legal advice or misrepresenting the legal advice to third parties. Doing so will demonstrate that the expert was not provided with their expert opinion from anyone else other than from him/herself. The expert could even use the written correspondence from legal counsel to help demonstrate impartiality, if such were questioned. Such correspondence protects the lawyer generally, in any event.

V: CONCLUSION

This paper, at a high-level, has set out numerous examples where municipal, planning, and environmental law intersect, which legal counsel need to be aware of. It has canvassed the complexity of such interactions and the need for legal counsel for clients, in furtherance of competent risk management, to recommend that their client further certain elements of due diligence prior to making final decisions. Some examples were provided and a case study of the *Don Black* case was conducted, which serve as interesting and practical examples of the intersection of municipal, planning, and environmental law and related duties. However, there are endless numbers of additional examples that counsel could look to, which confirm counsel's requirement to recommend appropriate due diligence where these three areas of law intersect. From a professional responsibility perspective, this paper has examined rules of professional conduct implicated when the intersection of municipal, planning and environmental law collide and has also examined the recent clarification by the Supreme Court of Canada on the standard for admissibility of expert evidence in court/tribunal proceedings. It is necessary for counsel to take precautions to ensure that their legal work is not misused or misconstrued to be other types of professionals (i.e. planning or engineering) in a manner that would make those experts biased. The author of this paper is hopeful that this 'tip of the iceberg' paper may be of assistance to legal counsel when it encounters issues related to the intersection of municipal, planning, and environmental law in their own practices, prior to their reviewing their particular issue in greater detail.