

Canada's Anti-Spam Legislation: Municipal Government Implications

By Monica Ciriello

"Canadians should not receive emails that they do not want or did not ask to receive."
-Industry Minister James Moore

On July 1, 2014 Canada's Anti-Spam Legislation (CASL) came into effect. This means that consumers will now have control over who can send them a commercial electronic message or business email. The Canadian Radio-television and Telecommunications Commission (CRTC) will enforce CASL and prohibit individuals and companies (including municipalities), from sending commercial electronic messages (CEMs) without implied or express consent, unless an exemption applies. The CRTC has indicated the following,

> "CASL does not apply to the activities of the federal, provincial and territorial governments. CASL does apply, however, to crown corporations, including municipal governments, when the corporation is acting in the course of any commercial activity."

Furthermore, even though consumers may have consented to receiving these messages, individuals and companies will still have to identify themselves in all their emails and provide a way for the customer to unsubscribe from receiving further messages.

It is clear that the provincial and federal governments are exempt from CASL, but the CASL implications on a municipality remain questionable (aside from the debate that a municipal government is not a crown corporation). A municipal government may be subject to CASL depending on their course of action, and whether or not it is a commercial activity. A "commercial activity" means any activity that is of a commercial character, whether or not such activity is conducted with the expectation of profit. This demonstrates that CASL regulates the type of activity and not the entity conducting the activity. As a precaution, municipal governments should review the content that is being sent out, and should not assume all electronic messages fall outside of CASL.

Penalties for violating CASL can be as high as $1 million for individuals and $10 million for businesses, although there are no automatic penalties for violation. The CRTC judges each case individually based on a series of factors, including the nature of the violation, any previous history with CASL, whether the business or individual benefited financially from the violation and the business's or individual's ability to pay a penalty. Additionally, beginning July 1, 2017, individuals and companies who feel they have been affected by a breach of CASL can bring an action in court, and may be able to recover actual and statutory damages.

Municipalities Anti-Wind By-Laws

East Durham Wind Inc. v. The Municipality of West Grey, 2014 ONSC 4669.

East Durham Wind Inc. holds a provincial Renewable Energy Approval (REA), under the *Green Energy Act*, to build a 14-turbine wind farm in the Municipality of West Grey. West Grey adopted two municipal by-laws that required wind projects to obtain permits, and subsequently refused to provide East Durham those permits. East Durham successfully applied for judicial review of the two by-laws.

The issue surrounded "entrance permits" to connect access roads on private lands, and "oversize/overweight haulage permits" to allow for the conveyance of large and heavy project material along public highways. West Grey declared in a council resolution that the municipality "is not a willing host for any further industrial wind turbines" and ultimately denied the permits to East Durham.

The case raised the question of "when and how a municipal by-law or policy may frustrate the purpose of a provincial legislative instrument." The Ontario Superior Court of Justice found that the two municipal by-laws in question frustrated the purpose of the *Green Energy Act*, which is to streamline the process for developing green energy in Ontario. Prior to the *Green Energy Act*, an energy provider had to apply to various agencies and levels of government.

HELD:

The Ontario Superior Court of Justice held that section 14 of the *Municipal Act* lays out the test for conflict between a municipal by-law and provincial legislation; a by-law is without effect to the extent of any conflict with an instrument of a legislative nature, including an order, license or approval, made or issued under a provincial or federal law. This section indicates that there is a conflict where a by-law frustrates the purpose of that act, regulation, or instrument. The court indicated that, "where a municipal government is opposed to wind energy projects generally, the potential for conflict is obvious" but ultimately held that both by-laws were inoperative to the extent that they frustrate the purpose of East Durham Wind's REA, which is to authorize the building of the project in furtherance of the province's goal of increasing renewable energy generation. The court did note that this holding did not affect the parties' abilities to engage in good faith negotiations around reasonable conditions, including sufficient financial security.

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their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

Ordinances *Cont'd from page 26*

The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality*. Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

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Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

Federal *Cont'd from page 21*

employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance