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Disruptive Public Meetings and the First Amendment



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By: Tom Carr, County Counsel, Washington County, Oregon and Tonya Haas Davidson, City Attorney, City of Greenwood Village, Colorado

The First Amendment clearly protects the right of constituents to speak at public meetings, and on virtually any subject during "open comment" segments. But there are limits, particularly during subject-specific public hearings. Counsel need to distinguish between legitimate guardrails and viewpoint discrimination.

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GPS CHIPPING YOUR EMPLOYEES AND OTHER FOURTH AMENDMENT PITFALLS

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While local governments have a valid interest in ensuring that public employees conscientiously perform their duties, oversight that strays into the worker's reasonable expectation of privacy will result in constitutional challenges.

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INSIDE CANADA

MONICA CIRIELLO
Ontario 2015

Overreaching Councillors, Roadway Obstacles, Undisclosed House Defects, and More

City Councillor Used Authority to Influence By-law Investigation
Investigation Report IC – 14166-0621, Integrity Commissioner Office for the City of Kawartha Lakes, March 4, 2022

Kawartha-Lakes---IC-14166-0621---Investigation-Report.pdf (kawarthalakes.ca)

A By-law Officer (Officer) with the City of Kawartha Lakes (City) received a complaint about signage at a local business and attended to undertake an investigation. When on site the Officer was greeted by an employee who provided information about the signage. During the investigation, a City Councillor (Councillor) got out of his vehicle and intervened in the discussion. The Councillor told the Officer to investigate other signs in the City and gave both parties his business card advising the employee to call him if he needed anything as he sits on the By-law Appeals Committee. The Officer filed a complaint with the Integrity Commissioner, alleging that the Councillor interfered with an investigation in contravention of the City's Code of Conduct and Ethics for Members of Council and Local Boards (Code).

HELD: Councillor violated Code.

DISCUSSION: The Councillor acknowledged that the Code applied when a Council Member is acting in his or her public capacity but suggested that he was merely acting as a private citizen when he arrived at the local business. The Integrity Commissioner disagreed, finding that there would be no reason for a private citizen to intervene in a discussion between an employee and an Officer. The Councillor provided his business cards to both parties to ensure they everyone knew who he was and advised the employee to call him if he needed anything, which could be viewed as an odd statement but for the Councillor acting in his public capacity. *Greatrix v. Williams*, 2018 ONMIC 6 provides clarity on Councillor involvement in by-law matters; a Councillor must refrain from influencing a specific by-law investigation at a "micro" level, however a Councillor at a "macro" level is entitled to engage in policy, accountability, and the process of making the by-law to be enforced. The Integrity Commissioner found that the Councillor was acting at a "micro" level by inserting himself into by-law enforcement. By attempting to exert authority and/or influence over the Officer during the investigation, the Councillor violated the Code. The Integrity Commissioner recommended that the Councillor's remuneration from the City be suspended for one month.

Damages and Maintenance Standards for Municipal Roadways
Singh v. City of Langford, 2022 BCCRT 422 https://canlii.ca/t/jnn5c
The Applicant was driving on a single lane municipal roadway in the City of Langford (City) when he hit a rock damaging his vehicle. The Applicant filed an application seeking damages, claiming that the City failed to keep the roadway clear of debris. The City denied liability, claiming it is unreasonable to be held responsible for damage caused by debris.

HELD: Application dismissed.

DISCUSSION: The Tribunal reviewed dash camera footage from the Applicant's vehicle, showing undisputed evidence that there was a single rock in the Applicant's lane; it was not a part of a larger pile nor were there any other rocks on the road. The Applicant submitted photos of the roadway where the accident occurred on various days which shows that the roadway was clear of debris and rocks. The Tribunal noted that this evidence did not assist the Applicant's application, as it only demonstrated that the City maintained the roadway. The Applicant failed to provide additional evidence as to the rock's origin or how long it was on the roadway. No evidence was submitted that the City received and ignored any reports about the rock prior to the accident. The issue for the Tribunal was whether the City

breached its obligation to maintain the road, free and clear of debris, and if so whether the Applicant is entitled to damages. The City has a duty to use reasonable care to keep its roadways in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety, *Craigie v. Lehigh Hanson Materials Limited,* 2020 BCSC 12. Furthermore, case law prescribes that policy decisions, opposed to operational decisions are generally immune from tort liability. The Applicant failed to prove the City's negligence caused the accident. Application dismissed.

Jordan Does Not Apply as Delay Preceded SCC Decision

York (Regional Municipality) v. 1085638 Ontario Limited, 2022 ONCA 263 https://canlii.ca/t/jnf54

The Appellants were charged and convicted under the *Building Code Act, 1992,* S.O. 1992 and *Planning Act,* R.S.O. 1990, c. P.13 for operating a garden centre in the City of Vaughan (City), a municipality within York Region. The Appellants sought leave to appeal the convictions, which was granted by the Appeal Judge and restricted to two issues.

HELD: Appeal dismissed.

DISCUSSION: The Appeal Judge granted the Appellant's appeal restricting it to two issues that the Justice of the Peace (JP) addressed: the issue of a legal non-conforming use and the issue of delay under s. 11(b) of the *Canadian Charter of Rights and Freedoms* providing the right to a trial within a reasonable time. The JP held that the Appellant could not rely on a legal non-conforming use argument as the garden centre building was built after the zoning bylaw was passed. The Court of Appeal assessed whether the *Planning Act* requires that the non-conforming use be in active operation on the day that the zoning by-law comes into force, as there was evidence to suggest that the garden centre did not operate until several years later. The Appellants submitted that the finding the business must be in operation on the day when the zoning by-law comes into effect was inconsistent with the wording of the *Planning Act*. The Court of Appeal disagreed, finding that the language in s. 34(9) of the *Planning Act* was quite clear and not open for any other interpretation.

As for the argument of delay under s. 11(b) of the *Charter*, the JP held that the Appellants failed to demonstrate any prejudice due to the delay. The City conceded to the Appellant's argument that the JP and the Appeal Judge erred by not applying the test in *R v. Jordan,* 2016 SCC 27. The *Jordan* framework provides timelines for when matters are to be heard, as well as a temporary exceptional circumstance to excuse delay in cases that were still in the system when the decision in *Jordan* was released. The Court of Appeal held that all of the delays in this matter preceded the decision in *Jordan* by more than 4 years, meaning that the error conceded by the City was of no issue and the 11(b) challenge for delay was properly dismissed by the JP.

No Recovery where Homeowners Fail to Disclose Defects to Municipality

Wilde et al v. The Rural Municipality of Taché et al, 2022 MBCA 31 https://canlii.ca/t/jnlrz

In 2007, the Applicants worked with a Contractor to design and construct a home, and the plans were prepared and approved by the Rural Municipality of Taché (Municipality). During excavation, the Contractor advised the Applicants that the foundation materials were modified, and upon final inspection the Municipality's inspector failed to notice that the foundation was not built in compliance with the plans that were originally provided. The Municipality approved the construction and issued an occupancy permit. In 2018, the Applicants observed cracks in the home's foundation and hired a third-party inspector who confirmed construction damage. The Applicants brought forward an application for damages against the Contractor and the Municipality (collectively, the Respondents) which was dismissed for delay under the *Limitation of Actions Act,* CCSM c L150 (*Act*). The Applicants appealed, arguing that the application judge misapprehended the evidence and misapplied the test under the *Act*.

HELD: Appeal dismissed.

DISCUSSION: The Appeal Court referenced *Olford et al v. Springwood Homes Inc,* 2019 MBCA which provides that a decision by an application judge to extend time under the *Act* "is discretionary and is afforded a high degree of deference unless there is an error of law, a palpable and overriding error of fact or mixed fact and law or the decision is so clearly wrong to amount to an injustice." The Applicants argued that the evidence in the application was misapprehended and should be provided additional time. The Court of Appeal disagreed and was not persuaded that the application judge committed an error in focusing on the defects in the design and construction by the Respondents, as well as determining when the Applicants were aware of the problems with the foundation. The application judge accurately referenced *Johnson v. Johnson,* 2001 MBCA 203, which provides that "the applicable standard is whether the applicant

Continued on page 28

knew or ought to have known that there *could be* a link sufficient to establish a cause of action and not that there actually *is* such a link" The Appeal Court was satisfied the Applicants knew that the materials in the foundation were changed in 2007 and that the home was not built in compliance with the Municipality's approved plans as such the Applicant should have been aware to investigate the construction defects earlier. The application judge correctly stated the law and made no error in factual findings. The Appeal Court dismissed the application and awarded costs in favour of the Respondents.

Solicitor not Needed to Go In-Camera Under Exception to *Municipal Act, 2001*

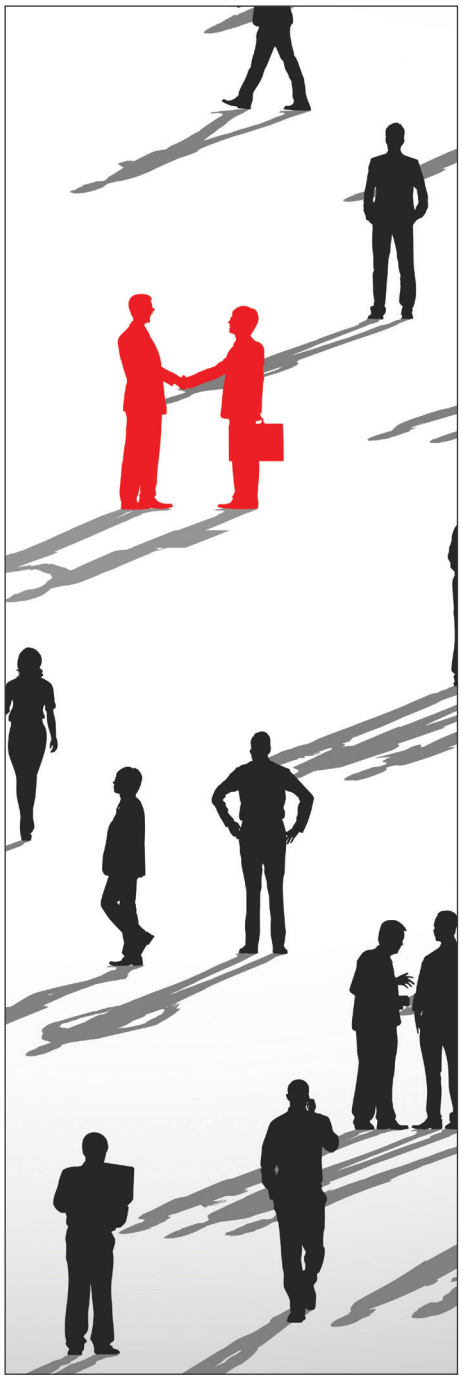
Collingwood (Town of) (Re), 2022 ONOMBUD 1 https://canlii.ca/t/jlvk1

The Ontario Ombudsman (Ombudsman) received a complaint that the Town of Collingwood (Town) Council went into in-camera meetings in February and June 2018 without falling into a closed meeting exception under the *Municipal Act, 2001*.

HELD: In-camera meetings fit within the closed meeting exception.

DISCUSSION: The *Municipal Act, 2001* requires all meetings of council, local boards and committees be open to the public unless there is a prescribed exception. In February 2018, Town Council voted to establish a judicial inquiry to examine the relationship between elected officials and a private corporation which purchased a 50% stake in the Town's municipal power utility. Town Council went in-camera under the open meeting exception for solicitor client privilege permitted under s. 239(2)(f) of the *Municipal Act, 2001* to receive legal advice pertaining to the judicial inquiry. In reviewing the minutes, the Ombudsman was satisfied that the in-camera portion fit within the solicitor-client exception under the *Municipal Act, 2001*.

In June 2018, Town Council proceeded in-camera under the same solicitor-client exception as they did in February, to receive an overview of the judicial inquiry process. During this meeting, no solicitor was present, and the information was provided by the Town CAO, which also included details on three different quotes to retain a new solicitor. When Town Council returned to open session, Council passed a motion to appoint a new solicitor to the judicial inquiry process. The complaint to the Ombudsman provided that it was inappropriate for Town Council to go in-camera under the exception for solicitor-client privilege without a solicitor present. The Ombudsman relied on an earlier decision, *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2, which provides that the exception can apply to certain circumstances where another person, including a CAO, conveys information or advice from a solicitor to a Council. The Ombudsman was satisfied that the three solicitor quotes presented by the CAO during the June meeting were subject to solicitor-client privilege even though no solicitors were present. The Ombudsman distinguished between a solicitor's generic hourly rate and a solicitor quote, concluding that the latter contains specific information based on each firm's suggested strategy for representing the Town on the judicial inquiry. Furthermore, the quotes were provided in confidence. The Ombudsman was satisfied that the in-camera council discussion about quotes from prospective solicitors fell within the scope of seeking and receiving legal advice under s. 239(2)(f) of the *Act*. The Town did not contravene the *Municipal Act, 2001* when it went in-camera in February or June 2018. ML



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