ONTARIO EAST MUNICIPAL CONFERENCE

LEGAL UPDATE

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Cunningham Swan

Topics

- Social Media and Politics
- LPAT
- Enforcement Issues

Social Media

Mclaughlin v. Maynard (2017)

- Defamation action against resident by councillors
- Counter claim by resident in defamation
- Posts on social media have become equivalent to expressing political views in the Town Square

Social Media

Mclaughlin v. Maynard (2017)

[66] Nor did Mr. Maynard allege a personal vice or indiscretion unconnected to the exercise of their public duties. A politician being called dishonest or a liar is now so common in our political discourse that it cannot be seriously suggested that this would be the type of personal attack that might cause serious harm. The same is true of comparing a politician to a clown or a similar satirical imputation.

…

[68] Alleging that a politician does not have any morals or empathy or that he is corrupt could cause serious harm but I have concluded that, in the particular circumstances of this case, the public interest in protecting Mr. Maynard's expression surpasses that harm.

Social Media

Seguin (2018) – Integrity Commissioner's decision

- Town of Blue Mountain
- Councillor used Facebook and personal website
- Using job title, not name of employee was sufficient to single out the employee and breached the Code provisions against injuring the reputation of staff
- Calling the employee's Code complaint against the Councillor a "witch hunt" and a misuse of public funds was insulting, disrespectful and harmful to the staff/Council relationship
- Even though the Councillor's lawyer called it a "witch hunt" in correspondence, the Councillor was held to a higher standard

Social Media

Seguin (2018) – Integrity Commissioner's decision

- Another post claimed that Council had "no clue in what they were accusing and sanctioning [him] for," and alleged that the Council lacked respect and professionalism
- Found to be largely an expression of his personal unhappiness with the process and with Council as a whole. It did not single out the employee and accordingly was not a breach of the Code

Social Media

Greatrix v. Williams (2018) – Integrity Commissioner's decision

- The Mayor commented on Facebook (responding to a newspaper article and posts from the public):
  - "If the events in The Orangeville Banner article are true, I believe our bylaw department have not followed Council's direction… I will be formally asking that bylaw back off on this matter until Council chooses to give direction to the contrary."
- The complaint alleged that this was directing staff without Council authority; encouraging disrespect for by-laws; abusing or bullying staff

Social Media

Greatrix v. Williams (2018) – Integrity Commissioner's decision

133. …As part of the political process, a Council Member is entitled to form views, to hold views, to express views and, once in office, to give effect to those views. Some of those views may involve a change in law or a change in direction…

140. While (at a "micro" level) a Council Member must not try to influence the disposition of a specific by-law enforcement case, a Council Member (at the "macro" level) is entitled to engage on policy, on accountability, and, of course, on the legislative process of making the by-laws that actually get enforced.

187. …The Respondent is responsible only for his own conduct. It is the nature of public discussion that some members of the public (usually, and in this specific case, a small number) may make extremely improper or offensive contributions to the debate. It is not reasonable to blame elected representatives for the comments of members of the public. Further, elected representatives are not required to refrain from public communication on issues, including controversial issues, because of what a small number of individuals might say.

Social Media

Greatrix v. Williams (2018) – Integrity Commissioner's decision

With respect to the Mayor's alleged failure to correct misinformation and defend the position of the by-law department, the Integrity Commissioner dismissed the complaint, stating:

206. It is a fact of public, political discussion that an elected representative will hear, read or receive numerous comments that might benefit from correction, clarification, additional information or contradiction or, sometimes, that deserve condemnation. It is no exaggeration that an elected representative could spend all day addressing inaccurate, uninformed or offensive comments and have no time left for anything else.

207. …I find that the Code does not require a Council Member to contradict or to correct comments by members of the public. I find that the Code does not require a Council Member either to address or to ignore any particular comment by a member of the public. It would be unworkable to interpret the Code in any other way.

Social Media

Miles v. Fortini (2018) – Integrity Commissioner's decision

- A Brampton Councillor complained that a fellow Councillor breached the Town's Code of Conduct after he made public comments that were critical of the Council's decision to purchase a property.
- Interviewed on a podcast, Fortini made the following comments :
  - "…Most of the stuff was all behind closed doors... it came to Council for voting and we did not know it was a final vote..."
  - "…No consultation, no town hall meeting… Appraisals were never discussed in the open: what was it worth? It was all behind closed doors, and that bothers me."
  - "I wonder why everybody supported it. I wonder if they've been paid off. I wonder that they donated through the campaigns."
  - "…one of the worst [deals] I'd ever seen for taxpayers, when you're paying 2 1/2 times more than the land is valued at. We don't know if it's contaminated. We don't know anything."

Social Media

Miles v. Fortini (2018) – Integrity Commissioner's decision

- The Commissioner found that majority of Fortini's comments were expressions of opinions and accordingly could not the subject of an investigation into their truthfulness. These comments included allegations that Councillors were misinformed or ignorant, that residents had no say in the process, that campaign donations can influence Councillors' decisions, and that the City paid too much for the property. The Commissioner also found Fortini's claim that the public opposed the project was a matter of opinion, not a statement of fact:
  - 62. Quite common, in political debate, is for a politician to refer to comments and feedback from members of the public. How a politician interprets public sentiment is essentially a matter of opinion, not a statement of fact that can be proved false or true.
  - 65. I find that a politician's comments about the mood and reaction of the public are expressions of opinion not statements of fact. It is not my place to label such opinions as true or false.

Social Media

Miles v. Fortini (2018) – Integrity Commissioner's decision

- Briefly dismissing three other alleged breaches of the Code, the Commissioner noted that:
  - Fortini did not engage in discreditable conduct as neither his statements of political opinion nor his inaccurate statements of fact were discreditable or breaches of decorum;
  - Fortini did not unduly influence staff as there was no evidence that the neutrality or objectivity of the staff was threatened by his comments; and
  - Fortini did not injure the reputation of the staff, as disagreement with a staff recommendation and explanations about that disagreement are not contraventions of the Code. Fortini did not specifically target any staff members or make critical comments about the staff's performance or capabilities.

Social Media

Bartscher v. Cardy (2018) – Integrity Commissioner's decision

- Councillor Cardy used racially offensive language to describe someone from the middle east
- The Councillor alleged his Facebook account was hacked
- The Integrity Commissioner found no evidence to support that defence
- He also argued that the post was not related to any Council business and therefore the Code did not apply

Social Media

Bartscher v. Cardy (2018) – Integrity Commissioner's decision

- The Code opens with a statement of principles which includes this statement:
- A written Code of Conduct helps to ensure that the members of Council, Local Boards and Advisory Committees share a common basis of acceptable conduct. These standards are designed to supplement the legislative parameters within which the members must operate. ***These standards are intended to enhance the public's confidence that the County of Brant's elected and appointed officials operate from a basis of integrity, justice and courtesy.***

Social Media

Bartscher v. Cardy (2018) – Integrity Commissioner's decision

- In this case, Councillor Cardy attempted for a full day to defend his use of the inappropriate language but finally concluded the thread of posts with an attempt at an apology. It is my view that he understood the severity of what he had said. He also did not go on at length repeating the comments or exacerbating them with worse comments...
- I recommend that Council impose a penalty on Councillor Cardy of a two (2) day suspension of remuneration for the posting of inappropriate language on Facebook.

Local Planning Appeal Tribunal

Sept 3, 2019 further amendments to the Planning Act and Local Planning Appeal Tribunal Act proclaimed in force

- appeals (zoning and OP) are no longer restricted to arguing that approval of the instrument is inconsistent with the Provincial Policy Statement, fails to conform or conflicts with a provincial plan or fails to conform with an Official Plan. Whether the decision is good planning is back as a ground of appeal;
- Returning to an evidence-based trial *de novo* hearing format;
- Removing the restrictions on introducing evidence and calling, examining and cross-examining witness;
- Introducing a new power to restrict examinations and cross-examinations of witnesses;
- Requiring that anyone who is not a party to the proceeding make submissions to the Tribunal in writing only;
- Reducing the deadlines for appeals for a failure to make a decision on a development application; and
- Restricting third party appeals of plans of subdivision so that only the applicant, the municipality, the Minister, a public body or a prescribed list of persons may appeal.

Local Planning Appeal Tribunal

Craft v City of Toronto (Divisional Court)

- Even though recent amendments to the Planning Act will see future appeals dealt with under a new process, the ruling is important for all cases currently in the system. The Divisional Court concluded that:

  - No party may call their own witnesses or introduce evidence unless permitted by the Tribunal;
  - The LPAT has the power to call and questions witnesses;
  - Only the LPAT member may question the witnesses; and
  - Parties to a proceeding do not have a right to cross-examine witnesses.

Enforcement

Elbasiouni v. Brampton (2019) Ontario Superior Court

- Brampton CBO revoked a building permit for the construction of the duplex
- The basis of the revocation was a mistake by the CBO as to whether the zoning permitted a duplex – upheld by the Court
- The owner tendered evidence of zoning maps that the court determined were not genuine
- The court also rejected the argument that the property had a non-conforming status as the duplex represented an extraordinary intensification of the use that was not protected

Enforcement

Greater Sudbury v. Thibert (2019) Ontario Court of Justice

- Thibert accused of depositing snow and ice on a municipal highway
- In a prosecution a municipal by-law must be proven, the court cannot simply accept the by-law is "law"
  - A copy certified by the Clerk and under seal is acceptable (without calling the Clerk as a witness)
  - The original by-law may be presented in court by the Clerk
- Simple negligence during the loading and transporting of snow that allows snow and or ice to be deposited on a highway is sufficient to impose liability
- Thibert was able to show due diligence as what steps he took to prevent the offence and was acquitted

Enforcement

Enforcing orders (Municipal Act)

445 (1) If a municipality is satisfied that a contravention of a by-law of the municipality passed under this Act has occurred, the municipality may make an 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 do work to correct the contravention.

446 (1) If a municipality has the authority under this or any other Act or under a by-law under this or any other Act to direct or require a person to do a matter or thing, the municipality may also provide that, in default of it being done by the person directed or required to do it, the matter or thing shall be done at the person's expense.

(2) For the purposes of subsection (1), the municipality may enter upon land at any reasonable time.

(3) The municipality may recover the costs of doing a matter or thing under subsection (1) from the person directed or required to do it by action or by adding the costs to the tax roll and collecting them in the same manner as property taxes. (4) For the purposes of subsection (3), a local municipality shall, upon the request of its upper-tier municipality, add the costs of the upper-tier municipality to the tax roll.

Enforcement

Enforcing orders (Rules of Civil Procedure)

60.11 (5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

Where Corporation is in Contempt

(6) Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 against his or her property.

Enforcement

Boily v. Carleton Condominium Corporation 145, 2014 ONCA 574*,*

- Condo corp ordered to comply with earlier court order
- Individual directors fined $7,500 each

The purpose of a penalty for civil contempt is to enforce compliance with a court order and to ensure societal respect for the courts. The remedy for civil contempt is designed not only to enforce the rights of a private party, but also to enforce the efficacy of the process of the court itself.

The following are the factors relevant to a determination of an appropriate sentence for civil contempt:

a) the proportionality of the sentence to the wrongdoing;
b) the presence of mitigating factors;
c) the presence of aggravating factors;
d) deterrence and denunciation;
e) the similarity of sentences in like circumstances; and
f) the reasonableness of a fine or incarceration.

Enforcement

Allied Properties REIT v. 1064249 Ontario Inc., (2018) - Ontario Superior Court

- Parking lot business operating in breach of prohibition order
- Revenue of $47,000 and profit of $7,000 during period it operated in contempt of the court's order
- The court noted that those in contempt should not profit from their contempt and that contempt penalties should not be a mere license fee for further disobedience or a cost of doing business
- The court ordered a penalty of $25,000, concluding "here, the amount of the fine removes the profit from the contempt." No penalty was imposed on the director of the corporation.

Enforcement

Oshawa v. Ye (2019) Ontario Court of Justice

- Owner of a number of multi-unit buildings
- History of zoning non-compliance (additional illegal units)
- Previous convictions and prohibition orders
- Continued non-compliance
- $34,000 fine
- 21 days in jail
- In imposing sentence, the Court stated that the owner was collecting rents from tenants whose safety, property and lives were at risk of potentially significant harm. Jail time was appropriate for defendants with prior convictions where fines have not had a deterrent effect.

Thank you

Tony Fleming is a Partner in the Land Use Planning and Development Group, Environmental Group and the Municipal Group at Cunningham Swan. Tony is recognized by the Law Society of Upper Canada as a Certified Specialist in Municipal Law (Local Government/ Land Use Planning and Development). As a Certified Specialist, Tony has demonstrated expertise in the fields of municipal law and land use planning and development law.

Tony provides advice to municipalities and private sector companies on all aspects of land use planning and development as well as environmental law. Our municipal clients consult Tony on all aspects of municipal governance and complex land use planning matters. Tony appears frequently before the Local Planning Appeals Tribunal to defend decisions of municipal Councils and Committees of Adjustment. Tony also appears regularly before the Assessment Review Board and the Environmental Review Tribunal. In addition, Tony appears in all levels of Ontario Courts on administrative law matters, including defending challenges to municipal by-laws.

Prior to joining Cunningham Swan, Tony was Senior Legal Counsel with the City of Kingston. Tony focused on providing advice on land use planning and development and environmental law with the City of Kingston, building on his experience in private law firms in Toronto where Tony practised as a land use planning and environmental lawyer.

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